

Note regarding CJA Ethics Opinions No. 45 and No. 48: Superseded in part by CCP sec 170.1(a) (9). California Judges Association Opinions No. 45, "Disclosure Requirements Imposed by Canon 3E Pertaining to Judicial Disqualification" and No. 48, "Disclosure of Judicial Campaign Contributions," do not presently reflect current law in light of the recent amendment to CCP 170.1 which added CCP 170.1(a) (9) concerning campaign contributions.

OPINION NO. 45

(Issued: January 1997)

DISCLOSURE REQUIREMENTS IMPOSED BY CANON 3E PERTAINING TO JUDICIAL DISQUALIFICATION

I. Introduction

Effective January 15, 1996¹, the California Supreme Court issued the California Code of Judicial Ethics, which modified the Code of Judicial Conduct previously promulgated by the California Judges Association. Canon 3E of the new Code addresses judicial disqualification and disclosure requirements. The Canon moved the disclosure requirements previously listed in the Commentary into the text of the Code. The Ethics Committee has received numerous inquiries seeking guidance on matters of disqualification, disclosure and waiver of disqualification. Because the three concepts are interrelated, yet analytically distinct, they are addressed together in this opinion. Also underlying any analysis of questions of disclosure, disqualification and waiver of disqualification is Canon 2. Canon 2 requires judges to always act in ways that promote public confidence in the integrity and impartiality of the judiciary and to avoid not only impropriety, but its appearance. This opinion should be read in conjunction with Opinion 51 and Opinion 55.

II. Canon 3E and CCP 170.1

Canon 3 generally requires impartiality and diligence in the performance of judicial duties. Canon 3E has been modified in the following manner:

"E. Disqualification

A judge ~~should~~ shall disqualify himself or herself ~~in a proceeding in which the judge's impartiality might reasonably be questioned, or in a~~ any proceeding in which disqualification is required by law*. 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.

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Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, or whenever required by the disqualification provision of the Code of Civil Procedure.

~~A judge should 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.~~

However, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only

¹ Final revisions to sections not relevant here took effect April 15, 1996.

judge available in a matter requiring judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must ~~timely~~ promptly disclose on the

record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

~~A judge should observe the provisions of the Code of Civil Procedure concerning remittal of disqualification.”~~

1996 Changes

Aside from minor, nonsubstantive changes, the Supreme Court modified Canon 3E in two respects: First, it deleted previous language which required a judge to disqualify him or herself “in a proceeding in which the judge’s impartiality might reasonably be questioned.” This change has the effect of limiting the circumstances under which the judge is disqualified under the Canons to those where “disqualification is required by law.” However, the deleted language is substantially the same as that found in CCP 170.1 (a) (6) (c) [a “person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.”] Thus, the operative disqualification language in the new Code is essentially unchanged from the earlier version.

Second, the Supreme Court moved the disclosure requirement from the Commentary to the Code itself and limited the disclosure mandate to trial judges only. The test for disclosure remains the same under the new Code. Its placement in the canons underscores the Supreme Court’s view of the importance of the disclosure of information relating to a judge’s possible disqualification even though the judge has made an initial determination that he or she is not disqualified.

The mandate that a judge must disqualify him or herself whenever “disqualification is required by law,” is a reference to CCP 170.1 et seq. Under 170.1, there are seven legal grounds for disqualification. In summary they are:

- 1) The judge has personal knowledge of disputed evidentiary facts.
- 2) The judge has served as a lawyer in the proceeding or for a party.
- 3) The judge, judge’s spouse or minor child has a financial interest in the subject matter or a party.
- 4) The judge, spouse or close relative is a party.
- 5) The lawyer or spouse of the lawyer is a close relative of the judge or the judge’s spouse is associated in the private practice of law with a lawyer in the proceeding.
- 6) The judge believes recusal would further the interest of justice, there is a substantial doubt as to the judge’s capacity to be impartial, or a person aware of the facts might reasonably entertain a doubt the judge would be impartial. Bias or prejudice toward a lawyer may be grounds. It is the “gray area” in this sixth ground which leads to the most questions.
- 7) The judge is unable to perceive the evidence or properly conduct the proceeding.

Pursuant to CCP 170.2, it is **not** a ground for disqualification that the judge:

- 1) Is or is not a member of any racial, ethnic, religious, sexual, or similar group involved in the proceedings;
- 2) Has previously expressed a view on a legal or factual issue presented;

- 3) Has, as a lawyer, participated in drafting laws which pertain to the proceeding, unless the judge believes that prior involvement was so well known as to raise a reasonable doubt in the public mind concerning the judge's impartiality.

