

(Issued: August 29, 2006)

**ETHICAL CONSIDERATIONS WHEN A JUDGE OR A MEMBER  
OF A JUDGE'S FAMILY HAS BEEN ARRESTED OR IS  
BEING PROSECUTED FOR CRIMINAL ACTIVITY**

**I. Introduction**

The issues presented in this opinion concern the disqualification and disclosure responsibilities and other ethical duties faced by a judge when either the judge or a member of the judge's family has been arrested or is being prosecuted for a criminal offense.

**II. Applicable Canons and Authorities**

Canon 1: An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved....

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 2B(2): A judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others.

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 3D(3): A judge who is charged by prosecutorial complaint, information, or indictment or convicted of a crime in the United States, other than one that would be considered a misdemeanor not involving moral turpitude or an infraction under California law, but including all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol, shall promptly and in writing report that fact to the Commission on Judicial Performance.

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

Canon 3E(2): In all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.<sup>1</sup>

CCP §170: A judge has a duty to decide any proceeding in which he or she is not disqualified.

CCP §170.1(a): A judge shall be disqualified if any one or more of the following is true: ... (6)(A) For any reason: (i) the judge believes his or her recusal would further the interests of justice; (ii) the judge

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<sup>1</sup> As of the issuance of this opinion, the Supreme Court Advisory Committee on the Code of Judicial Ethics has proposed that Canon 3E(2) be amended, effective January 1, 2007, to read: "In all trial court proceedings, a judge shall disclose on the record information that the parties or their lawyers might reasonably consider relevant to the question of disqualification under Code of Civil Procedure §170.1, even if the judge believes there is no actual basis for disqualification." The analysis of this opinion will not change if the Supreme Court adopts the proposed amendment as anticipated.

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.

(B) Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.

California Constitution, Article VI, Section 18(a): A judge is disqualified from acting as a judge, without loss of salary, while there is pending ... an indictment or information charging the judge in the United States with a crime punishable as a felony under California or federal law....

California Constitution, Article VI, Section 18(c): The Commission on Judicial Performance shall suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or any other crime that involves moral turpitude under that law. If the conviction is reversed, suspension terminates, and the judge shall be paid the salary for the judicial office held by the judge for the period of suspension. If the judge is suspended and the conviction becomes final, the Commission on Judicial Performance shall remove the judge from office.

California Rule of Court 6.608: Each judge must (1) hear all assigned matters unless: (a) he or she is disqualified; or (b) he or she has stated in writing the reasons for refusing to hear a cause assigned for trial, and the presiding judge, supervising judge or master calendar judge has concurred.

David M. Rothman, California Judicial Conduct Handbook (2d ed.), §7.46.

### **III. Discussion**

#### **A. Duty to Self-Report**

A judge who has been charged with a criminal offense should immediately report that fact in writing to the Commission on Judicial Performance, unless the offense falls within the exceptions delineated in Canon 3D(3). If the judge is subsequently convicted, the judge must promptly make a separate report in writing to the Commission.

#### **B. Abuse of Office**

When a judge is arrested, at no time during the detention, arrest or subsequent investigation should the judge make mention of his or her judicial office except in response to law enforcement questioning concerning occupation, employment or other relevant background information. An attempt to invoke the judicial office to avoid arrest, receive any kind of preferential treatment or improperly influence the arresting officer violates Canons 1, 2A and 2B(2). Inappropriate behavior at the time of arrest, such as providing untruthful responses to questions by the arresting officer, violates Canons 1 and 2A.

Similarly, if a judge is present when a family member is arrested, the judge should not refer to his or her judicial office or attempt to influence the arresting officer. After the arrest, the judge should take special precautions to avoid any contact or conversation concerning the case with the law enforcement and prosecuting agencies involved.<sup>2</sup> Nor should the judge discuss the arrest or prosecution with any judicial officer considering the issue of bail or any other matter relating to the case. If the arrest occurs within the jurisdiction of the judge's court, it is recommended that the judge notify the Presiding Judge, so that the case may be assigned to a judge whose impartiality will not be questioned.

#### **C. Disqualification**

If a judge is charged with a crime punishable as a felony under California or federal law, the judge is automatically disqualified from acting as a judge during the pendency of the case.

