

CALIFORNIA JUDGES ASSOCIATION
Judicial Ethics Committee
Opinion No. 60

DURATION OF DISCLOSURE

I. Introduction

The disqualification requirements of California Civil Procedure Code section 170.1 are designed to ensure public confidence in the integrity of the judicial process. Canon 3E(2) adds another layer of protection by requiring disclosure of any information that may be reasonably relevant to the issue of disqualification. Disclosure not only allows the parties to take any appropriate action, it also lends transparency to the process. However, disclosure of irrelevant information may create an unnecessary concern that there is an issue as to the court's impartiality where there is no basis for concern. Where that is the case, disclosure may undermine the very public confidence it is designed to inspire. That is why indefinite or prolonged disclosure of information may do more harm than good. Taking a more analytical approach to the question of duration of disclosure is not a question of convenience, but rather, a necessary step in maintaining confidence in the judicial process. Although several formal ethics opinions have addressed the question whether disqualification and/or disclosure is required, none have addressed the question of how long one must disclose once it is determined that disclosure is required. This opinion seeks to provide guidance to Judges concerning the duration of disclosure.

II. Authority

Canon 3E (2): "In all trial court proceedings, a judge shall disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure Section 170.1, even if the judge believes there is no actual basis for disqualification."

Rothman, David, *California Judicial Conduct Handbook* (3d Ed. 2007) §7.00.

III. Discussion

With the exception of subsection (a)(6), the disqualification requirements of Civil Procedure Code section 170.1 are fairly clear. As long as any of those specific circumstances exist disqualification is mandated. The more general disqualification provisions of CCP Section 170.1(a)(6) and the disclosure requirement of Canon 3E(2) are not as easily applied. However, the principles underlying both disqualification and disclosure are the same: to "assure the parties and the public of the integrity and fairness of the judicial process." Rothman, David, *California Judicial Conduct Handbook* (3rd Ed. 2007) §7.00.

Once the Judge has determined disclosure is necessary, the question of how long one should disclose should be answered by referring to the same principles that led to the initial disclosure. In some instances the need to

disclose will be finite, and cease when the underlying condition requiring disclosure ceases to exist. In others, there is no clearly defined basis for determining when the condition leading to disclosure ceases to exist. In the former category, determining the duration of disclosure is simple. In the latter, it is more complex.

The first step in analyzing how long one must disclose is to determine within which category the disclosure falls. That determination is made by answering the following question: Does the appearance of potential bias exist only for as long as the condition giving rise to the initial disclosure exists? If so, the duty to disclose continues only as long as the underlying condition exists. An example would be a financial interest that, although not requiring disqualification, required disclosure. If the judge were to divest that financial interest, there would be no continuing need to disclose.

If, on the other hand, the appearance of potential bias continues after the circumstances requiring initial disclosure change, disclosure should continue for a period of time. Examples include cases involving prior personal or business relationships requiring disclosure. Depending on the nature of the relationship, disclosure may continue even after the specific personal or business relationship has ended. Also, if the disclosure was required in the first instance because the information was relevant to the question of disqualification under the general provisions of Section 170.1(a)(6), it may be difficult to determine when the underlying condition ends. For cases falling into this second category, the challenge is determining the duration of disclosure, which is the second step in our analysis.

Advice given in prior formal opinions and informal responses provides some guidance in this area. In some instances the Ethics Committee has suggested specific time frames depending on the circumstances. In others, the advice given is to disclose for “a reasonable period of time.” If the situation is one in which specific time frames have been suggested, following those guidelines would be prudent. If no time frames have been suggested, the following are some of the factors that should be considered in determining what constitutes “a reasonable period of time.”

- 1) Where disclosure resulted from a prior relationship with a party or attorney:
 - a) Was the relationship personal or professional?
 - b) What was the duration and frequency of the contact?
 - c) Is there any continuing contact?
 - d) How much time has elapsed since the relationship which gave rise to disclosure?
 - e) Was the relationship directly with the Judge, or did it involve a family member or an entity with which the Judge is connected?
- 2) Where the disclosure resulted from a prior incident involving the same or similar subject matter before the court:
 - a) Did the incident involve the Judge directly or someone close to the Judge?

- b) How significant an impact would such an event normally have on someone?
- c) Are there any consequences from the prior event still affecting the Judge or anyone close to the Judge?
- d) How similar is the prior event to the matter before the court?
- e) How much time has passed since the prior event?

