

APPENDIX E

Disqualification and Disclosure Guide to The Decision-Making Process¹

“The basic function of an independent, impartial and honorable judiciary is to maintain the utmost integrity in decisionmaking”²

STEP 1—REVIEW THE NEW CASE and the issues that come to mind.

On receipt of a new case, review information about the matter (e.g., facts that are known, parties, lawyers, witnesses, issues). Does anything come to mind that triggers a question or concern about hearing the matter? What lights go on in your head?

STEP 2—EXAMINE GROUNDS AND MAKE A DECISION.

The grounds for disqualification are set out in Code of Civil Procedure section 170.1 (plus the definitions in Code of Civil Procedure section 170.5) and Code of Judicial Ethics, canon 3E. Unless a judge is disqualified under these sections the judge *must* hear the matter as required by Code of Civil Procedure section 170.

LOOK AT THE SPECIFIC DISQUALIFICATION GROUNDS IN CODE OF CIVIL PROCEDURE SECTION 170.1, SUBDIVISION (a)(1)–(5), (7)–(9).

Look at “the things that came to mind” in **STEP 1** and decide if there is any specific ground requiring disqualification by reviewing Code of Civil Procedure section 170.1, subdivision (a)(1) through (5), and (7) through (9), along with the definitions in Code of Civil Procedure section 170.5.

LOOK AT THE GENERAL DISQUALIFICATION GROUNDS IN CODE OF CIVIL PROCEDURE SECTION 170.1, SUBDIVISION (a)(6).

See *Handbook*, Appendix G.

Apply the tests set forth in Code of Civil Procedure section

¹Because of the focus in this appen. E on Code of Civil Procedure §§ 170.1–170.5 and the requirements of disclosure in Cal. Code Jud. Ethics, canon 3E(2), appen. E does not discuss appellate court justices. Nevertheless, it is important to note that Cal. Code Jud. Ethics, canon 3E(1), (3), (4), (5) & (6) applies to appellate justices. See especially Rothman et al., *California Judicial Conduct Handbook* (4th ed. 2017) (*Handbook*), §§ 7:1, 7:3, 7:90.

²Advisory Com. com., Cal. Code of Jud. Ethics, canon 1.

170.1, subdivision (a)(6) to the things that came to mind in **STEP 1**. Is there some general ground that requires disqualification?

Matters which are not grounds for disqualification:

- (1) being a member of a racial, ethnic, religious, sexual or similar group;
- (2) having expressed views in any capacity on legal or factual issues in the matter; or
- (3) activities as a lawyer or public official regarding drafting laws.³

LOOK AT OTHER GROUNDS FOR DISQUALIFICATION.

See Code of Judicial Ethics, canon 3E.

MAKE THE DISQUALIFICATION DECISION.

After examining the specific and general grounds set out above, ***make a decision!*** This is a judicial decision, not a decision made by the parties. Do not say: “Well counsel, I want to disclose the following, and I will recuse myself if either of you have a problem with this.” Remember, unless you are disqualified you must hear the cause.

Questions to consider:

- (1) “**Can I be fair and impartial, even if I am NOT disqualified?**” If you cannot be fair and impartial, you are disqualified. If you can be fair and impartial, go on to question (2).
- (2) “**Am I disqualified** under Code of Civil Procedure section 170.1, **even though I can be fair and impartial?**”

After answering these two questions,

If you ARE NOT disqualified—

Then go to **STEP 5** to consider whether or not a DISCLOSURE pursuant to Code of Judicial Ethics, canon 3E(2)(a) or (b) is required.

If you ARE disqualified—

Then go to **STEP 3** and decide whether a WAIVER OF DISQUALIFICATION IS APPROPRIATE.

STEP 3—WHEN IS A WAIVER OF DISQUALIFICATION ALLOWED?

All statutory grounds for disqualification in Code of Civil Procedure section 170.1 may be waived **EXCEPT** the following. These three grounds for disqualification set out in Code of Civil Procedure section 170.3, subdivision (b)(2) **MAY NOT BE WAIVED:**

³Code Civ. Proc., § 170.2.

- the judge has a personal bias or prejudice concerning a party;
- the judge served as an attorney in the matter in controversy; or
- the judge has been a material witness concerning the matter in controversy.

If disqualification MAY NOT BE WAIVED per Code of Civil Procedure section 170.3, subdivision (b)(2):

Go to **STEP 6** for making the recusal.

