

**CALIFORNIA JUDGES ASSOCIATION
Judicial Ethics Committee**

Opinion No. 63

**DISQUALIFICATION AND DISCLOSURE REQUIREMENTS OF
A HEARING JUDGE WHEN A JUDICIAL COLLEAGUE (OR THE
COLLEAGUE'S FAMILY MEMBER) OR AN EMPLOYEE OF THE
COURT HAS AN INTEREST IN THE CASE**

I. Introduction

In Formal Opinion No. 62, the Ethics Committee opined that a presiding judge lacks authority to recuse the entire bench because, with limited exceptions, no judge may declare another judge to be disqualified to hear a case. The issue of “bench disqualification” arises most frequently in cases where a judge of the court (or that judge’s family member) or a court employee has some connection to a case filed in the court. As Opinion No. 62 states, each judge of the court must individually determine whether he or she is disqualified, regardless of how likely it appears to the presiding judge that all judges on the bench are disqualified. This opinion identifies and analyzes the factors hearing judges (HJs) should make in determining whether they are disqualified in such circumstances.

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.

Canon 3E(2): 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.

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

Rothman, David, *California Judicial Conduct Handbook* (3d Ed.) §§ 7.36, 7.40, 7.52

Ethics Opinions 54 and 56

III. Discussion

The “duty to decide” is one of the first principles of Judicial Ethics: a judge must decide all matters assigned to the judge except those he or she is disqualified from hearing. This duty is enshrined in Canon 3B(1) of the California Code of Judicial Ethics as well as in Title 2 of the Code of Civil Procedure (Judicial Officers), Section 170. The grounds for disqualification are set forth in Code of Civil Procedure Section 170.1. With three exceptions, the grounds are objective: For example, a judge is disqualified if he/she is a witness to disputed facts in the proceeding, has a financial interest in the subject matter of the proceeding, or by reason of disability is unable to perceive the evidence or conduct the proceeding. Cal. Code Civ. Proc. § 170.1(a) (1), (3), (7). In addition to the objective grounds for disqualification, Civil Procedure Code Section 170.1(a)(6) establishes three more subjective grounds: (1) the judge believes recusal would further the interests of justice, (2) the judge doubts his or her own ability to be impartial, and (3) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Unless one of these grounds exists, a judge to whom a case is assigned has a duty to decide that case.

Notwithstanding the duty to decide, some judges persist in declaring themselves to be disqualified whenever they would feel “uncomfortable” deciding a case. Examples include cases where the judge is acquainted with one of the lawyers outside the courtroom; where the judge practiced law many years ago in a firm that represents a party; where the judge sometimes dines at a restaurant or stays at a hotel that is a party; or where the judge’s child has been a student at a school that is a party. Although Canon 3E(2) may require the judge to disclose these facts, they are not disqualifying unless they meet one of the tests of disqualification set forth in Civil Procedure Code Section 170.1. In the case of the judge who sometimes dines at a restaurant that is a party, for example, only the subparts of Section 170.1(a)(6) could possibly apply, and that application may be dubious. Unless the judge has strong feelings about the restaurant or the case involving the restaurant that make the judge doubt his/her ability to be impartial, the judge is probably not disqualified. A person aware of the facts would not *reasonably* doubt the judge’s ability to be impartial. For the same reasons, the interests of justice would likely not require disqualification either.

A persistent source of questions about disqualification under Section 170.1(a)(6) is the situation where a judicial colleague of HJ (or that colleague’s family member) or a court employee has some interest in the case. Examples include cases where a judge of the court or that judge’s family member is (1) a party, (2) a witness, and (3) a victim of a crime in the court’s jurisdiction. Judges often feel “uncomfortable” when presented with such circumstances. Despite that discomfort, however, disqualification is not a foregone conclusion. The judge may be disqualified if the judge doubts his/her capacity to be impartial or if a person aware of the facts would

reasonably doubt the judge's ability to be impartial. Each judge must conduct this analysis individually. HJ should consider the following factors:

- The nature of the relationship between HJ and the judicial colleague or court employee who has an interest in the case
- The length of the relationship between HJ and the judicial colleague or court employee who has an interest in the case
- The size of the court, both numerically and geographically
- The proximity in which HJ and the judicial colleague or court employee work
- The nature of the interest

The following hypotheticals provide guidance for the analysis:

Hypothetical 1: HJ's judicial colleague is an officer in a condominium homeowners association and is named in that capacity as a defendant in a civil case assigned to HJ.