In all cases, the duration of disclosure must be sufficient to ensure that the parties and the public have confidence in the integrity of the judicial process. In the final analysis, one should ask: how would a party react to the information if it were discovered following an adverse ruling? If a reasonable person might conclude the prior contact or incident could have affected the decision, then failing to disclose for a sufficient period would undermine public confidence in the ruling.

A benchmark of two years has begun to emerge. This benchmark is based on the Legislature's determination of the period for which disqualification is required in two circumstances: where the judge served as a lawyer in the proceeding (CCP §170.1(a)(2)(B)) and where the judge has participated in discussions regarding prospective employment as a dispute resolution neutral. CCP §170.1(a)(8)(A). In both these situations the statute prescribes a disqualification period of two years. Following the period of disqualification, disclosure is required for a period of time because whatever triggered the disqualification may still be relevant to determining disqualification under the general provisions of CCP 170.1(a)(6). The Committee believes that, since the disqualification period mandated by statute is two years, generally two years would be a "reasonable period of time" to disclose. The two-year benchmark is by no means a "bright line," however. Its applicability depends on the particular circumstances of a given case. Obviously, if any of the conditions that triggered disclosure in the first instance still exist following a two-year period, disclosure may still be required. Conversely, where disqualification was never required and the event that triggered disclosure has passed, disclosure for a shorter period may be sufficient.

IV. Examples

A. Cases involving prior business or professional contacts

1. Situations where the Ethics Committee has suggested the duration of disclosure.

- a. Attorney from Judge's former law firm represents a party in the proceedings. Disclosure for two years following the period of disqualification is sufficient.

- b. Judge formerly supervised attorney while working in a public agency. Disclosure is required for no more than two years.¹
- c. Judge performed the wedding of a witness or attorney appearing in court. If the Judge had no prior acquaintance with the parties to the marriage, disclosure was recommended for up to two years. If there was a prior association, disclosure was recommended for at least two years. The exact duration would depend on the extent and nature of the prior association.
- d. Judge has participated in the management or direction of a lawsuit involving the court and has worked directly with the Court's attorney. Judge should disclose whenever a party or attorney involved in the lawsuit appears in an unrelated matter for a period of two years following the litigation.

2. Determining a "reasonable period of time" for disclosure using the suggested factors.

- a. The conduct requiring disclosure is accepting an invitation to a social event hosted by an attorney who occasionally appears in Judge's court. Most of the contact between Judge and the attorney occurs during bar related events. The relationship is primarily professional, although on this occasion it was personal. This appears to be an isolated event and there is no indication it will be repeated. While disclosure is required for a reasonable period of time following the event, it need not continue beyond a matter of months, as opposed to years. Under these facts, disclosure for six months following the event would be sufficient.
- b. Attorney contributed money to Judge's campaign, but was not a major donor and was not actively involved in the campaign. While disqualification is not required under these facts, disclosure is

¹ The Ethics Committee is aware that this advice appears inconsistent with the public admonishment of former Judge Vincent DiFiglia issued by the Commission on Judicial Performance (CJP) on January 9, 2007 for, among other things, failing to disclose that he had been employed by the San Diego City Attorney's Office some 16 years prior to the case at issue. However, the Committee believes that Judge DiFiglia's case should be viewed in the context of its unique facts. Judge DiFiglia had failed to disclose numerous and extensive contacts with plaintiff's attorney, had been previously disciplined for very similar conduct involving the same attorney, and one of the parties had explicitly asked for disclosure of any prior employment with the San Diego City Attorney. The Committee is not aware of any other case where failure to disclose former employment as a lawyer or officer in a public agency alone has been the basis for discipline. Indeed, such employment with a public agency does not require disqualification, unless the Judge "personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding." CCP §170.1(a)(2)(C).

required because the information would be relevant to the question of disqualification. Making a campaign contribution does not necessarily involve any direct contact, nor does it involve continuing contact. However, it does directly involve the Judge's personal interest. Given the nature and duration of the contact, such disclosure should continue for one year following the election.

- c. Judge, a part time law professor, sometimes has former students appear in his court as lawyers or parties. The same considerations involving persons a Judge has supervised in the past in a public agency would apply to former students. Neither situation mandates disqualification. The relationships are similar though not identical. Both involve contacts made in a professional capacity. Though contact could be frequent, on these facts, they are not social and are not continuing. Therefore, two years is a sufficient time for disclosure.