If disqualification MAY be waived, answer two questions before accepting a waiver:

- (1) **Can I be FAIR AND IMPARTIAL** if counsel and the parties waive the disqualification? You cannot accept a waiver if you cannot be fair.
- (2) **Am I WILLING to hear this cause** even if they waive disqualification? There could be a number of reasons for not wanting to hear the cause even if they are willing to waive and even if you can be fair. For example, because the taking of a waiver requires disclosure of the reason for disqualification, you may not wish to make such a disclosure.

If you CANNOT BE FAIR and/or are NOT WILLING to accept a waiver:

Go to **STEP 6** for making the recusal.

If you CAN BE FAIR and are WILLING to hear the matter:

Go to **STEP 4**—How to Take a Waiver of Disqualification.

**STEP 4—HOW TO TAKE A WAIVER OF DISQUALIFICATION.
ASK THE PARTIES IF THEY WISH TO WAIVE
DISQUALIFICATION.**

If you decide you are willing to preside, inform the parties of the basis for disqualification on the record; you may ask the parties whether they wish to waive the disqualification.⁴ DO NOT seek to induce a waiver.⁵

The best practice is to leave the bench so that the matter of the waiver can be handled by the clerk after giving information.

**IF THE PARTIES DO NOT WISH TO WAIVE
DISQUALIFICATION.**

⁴*Id.*, § 170.3, subd. (b)(1).

⁵*Id.*, § 170.3, subd. (b)(3).

Do not try to discover which lawyers or parties favored or opposed a waiver.⁶

Go to **STEP 6** for Making the Recusal.

IF THE PARTIES WISH TO EXECUTE A WAIVER:

If the parties and attorneys wish to waive disqualification and you can be fair and are willing to accept the waiver, follow Code of Civil Procedure section 170.3, subdivision (b)(1):

- The waiver must be **IN WRITING**;
- The waiver must **RECITE THE BASIS** for the disqualification;
- The waiver must be **SIGNED BY ALL THE PARTIES AND ALL THE ATTORNEYS**;
- The waiver must be **FILED IN THE RECORD**.

CAUTIONARY NOTE:

If there is **no proper written waiver** that complies in every detail with the above requirements, there can be no waiver of disqualification.

Go to **STEP 6** for Making the Recusal.

If there is a **proper written waiver**, **HEAR THE MATTER!**

STEP 5—DISCLOSURE DECISION-MAKING PROCESS⁷

Even if you are not disqualified (see STEP 2 decision) you must decide whether or not you should make a disclosure. Code of Judicial Ethics, canon 3E(2)(a), requires disclosure on the record of “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.” Canon 3E(2)(b) requires certain specified disclosures of campaign contributions in trial court judicial elections.⁸

Purposes of this provision. There are three purposes behind Code of Judicial Ethics, canon 3E(2): To ensure the reality and appearance of the impartiality of the courts and the integrity of decisions; to allow the judge to hear from the parties if there are issues that the disclosure raises which the judge might want to consider; and to provide information that could form a basis for seeking recusal.

What should the judge focus on in making a decision as

⁶*Ibid.*

⁷Cal. Code Jud. Ethics, canon 3E(2)(a), (b).

⁸See Code Civ. Proc., § 170.1, subd. (a)(9)(C). Be aware that disqualification (subject to waiver) is required where a judge has received a contribution in excess of \$1,500 from a party or lawyer in a proceeding, under certain circumstances. (*Id.*, § 170.1, subd. (a)(9)(A), (D).)

to what to disclose? The information to be disclosed should be “**reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1**”⁹ where the judge has already decided that there is “no actual basis for disqualification.”¹⁰ The word “disqualification” used in Code of Judicial Ethics, canon 3E(2)(a), refers to the rules set out for disqualification in Code of Civil Procedure section 170.1. The word “relevant” as used here must refer to the definition in Evidence Code section 210. Since there are no grounds required for a peremptory challenge, what a lawyer and party might want to know in order to make a peremptory challenge is not the standard. The judge should focus on the grounds for disqualification under Code of Civil Procedure section 170.1, subdivision (a)(1) through (5), and (7) through (9), as well as the definitions set out in section 170.5, and examine closely section 170.1, subdivision (a)(6). *Handbook, Appendices F and G provide analysis of the substantive grounds for disqualification in Code of Civil Procedure section 170.1, subdivision (a)(2), (6)(A).*

If there is NOTHING to disclose.