Waiver

While waiver of disqualification is not specifically mentioned in the Canons, CCP section 170.3 (b) (1) addresses waiver and states that when a judge determines he or she is disqualified, after stating the reasons for the disqualification, the judge may ask the parties whether they wish to waive the disqualification. Any waiver shall recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record. Asking whether the parties wish to waive the disqualification the judge has concluded exists does not mean the judge may put pressure on the parties or their lawyers to obtain such a waiver.

III. Application to Specific Factual Situations

Whenever an issue arises regarding potential disclosure, disqualification or waiver, the judge must undertake a three-part analysis to decide: first, whether recusal is required because the judge is disqualified from hearing the matter; second, whether to ask the parties if they wish to waive the recusal, and if a waiver is tendered, what procedures are necessary to perfect the waiver; and third, even if no disqualification is necessary, is disclosure still required. With respect to the first issue (recusal), judges must consider at the outset the mandate of CCP 170 and Canon 3B that a judge has a duty to decide any proceeding or matter in which he or she is not disqualified.

A. **Facts:** Attorney loans a judge a computer, arranges car purchases and maintenance for members of the judge's family, seeks advice from the judge on appropriate strategy in cases with other judges, and attends reciprocal social dinners with the judge.

Analysis: The judge must disqualify. Clearly, any reasonable person would entertain a substantial doubt as to the judge's ability to be impartial under these circumstances. Here the attorney-judge relationship has gone far beyond acceptable professional association.

Adams vs. Commission on Judicial Performance, 10 Cal.4th 866 (1995).

B. **Facts:** Attorney loans a judge cash which the judge neglects to report on annual 721 Form.

Analysis: Judge must disqualify. Whether or not the loan has been reported, there exists a relationship between the judge and counsel that would cause a reasonable person to doubt the judge's ability to be impartial.

C. **Facts:** Judge is an active member of a sports group or social organization with an attorney who appears before the judge.

Analysis: Disqualification is not required because none of the seven legal grounds for disqualification (CCP 170.1) exist. Even the catchall ground for recusal (ground number six) is inapplicable. Nothing in the fact situation indicates the judge believes that recusal would further the interests of justice or that there is a substantial doubt as to his or her capacity to be impartial.

Similarly, nothing in the hypothetical situation indicates that a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

However, disclosure is required, and desirable, for two reasons. First, disclosure in an abundance of caution will assuage any doubt in most cases. A party or attorney learning of this

affiliation directly from the judge is far less likely to question the judge's impartiality than one who learns about it later from another source. By clearing the air, the judge dispels any potential doubt about impartiality. Merely mentioning the association to counsel is insufficient. The judge must disclose on the record or the clerk's minutes of the proceedings must reflect the disclosure.

Second, and equally important, if the judge fails to disclose, and was incorrect in his or her reasonable person analysis [CCP 170.1 (a) (6) (C)], the judge may have concealed facts that would constitute a basis for a successful challenge to the judge's improper failure to recuse him/herself, thereby effectively depriving the litigant of his/her CCP 170.3 right to challenge the judge.

D. **Facts:** The judge is acquainted with both husband and wife in a pending dissolution to be heard by that judge.

Analysis: The judge must disclose the relationship to all case participants but need not necessarily disqualify. Knowing both parties, the judge may have personal knowledge of disputed evidentiary facts. If so, the judge would be required to declare that he or she is disqualified, [CCP 170.1 (1) (a)], although the disqualification could be waived.

A further consideration would be whether a substantial doubt as to the judge's capacity to be impartial exists. Does the judge know one better than the other? What is the degree to which the judge is acquainted with the parties? Are the judge and parties such good friends that a reasonable person might question whether the judge could be impartial in rendering decisions? If so, the Commentary to Canon 3E and Canon 2 may prevent the judge's participation in the case.

Once again, by clearing the air with full disclosure on the record, the judge dispels any questions of bias, and prompt examination of the issues raised by the disclosure might lead to a conclusion that disqualification is required.

E. **Facts:** Judge found an attorney for his adult son and has agreed to pay son's attorney fees. Attorney now appears before judge on unrelated matter.

Analysis: At a minimum, disclosure is required and disqualification may be required. If the fee paid to the attorney is one that is a flat fee that has been assessed or paid, it would not appear that the judge's hiring the attorney would prevent the judge from participating in other cases in which the attorney appeared. However, Canons 3E and Canon 2 would compel disqualification if a person aware of the facts would reasonably entertain a doubt about the judge's ability to be impartial or otherwise call into question the integrity and impartiality of the judge. In close cases, it is always better to disqualify.

F. **Facts:** Judge hearing a case involving a bank realizes the judge's own home mortgage is with that bank.

Analysis: Judge need neither disqualify nor disclose this arm's length relationship. Here the judge receives no special treatment from the bank but merely engages in the same transaction available to any customer. Judge's status with the bank will not change with the case outcome. Hence, there is no reasonable appearance of bias.