Variation A: The court has hundreds of judicial officers assigned to a large number of court facilities widely dispersed throughout the county. Although HJ has met the party judge from time to time over a period of 7 or 8 years, they have no personal relationship. They have never been assigned to the same courthouse and only rarely attend the same countywide judicial meetings or social events. HJ is confident that he/she can be impartial. A person aware of these facts would not reasonably doubt HJ's ability to be impartial because of the insubstantial relationship between HJ and the colleague and the absence of any visible association between HJ and the colleague. HJ is not disqualified. In light of the large number of judicial officers on the bench, HJ should disclose that a judicial colleague is a party.

Variation B: HJ sits on a court with 12 other judges, divided among three small courthouses. The judges frequently are reassigned from one courthouse to another. All the judges know one another well. In these circumstances, even if HJ and party judge have not known one another long, and even if HJ believes he/she can be impartial, HJ is disqualified. A person aware of the facts would reasonably doubt HJ's ability to be impartial.

Hypothetical 2: HJ sits on a large court. HJ recognizes the name of a judicial colleague on the caption of a new case. The colleague has been on HJ's bench for only two years and HJ has never met him/her. HJ and the colleague do not sit in the same courthouse. HJ has no doubt of his/her ability to be impartial. A person aware of these facts would not reasonably doubt HJ's ability to be impartial because of the lack of any relationship between HJ and the party judge and the absence of any visible association. HJ is not disqualified but should disclose.

Hypothetical 3: The victim in a criminal case that has been assigned to HJ was the grandmother of a judicial colleague with whom HJ is friendly. Regardless of HJ's assessment of his/her ability to be impartial, HJ is disqualified because a person aware of the facts would reasonably believe HJ would be biased against a defendant accused of causing injury to the close relative of HJ's friend.

Hypothetical 4: The defendant in a criminal case that has been assigned to HJ is charged with conspiracy to kill another judge on HJ's bench. HJ does not know the other judge well. Although HJ may believe he/she can be impartial, a person aware of the facts would reasonably believe that, even though HJ does not know the threatened judge, HJ might well be biased against someone who is accused of conspiring to kill HJ's judicial colleague. HJ is disqualified.

Hypothetical 5: The defendant in a criminal case that has been assigned to HJ is the child of a court commissioner. Although the court is not large, HJ does not know the commissioner or the commissioner's child. Unless HJ believes he/she cannot be impartial, HJ is not disqualified, but should disclose the connection between the defendant and the commissioner.

Hypothetical 6: HJ has a criminal assignment in a court with 15 judges. The child of a court employee has three pending felonies. HJ knows the defendant is the child of the court employee but does not know the employee or the defendant. HJ believes he/she can be impartial. A person aware of these facts would not reasonably doubt HJ's ability to be impartial because of the lack of personal relationship between HJ and the employee. HJ is not disqualified but should disclose the relationship between the defendant and the court employee.

The analysis that emerges from the factors listed above and the hypotheticals supports disqualification where HJ and the judicial colleague or court employee who has an interest in the case have a close relationship or where the physical proximity of HJ and the judge or court employee creates a reasonable perception of a close relationship even in the absence of one. The mere fact that a HJ sits on the same court – or even in the same courthouse – as a judicial colleague or a court employee with an interest in the case does not automatically require disqualification.

IV. Conclusion

A judge is not automatically disqualified from hearing a case because a judicial colleague (or the family member of a colleague) or a court employee is a party to or otherwise has an interest in the case. In determining whether disqualification is required, HJ must consider whether recusal would further the interests of justice or whether HJ is unable to be impartial. If neither of these factors requires disqualification, HJ should consider whether a person aware of the facts would reasonably doubt HJ's ability to be impartial. HJ

should examine the nature and length of the relationship between HJ and the judicial colleague or court employee who has an interest in the case, the numerical and geographical size of the court, the proximity in which HJ and the judicial colleague or court employee work, and the nature of the judicial colleague's interest in the case.

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