

California Judges Association  
**OPINION 55**

(Issued: March 22, 2006)

**DISQUALIFICATION AND DISCLOSURE REQUIREMENTS WHERE A  
MEMBER OF JUDGE'S FAMILY IS EMPLOYED BY A GOVERNMENT  
ENTITY PARTY APPEARING BEFORE THE COURT**

**I. Issue:**

What are a judge's disqualification and disclosure obligations based on the employment of a family member by a government entity that is a party to litigation before the judge?

**II. Canons and Relevant Law:**

Canon 3E(1): A judge must disqualify when required by law.

Canon 3E(2): A judge shall disclose information that the judge believes the parties or their lawyers would consider relevant to the issue of disqualification, even if the judge believes there is no actual basis for disqualification.

Canon 3E(3): Ownership of government bonds issued by a party to a proceeding is disqualifying only if the outcome of the proceeding could substantially affect the value of the judge's bond.

CCP §170.1(a): A judge shall be disqualified if any one or more of the following is true:

(3) The judge, or the spouse or a minor child living in the household, has a financial interest in the subject matter in a proceeding or in a party to the proceeding.

(4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party.

(6)(A)(iii) For any reason, a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

CCP §170.5(b): A "financial interest" means ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value greater than \$1,500, or a relationship as director, advisor or other active participant in the affairs of a party.

CCP §170.3(b): After the basis for a disqualification is disclosed, the parties and their attorneys may waive the disqualification in writing on the record.

**III. Discussion:**

In any case where a judge's family member is employed by a party to litigation before the judge, the judge must determine whether disqualification or disclosure is appropriate. Special considerations arise where the employer is a government entity. The purposes of this opinion are (1) to provide a thorough analysis of the disqualification/disclosure issues presented where a government entity party appearing before a judge employs a member of the judge's family, and (2) to amend Formal Opinion No. 45 to redact the portion of the opinion discussing this limited issue.

Formal Opinion No. 45, issued by the CJA Ethics Committee in 1997, covers a broad range of topics relating to disqualification, disclosure and waiver of disqualification. It discusses the application of

Canon 3E in the context of a number of different factual situations, including the situation where a judge's spouse is employed by a government entity party. (See Formal Opinion No. 45 at section III (I).) The opinion states, without explanation, that in this type of situation, a judge must self-recuse because the spouse's employment creates a "financial interest" in the subject matter of the proceeding. The Ethics Committee has reconsidered this assertion and concluded that the employment *per se* does **not** create a disqualifying financial interest for the judge. Because Formal Opinion No. 45 may be interpreted to stand for the erroneous proposition that disqualification is required whenever a judge's family member is employed by a government entity party, the opinion is hereby amended to redact Section III (I).

When a government entity is a party, a judge is deemed to have a "financial interest" if (1) the judge owns government bonds issued by the party and the outcome of the proceeding could substantially affect the value of the judge's bonds (Canon 3E(3)), or (2) the judge, the judge's spouse<sup>1</sup> or a minor child living in the household has a relationship to the party as "a director, advisor or other active participant in the party's affairs" (CCP §§170.1(a)(3), 170.5(b)). Further, a judge is disqualified whenever the judge, the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party or an officer, director, or trustee of a party (CCP §§170.1(a)(4)).<sup>2</sup> The positions of director, advisor, officer, trustee or "other active participant in the party's affairs" are not defined by statute or case law. The terms "director", "officer", and "trustee" are fairly straightforward, but the terms "advisor" and "other active participant in the party's affairs" are not. With respect to the latter two terms, the Ethics Committee believes that a reasonable interpretation, consistent with the purpose of the statute, would be a narrow construction that focuses on whether the position requires the individual to advise on, or actively participate in, the major activities or policy decisions of the government entity.

Even if the family member's employment with the government entity party does not mandate disqualification under CCP §170.1(a)(3) or (4), the judge must still consider whether there is an independent basis to disqualify under CCP §170.1(a)(6)(A)(iii).<sup>3</sup> Section 170.1(a)(6)(A)(iii) requires disqualification where, for any reason, a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Thus, in a case where a government entity party employs a member of the judge's family,<sup>4</sup> the judge must determine whether a person aware of that fact would, for any reason, reasonably entertain a doubt about the judge's capacity to remain impartial in the lawsuit. One such reason might involve financial consequences to the government entity party, notwithstanding the fact that the judge personally has no "financial interest" in the matter as defined by CCP §170.5(b) or Canon 3E(3). If, for example, the government entity party were to suffer a financial loss as a result of an adverse judgment, this might theoretically impact the employee/family member through a potential loss of employment, decrease in salary, or the like. However, in most instances, an adverse judgment would not endanger the financial well-being of a government entity, and any negative financial consequences to the family member would be so attenuated that no reasonable person would doubt the judge's ability to remain impartial. Disqualification, therefore, would not be warranted in these circumstances, although the judge would certainly have an obligation to disclose the family member's employment under Canon 3E(2).

Aside from potential financial consequences, there may be other reasons upon which a person might reasonably entertain a doubt as to the judge's capacity to remain impartial, thereby requiring disqualification under CCP §170.1(a)(6)(A)(iii). For example, if the judge's family member works for a city government in a department or division that is directly involved in the litigation, this fact most likely would raise a question about the judge's ability to remain impartial, regardless of whether the family

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<sup>1</sup> For purposes of the Political Reform Act, the term "spouse" includes registered domestic partners recognized by state law. Cal. Code of Regs. §18229.

<sup>2</sup> The permissible limits of a judge's service in a governmental position are governed by Canons 4C(2) and (3) and are outside the scope of this opinion.

<sup>3</sup> Formerly, CCP §170.1(a)(6)(C).

<sup>4</sup> Here, because the analysis is outside CCP §170.1(a)(3), "family" is not confined to a spouse/domestic partner or minor child living in the household.

member may be affected financially by the outcome of the action. Similarly, if a lawsuit before the judge involves a particular school within a school district and the judge's family member is a teacher at that school, then disqualification is probably required under CCP §170.1(a)(6)(A)(iii). On the other hand, if the lawsuit involves the school district as a whole, the judge's capacity to remain impartial becomes less questionable and disclosure is likely sufficient. Because disqualification under CCP §170.1(a)(6)(A)(iii) is based on a standard of reasonableness in light of the particular facts, it is not possible to state a hard and fast rule that will apply to all cases involving the employment of a family member by a government entity party. The final determination of whether to disqualify or disclose will depend on the specific circumstances of the case.

Finally, any disqualification arising from the employment of a family member by a government entity party may be waived, whether based on CCP §170.1(a)(3), (4) or (6)(A)(iii). See CCP §170.3(b).

**2005/06 Judicial Ethics Committee**

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