G. **Facts:** Judge retains an interest in former law firm's pension plan. The plan assets fluctuate daily and the judge has neither knowledge of those assets nor management authority over them.

Analysis: Recusal is not required (see analysis in C, above). While the judge need not disclose the pension plan, the judge must disclose the prior firm affiliation. Previous membership in the law firm

does not compel recusal as it does not fall within any of 170.1 grounds. Because the plan assets fluctuate regularly and the judge neither knows the specifics nor controls those assets, this need not be disclosed.

H. **Facts:** Judge receives an unsolicited letter from an out-of-state judge seeking leniency for a criminal defendant about to be sentenced by judge.

Analysis: The California judge must disclose this unauthorized ex parte communication to all parties but need not disqualify. Here there exists little likelihood the letter will have an impact on the judge's impartiality, and disclosure at the first opportunity reinforces this view.

I. ~~**Facts:** Judge has a financial interest in the subject matter of a proceeding. For example, judge's spouse is employed by a government agency party. (See Opinion 55)~~

~~**Analysis:** Judge must disqualify. Judge may then ask parties if they wish to waive disqualification if judge discloses the basis for the disqualification at time the judge asks about waiver. The recusal may be waived in a writing signed by the parties and their counsel, provided the judge also considers Canon 2 and concludes it would not be violated.~~

~~Note, that in many circumstances the spouse's government agency is not a party to the proceeding, but the government agency brings the action in a representative capacity on behalf of a city, county, state or other body. Under these circumstances there would be no duty to disqualify. Disclosure of the spouse's employment may be appropriate depending on the circumstances even if the judge does not believe disqualification is required.~~

J. **Facts:** A party or counsel states the judge cannot be fair because opposing counsel has appeared before the judge on many occasions over many years.

Analysis: Judge need not disclose or disqualify merely because an attorney has appeared often before the judge even when the judge holds that attorney in high professional esteem, provided the judge believes self not to be prejudiced for or against anyone in the case. If the rule were otherwise, it would simply be impossible for an experienced, well-known judge to get through a lengthy calendar. The process of disclosing how well the judge knew every lawyer present might consume so much time, little would remain for hearing the scheduled cases. It must reasonably be accepted that judges were lawyers once themselves and know lots of lawyers or they would not be judges.

K. **Facts:** A party has threatened to complain to the Commission on Judicial Performance regarding the judge.

Analysis: While the judge should make all parties aware of the threat, the judge need not recuse unless the judge doubts his or her own ability to be fair. Were such threats a valid disqualification ground, any unscrupulous party or lawyer would gain an ability to remove a judge at any point merely by threatening to lodge a complaint, however lacking in merit.

IV. Conclusion

Modified Canon 3E relies solely on statutory grounds for disqualification and disclosure requirements. While the new standard is neither more nor less stringent, it is arguably clearer. Every matter involving a potentially sensitive issue requires the judge to make a three-part analysis of recusal, waiver and disclosure. Judges should look to CCP 170.1 for disqualification grounds and to CCP 170.2 for areas which do not require disqualification. CCP 170.3 (b) governs the process of waiving disqualification.

In summary, judges should consider three things:

1. **Disqualification.** The Legislature has outlined the situations in which disqualification is required or required to be considered [CCP 170.1 (a) (1-6; (b))], and Canon 3E has, in effect, deferred to the Legislature on that issue. If the judge concludes he or she is disqualified, the grounds for disqualification should be clearly stated. Only after that may the court accept a written waiver as set forth in CCP 170.3 (b).
2. **Disclosure.** New Canon 3E has accentuated the importance of disclosure by moving the requirement that trial judges disclose, even when they need not disqualify, from the former Commentary into the new text. Disclosure is required if the judge believes the parties or their lawyers might consider the information relevant to the issue of disqualification [Canon 3E, second sentence]. The Legislature has only addressed disclosure in one situation: when the judge first disqualifies him or herself and thereafter asks the parties and attorneys if they wish to waive the disqualification [CCP 170.3 (b) (1)].
3. **Waiver.** Waiver may only be obtained in circumstances under which the judge has already disqualified him or herself, and simultaneously makes disclosure. [CCP 170.3 (b) (1)]. Even then, there can be no waiver if judge:
 - a) has a personal bias or prejudice concerning a party; or
 - b) judge served as an attorney or has been a material witness in the matter. [CCP 170.3 (b) (2) (A) (B)].

Waivers of disqualification must always be in writing and signed by the parties and their counsel.

1995/96 COMMITTEE ON JUDICIAL ETHICS
(finalized by 96/97 Committee, January 1997)