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<sup>2</sup> Such contact may be unavoidable if the family member who has been arrested is a minor; however, the judge should not identify himself or herself as a judge.

In all other instances when the judge or a family member has been arrested or is being prosecuted, the judge must determine whether he or she is disqualified from hearing certain types of cases, and if so, for what period of time. To answer the first question, the judge must consider the grounds for disqualification set forth in CCP§170.1(a)(6)(A). The California Judicial Conduct Handbook provides guidance for this analysis:

First, the judge must honestly determine whether, in fact, these very personal events have created within the judge a state of mind that makes it impossible for the judge to be fair and impartial. This goes to the question of subjective bias.

Second, if the judge is satisfied that the event has not prejudiced him or her, the judge must determine whether, based upon an objective standard, others who are aware of the event, ‘might reasonably entertain a doubt that the judge would be able to be impartial.’

It is important to emphasize the word ‘reasonably’ in order to avoid frivolous conclusions.... [If the event is recent], one might reasonably entertain a doubt that the judge would be able to set aside his or her feelings about the event and render fair and impartial justice. If the judge so concludes, the judge should recuse, although such recusal may be waived, unless the judge concluded that he or she were actually biased.

David M. Rothman, California Judicial Conduct Handbook (2d ed.) at §7.46.

Thus, assuming the judge has no actual bias, the issue of disqualification is based on an objective standard of whether others might reasonably entertain a doubt about the judge’s impartiality. Application of this test will be straight-forward in some instances. For example, where a judge is charged criminally in a case that is being prosecuted in the judge’s own jurisdiction, and the law enforcement agency involved in the investigation, the District Attorney’s office prosecuting the case, or the judge’s own defense counsel appears in a matter before the judge, the judge clearly should self-recuse because a person would reasonably entertain a doubt about the judge’s ability to be impartial. In other instances, application of the test will require consideration of a wide variety of factors, such as:

1. Whether the subject of the arrest or prosecution is the judge or is a member of the judge’s family;
2. The jurisdiction in which the judge’s or family member’s arrest occurred or where the case is being prosecuted;
3. If the case is filed in the judge’s own jurisdiction, whether it is being heard in the same courthouse in which the judge sits;
4. The seriousness of the alleged criminal activity of the judge or family member, or the seriousness of the consequences;
5. Whether criminal charges have been or likely will be filed;
6. If criminal charges have been filed, the stage of the criminal case;
7. Any similarity between either the nature of the charges against the judge or family member or the underlying facts, and the case before the judge;
8. Whether the case before the judge involves the same law enforcement or prosecutorial agency as in the judge’s or family member’s criminal case;
9. If there is a conviction, whether it resulted from a negotiated plea or a contested trial;
10. If there is a conviction, the terms of any sentence imposed;
11. If there is a conviction, whether the case is on appeal;
12. Whether the family member arrested resides in the judge’s household and, if not, the closeness of the relationship between the judge and the family member;
13. Whether the judge participated in the selection or retention of counsel for the family member.

The period of disqualification will also depend on the particular circumstances. In most instances, disqualification should continue at least until the judge’s or family member’s criminal case is concluded, *i.e.*, there is a conviction, acquittal or dismissal. When there is a conviction, the period of disqualification may continue for a longer period of time, again depending on the circumstances. Certain disclosures will normally be required once the period of disqualification ends, as discussed in the next section.

Judges are reminded that there is no requirement to announce or reveal the reason for self-recusal. While California Rule of Court 6.608(1) requires a judge who refuses to hear a case in which he or she is *not* disqualified to provide his or her reasons in writing to the judge overseeing the court's calendar, there is no parallel mandate that a judge's reason for self-disqualification be disclosed.

#### **D. Disclosure**

If the judge determines that disqualification is not required, he or she must then decide whether disclosure of the judge's or family member's criminal matter is mandated. The appropriate test for disclosure is whether the arrest or prosecution is information that the parties or their lawyers might reasonably consider relevant to the question of disqualification under CCP §170.1.<sup>3</sup> Here again, the judge should consider all of the particular circumstances, including those factors discussed in the preceding section.