B. Cases involving former legal representation of Judge or members of Judge's family

1. Situations where the Ethics Committee has suggested the duration of disclosure.

- a. Attorney represented Judge in debt collection action. Disclosure is required for two years following the representation whenever Attorney appears in Judge's court.
- b. Attorney represented Judge's spouse in a petty theft infraction case. Disclosure is required for at least one year following the representation.
- c. Attorney acted as a mediator in a family law matter involving the Judge. Disclosure for two years following the mediation would be sufficient.
- d. Attorney represented Judge's foster child in a dependency matter. Disclosure is required for 6 months following the representation.

2. Determining a "reasonable period of time" for disclosure using the suggested factors.

- a. Judge recommended an attorney to represent his/her mother in a conservatorship proceeding. The mother retained the attorney who is paid for by the mother. Attorney appears frequently in Judge's court which handles similar matters. Here disclosure was required because attorney represented a close family member of the Judge and also because the attorney was referred by the Judge. The relationship is professional. The Judge is disqualified in cases in which Attorney appears while the conservatorship proceedings are pending and should disclose the fact of referral and representation for two years following the termination of the representation.

- b. Judge's spouse owns an apartment building from which she evicted a tenant. Tenant's attorney appears frequently in Judge's court. As attorney represented a party who was involved in litigation with a close family member of the Judge, disqualification is required for the duration of the eviction action. The same considerations that apply to disclosure of an attorney's representation of a close family member apply to an attorney representing an adverse party to a close family member. Therefore, disclosure is required for two years following the termination of the eviction action.

C. Cases where Judge or a family member is accused of crime or is a crime victim

1. Situations where the Ethics Committee has suggested the duration of disclosure.

- a. Judge's estranged son is accused of a serious criminal offense. Disclosure is required in all similar cases until the son is either acquitted or finishes serving his sentence.
- b. Judge is convicted of a misdemeanor DUI in another jurisdiction. Disclosure is required in all similar cases for the period of Judge's probation (presumably three years).
- c. Judge was the victim of a residential burglary in which \$2000 in property was taken by an unknown person. Disclosure is required in all theft and burglary cases for no more than two years.
- d. An intruder broke into Judge's home while the Judge and his family were present. Police were called and the suspect was apprehended. Disclosure is required for two years in all similar cases and in all cases involving the investigating officer and Deputy District Attorney who handled the case.
- e. Judge's emancipated adult family member obtained a restraining order against a former spouse of the adult family member. The restrained person was recently arrested for violating the order. The case was filed in another jurisdiction, and did not involve any violence or threats of violence. Disclosure is required in similar cases for as long as that case is pending.
- f. Judge's son, a minor, is charged with misdemeanor hit and run in juvenile court. Disclosure is required as long as the case is pending and the son is subject to the jurisdiction of the juvenile court.

2. Determining a "reasonable period of time" for disclosure using the suggested factors.

- a. Judge was involved in an accident caused by someone driving under the influence of alcohol. A person unknown to the Judge was killed in the accident. The Judge suffered only minor injuries. While the results of the accident were extremely serious, they did not involve the Judge directly. There are no lingering consequences

from the accident affecting the Judge. Disclosure would be required in all similar cases for two years.

- b. Judge in a criminal court was the subject of criminal threats made by a defendant. Charges of threatening a Judge in violation of Penal Code section 76 were filed as a result. The case involves the Judge directly, but there is no indication, on these facts, that the threats resulted in any harm to the Judge or had any significant impact. Therefore, disclosure is required for two years following the incident in all cases involving criminal threats and any cases involving the Deputy District Attorney or police officers involved in that case.

V. Conclusion.

The question of how long disclosure is required should be addressed upon making the initial determination that disclosure is mandated under Canon 3E(2). If the circumstances giving rise to the need for disclosure are similar to those where time frames have been suggested here or in other formal opinions, following those time frames would be appropriate. If the circumstances vary from the given examples, or if no time frame is mentioned, the factors listed above in Section III should be used to determine the duration of disclosure. In performing that analysis, the benchmark of two years is a useful starting point, but should not be solely relied upon. Ultimately, whether disclosure should continue beyond the two year benchmark, or should be for less than two years, depends on the specific circumstances presented, and should be guided by the underlying principles requiring disclosure; ensuring public confidence in the integrity and fairness of the judicial process.

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