HEAR THE MATTER!

Note you have already decided in **STEP 2** that you are NOT disqualified.

If there IS something to disclose: Make the disclosure.

Make the disclosure on the record. In making this disclosure the judge is NOT disqualifying himself or herself (see **STEP 2** above). The judge has already decided “I am not disqualified.” Thus the disclosure is not appended with the comment, for example, “I will recuse myself if either of you is uncomfortable.” Remember, Code of Civil Procedure section 170 *requires* a judge to hear matters unless disqualified.

Hear from the parties if they wish to be heard.

This is not mandatory, and some judges feel it is unnecessary. Others, however, including the authors, believe it is a good practice to at least hear what the parties might have to say on the subject. A reasonable opportunity for parties to seek some clarification of the disclosure is appropriate, but the judge need not engage in an open-ended and undignified interrogation by the parties.

Consider any new information provided by the parties.

⁹Cal. Code Jud. Ethics, canon 3E(2)(a).

¹⁰*Ibid.*

If you hear from the parties, consider what has been said and whether or not it causes you to revisit your decision not to disqualify yourself.

Decide whether to revisit disqualification or hear the matter.

If there is something that leads you to revisit the issue of disqualification, go back to STEP 2 and decide whether you are IN FACT DISQUALIFIED.

If there is NOTHING presented that causes a revisit of disqualification, HEAR THE MATTER!

Notes on motions to disqualify in the disclosure process:

CHALLENGE FOR CAUSE may be brought after disclosure. An affidavit to disqualify a judge for cause under Code of Civil Procedure section 170.3, subdivision (c), is timely after the disclosure and must be handled by the judge in strict compliance with this statute.

PEREMPTORY CHALLENGE may only be effective IF IT IS TIMELY. Only a timely affidavit of prejudice under Code of Civil Procedure section 170.6 is effective after disclosure. If the peremptory challenge is untimely, the making of the disclosure DOES NOT allow the judge to reopen the timeliness requirements.¹¹ Judges are required to hear all matters in which they are not disqualified.¹²

STEP 6—MAKING THE RECUSAL

Inform the parties and get off the case.

Once disqualified, a judge must see to it that the parties are informed, and thereafter the judge has nothing further to do with the case, except for those specific acts set out in Code of Civil Procedure section 170.4 (see *post*).

What a judge MAY NOT do after disqualification:

Once disqualified a judge **SHALL NOT:**

- Have any further involvement with the matter, except for those specific things set out in Code of Civil Procedure section 170.4, subdivision (a), see *post*.
- Assign the case to another judge without the agreement of the parties or the direction of the master calendar judge or presiding judge. If the master calendar judge directs the transfer, the minutes of the proceedings should note that transfer was by order of the master calendar court.

¹¹*Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 318–319.

¹²Code Civ. Proc., § 170; Cal. Code Jud. Ethics, canon 3B(1).

- Communicate about the matter in any way whatsoever with the judge to whom the case is assigned after disqualification.
- Engage in a soliloquy about the case, the lawyers, or parties that may be perceived as going beyond what is necessary to effectuate the disqualification.

A DISQUALIFIED JUDGE MAY ONLY DO THE FOLLOWING:

Once disqualified, a judge may, but is not required to, engage in certain very limited activities in regard to the matter in which he or she was disqualified per Code of Civil Procedure section 170.4, subdivision (a):

- Take actions necessary to maintain the jurisdiction of the court pending assignment of a judge who is not disqualified.
- Request another judge agreed on by the parties to preside.
- Hear and determine “purely default” matters.¹³
- Issue an order for possession prior to judgment in eminent domain.
- Set proceedings for trial or hearing.
- Conduct settlement conferences.

Rules on having to give reasons for disqualification:

- If a waiver of disqualification is involved, the judge must provide the basis for disqualification on the record. See **STEP 4**.
- If a judge is disqualified, and no waiver is involved, a judge need not give the reasons.
- If a judge **is not disqualified and yet refuses to hear a matter assigned** to the judge, “the judge must state reasons in writing unless the judge supervising the master calendar has concurred.”¹⁴

¹³See *Handbook*, § 7:4.

¹⁴Cal. Rules of Court, rule 10.910(b).