If information relating to the judge's or family member's arrest or criminal prosecution must be disclosed, the disclosure must be on the record. The disclosure need not be detailed. For example, it would normally suffice to reveal that the judge or a member of the judge's family has been charged with a criminal offense similar to the matter before the judge, without disclosing details of the charges or the specific family member involved.

In situations where disclosure, but not disqualification, is required, some judges are confronted with a dilemma in that the disclosure mandates conflict with the desire for privacy in the judge's personal life. The dilemma is compounded by the requirement of Canon 3B(1) and CCP §170 that judges hear and decide all matters except those in which the judge is disqualified. The Ethics Committee advises that where a judge believes that the embarrassment attendant upon disclosure of a personal or family member's criminal matter is extreme and would subject the judge to such humiliation that the judge would be unable to conduct a fair hearing, the judge should recuse. Recusal is appropriate under these circumstances pursuant to CCP §170.1(a)(6)(A)(i), in that the interests of justice are served by transferring a case from a judge who is unable to fairly decide the matter due to the extreme discomfiture of being required to disclose a highly personal matter.

#### **IV. Examples**

- 1. Question:** A judge has been arrested for and charged with driving under the influence in a neighboring jurisdiction. The judge intends to resolve the matter by pleading guilty in exchange for a grant of probation. What are the disqualification and disclosure requirements when the judge is assigned a DUI case for trial? **Answer:** As long as the judge's DUI case is still pending, even though it is being prosecuted in another jurisdiction, one might reasonably entertain a doubt about the judge's ability to remain impartial in cases involving the same charge. Therefore, until the judge is sentenced in his or her own case, the judge should self-recuse in any DUI case assigned to the judge for trial. Once the judge has been sentenced, the judge should disclose the fact that he or she is on probation for a DUI conviction whenever the judge is assigned a DUI case, because the parties or their lawyers might reasonably consider this information relevant to the question of disqualification under Code of Civil Procedure §170.1. Had the prosecution taken place in the judge's own jurisdiction, the judge would be required to self-recuse in all criminal cases and any civil matter in which the same investigative or prosecutive agency was involved, because a reasonable person would doubt the judge's ability to be impartial under those circumstances. And, of course, regardless of where the prosecution is pending, the judge has a duty to promptly report, first the filing of the complaint and then the conviction, to the CJP.
- 2. Question:** A judge is assigned to a general trial department and hears both civil and criminal matters. The judge's estranged son has been arrested and is being prosecuted in a neighboring jurisdiction for

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<sup>3</sup> See fn. 1, *supra*.

several serious felony sexual assault and kidnapping offenses. The judge has not seen the son for years, and does not intend to assist in any way in securing counsel. Must the judge self-recuse or disclose in all criminal cases assigned to him or her? **Answer:** Despite the seriousness of the charges pending against the judge's son, a reasonable person would not doubt the judge's ability to be impartial in criminal cases, even in those cases involving the same or similar charges as alleged against the son, in light of the estranged relationship between the judge and son, the lack of involvement by the judge in the son's case and the fact that the son's case is pending in another jurisdiction. Therefore, the judge need not self-disqualify in criminal cases unless an attorney or some other individual involved in the son's case appears before the judge. However, the judge should disclose the situation in any case where charges similar to those against the son are brought, because the fact that a member of the judge's immediate family, even an estranged member, is being prosecuted for a similar offense is information that the parties or their lawyers might reasonably consider relevant to the question of disqualification under Code of Civil Procedure §170.1. Absent unusual circumstances, disqualification or disclosure should continue at least until there is a conviction, acquittal or dismissal in the son's case. If the son is convicted and receives a state prison sentence, disclosure should normally continue until completion of the sentence.

#### **V. Conclusion**

The fact that a judge or judge's family member has been arrested and is being prosecuted presents practical and personal difficulties for a judicial officer. No one factor prevails in the determination of whether a judge should self-recuse or the type of disclosure required if the judge is not disqualified. Each situation presents a unique set of circumstances that must be carefully analyzed. Jurists who find themselves in this situation are encouraged to contact the Ethics Committee for advice based on the individual circumstances at hand.

**2005/2006 Judicial Ethics Committee**

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