

CALIFORNIA JUDGES ASSOCIATION
Judicial Ethics Committee
Opinion No. 62

**ETHICAL LIMITATIONS ON PRESIDING JUDGE'S
AUTHORITY TO RECUSE THE ENTIRE BENCH**

I. Introduction

The Ethics Committee has received a number of requests from presiding judges for advice on how to proceed when it appears to the presiding judge that all judicial officers on the court are disqualified. These questions present both ethical and administrative issues which sometimes seem to overlap. This opinion clarifies the ethical rules that should govern presiding judges' resolution of these issues.

II. Applicable Canons and Authorities

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

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

Cal. Code Civ. Proc. §170.1(a)(6): [A judge shall be disqualified if] (6)(A) For any reason:

(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.

Cal. Code Civ. Proc. § 170.3(a), (b), (c) (in relevant part):

(a)(1) If a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge of the court of his or her recusal. . . .

(b)(1) A judge who determines himself or herself to be disqualified . . . may ask the parties and their attorneys whether they wish to waive the disqualification

(c)(1) If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge

Cal. Code Civ. Proc. § 170.8: When there is no judge of a court qualified to hear an action or proceeding, the clerk shall forthwith notify the Chairman of the Judicial Council of that fact. The judge assigned by the Chairman of the Judicial Council shall hear the action or proceeding . . .

Gubler v. Commission on Judicial Performance (1984) 37 Cal. 3d 27, 54 (disapproved on other grounds in *Doan v. Commission on Judicial Performance* (1995) 11 Cal. 4th 294, 325).

California Rules of Court 10.603 (a): The presiding judge is responsible for (1) Ensuring the effective management and administration of the court, consistent with any rules, policies, strategic plan, or budget adopted by the Judicial Council or the court.

California Rules of Court 10.608: 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.

Rothman, David, *California Judicial Conduct Handbook* (3d Ed.) §5.10 & Appendix F. Ethics Opinions 45 and 55.

III. Discussion

Disqualification under Canon 3E and Code of Civil Procedure Sections 170.1 et seq.

The question whether the entire bench is disqualified arises in a number of contexts, including, by way of example only: (1) when a judge of the court is a party to a case, (2) when the spouse or child of a judge of the court is a party to the case, (3) when a judge of the court is a witness in a case, (4) when a judge of the court is a victim of a crime in the court's jurisdiction, and (5) when the outcome of the case directly affects all the judges on the bench. In such circumstances and others, the presiding judge may believe that all of the judges on the court are disqualified to hear the case because a person aware of the facts might reasonably entertain a doubt that any of the judges could be impartial. However, the presiding judge is not empowered to make that determination.

Except in the context of a challenge under Civil Procedure Code §170.3(c), no judge may declare another judge to be disqualified to hear a case.¹ This rule is implicit in CCP §170.3, which makes the judge's personal determination of disqualification the first step in the disqualification analysis.

¹ On occasion, a party may file a written verified statement pursuant to Civil Procedure Code §170.3(c) declaring that all judges on the court are disqualified. Such a challenge presents a legal issue that must be resolved in the context of the litigation.

E.g., if a judge determines himself or herself to be disqualified, the judge must notify the presiding judge and withdraw from the proceedings (CCP §170.3(a)(1)); a judge who determines himself or herself to be disqualified may ask the parties whether they wish to waive the disqualification (CCP §170.3(b)(1)); if a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing before the judge. CCP §170.3(c)(1). As explained below, the presiding judge may exercise his/her administrative authority to reassign a case that should, for some reason, not be heard by any of the judges on the bench. However, if the presiding judge wishes to declare that all the judges on the bench are disqualified, he/she may only do so by polling the individual members of the bench for their individual determinations.

It is important that presiding judges remind judges that unless they are disqualified, they have a *duty* to hear all assigned matters. The presiding judge should explain that the mere fact that a judge is in the same courthouse as a Court employee (or a member of that Court employee's family) involved in a case assigned to that judge does not call for automatic disqualification of any judge on the bench. Presiding judges should be careful not to invite improper disqualification when it is not warranted.

Presiding Judge's Administrative Authority

The ethical opinion stated above does not restrict a presiding judge's authority to reassign a case pursuant to his/her administrative authority. CRC 10.603(a) assigns to the presiding judge the responsibility for ensuring the effective management and administration of the court, which includes assigning and reassigning cases. A presiding judge may invoke such an administrative remedy without determining that all the judges on the bench are disqualified. The presiding judge's options may include (1) the assignment of a case to an assigned judge already on assignment to the court and (2) the establishment of reciprocal relationships with courts in other counties whereby cases that the presiding judge believes will engender mass recusals are automatically reassigned to the other county. Presiding judges are cautioned, however, that any administrative remedy has a significant limitation: determination that the entire bench is actually *disqualified* is a prerequisite to the Judicial Council's reassignment of the case to another jurisdiction. CCP § 170.8.²

IV. Conclusion

No single judge, even the presiding judge, may recuse an entire bench from hearing a case. It is appropriate for the presiding judge to poll the entire bench to determine whether any judge is not disqualified from hearing a particular

² If the presiding judge is himself or herself disqualified the assignment to a qualified judge should be made by an acting presiding judge appointed for this purpose.

case. Although the presiding judge may exercise his/her administrative authority to arrange for the case to be heard in another jurisdiction, it may not be advisable to do so.

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