

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Kenneth L. Kann, Managing Attorney
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Office of the General Counsel

DATE: August 31, 2005

SUBJECT: Judicial Administration Rules: Duties of All Judges (amend Cal. Rules of Court, rule 6.608) (Action Required)

Issue Statement

The language of rule 6.608(1) of the California Rules of Court can be misinterpreted to require a judge who determines that he or she is disqualified from hearing a matter to obtain the concurrence of the presiding judge or master calendar judge.

Recommendation

Staff recommends that the Judicial Council, effective January 1, 2006, amend rule 6.608(1) to clarify that concurrence of the presiding judge or master calendar judge is required only if the judge refuses to hear a case for a reason other than disqualification. The amended rule would provide: "Each judge must: (1) Hear all assigned matters unless: (a) he or she is disqualified; or (b) he or she has stated in writing the reasons for refusing to hear a cause assigned for trial and the presiding judge, supervising judge, or master calendar judge has concurred."

Rationale for Recommendation

California Rule of Court 6.608(1) states: "Each judge shall: (1) Hear all assigned matters unless he or she is disqualified or has stated in writing the reasons for refusing to hear a cause assigned for trial, and the presiding judge or master calendar judge has concurred." Some judges have interpreted this rule to mean that a judge who determines that he or she is disqualified must obtain the concurrence of the presiding or master calendar judge. Others believe the rule does not require such concurrence.

A review of the history of the predecessor rules clarifies that the latter interpretation is correct; a judge who is disqualified need *not* obtain the concurrence of the presiding or master calendar judge. However, the rule as written is not clear. On its face, the phrase following the comma—“and the presiding judge or master calendar judge has concurred”—could be interpreted to apply to both situations preceding the comma, rather than just the latter. In other words, the placement of the phrase and the punctuation could incorrectly suggest that a judge must obtain the concurrence of the presiding or master calendar judge in both instances, i.e., when a judge has determined that he or she is disqualified and also when a judge refuses to hear a case for other reasons.

The history of the rule indicates that concurrence of the presiding or master calendar judge is not required for disqualification. The 1973 version of this rule (rule 244.5, effective January 1, 1973) provided that the presiding judge shall “require a judge who refuses a cause assigned to him for trial or for hearing, when he is not disqualified, to state his reasons in writing unless the presiding judge or the master calendar judge has concurred in such reasons.” The former rule makes no other reference to disqualification. The successor to rule 244.5 was rule 206, which is the predecessor to rule 6.608. Rule 206, which became effective on January 1, 1985, stated: “Each judge shall (1) hear all assigned matters unless disqualified; (2) state in writing the reasons for refusing to hear a cause assigned for trial for which the judge is not disqualified, unless the presiding judge or the master calendar judge has concurred in the reasons.”

The current rule—rule 6.608—was adopted effective January 1, 2001. Nothing in the history of the current rule indicates why the two subsections from former rule 206 were combined into one subsection. However, the report to the Judicial Council proposing the language of rule 6.608 recommended that the provisions of rule 206 be incorporated into proposed rule 6.608 “with minor alterations.” This language suggests that the new rule was not intended to change the meaning of rule 206. Thus, it is apparent from a review of the former rules that the phrase addressing concurrence by the presiding or master calendar judge was intended to apply only to the situation in which a judge is not disqualified but nevertheless refuses to hear the assigned matter.

This interpretation is supported by the fact that the statutory scheme governing disqualification does not authorize a presiding judge to review a judge’s disqualification decision. Code of Civil Procedure section 170.3(a)(1) merely states that “[w]henever a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge of the court of his or her recusal and shall not further participate in the proceeding” Section 170.3(a)(1) does not condition a judge’s disqualification on concurrence of the presiding judge or master calendar judge.

There is some concern that this interpretation might deprive a presiding judge of the authority to manage a situation in which another judge in the court repeatedly and unjustifiably disqualifies himself or herself, thereby affecting the effective operation of the court. However, rule 6.608 was not intended to address that situation. A presiding judge does have a remedy under rule 6.603(c)(4), which provides that a presiding judge shall notify the Commission on Judicial Performance when a judge has substantially failed to perform judicial duties, including “persistent refusal to carry out assignments as assigned by the presiding judge”

Based on the history of the rule and a review of the law concerning this issue, judges who determine they are disqualified are not required to seek or obtain the concurrence of the presiding or master calendar judge before they are recused. However, judges who are not disqualified but nevertheless refuse to hear an assigned matter must state in writing the reasons for the refusal, and the presiding judge or master calendar judge must concur. The proposed amendment would clarify this meaning of the rule.

Alternative Actions Considered

The rule could be left unchanged, though the language of the rule has created confusion about its meaning.

Comments From Interested Parties

There were six responses to the invitation to comment. Four commentators supported the proposed amendment without comment, and two commentators agreed with the proposed amendment if the language is modified. One of those commentators suggested that “supervising judge” be added to the list of those who can concur with a judge’s reason for not hearing a matter. The proposed language of the rule has been changed to include supervising judges in that list.

The final commentator expressed concern that the rule as amended would permit a judge to refuse to hear a matter in which the judge is not disqualified, which would conflict with Code of Civil Procedure section 170. Section 170 states: “A judge has a duty to decide any proceeding in which he or she is not disqualified.” This commentator would require judges who recuse themselves to state in writing the reasons for any recusal.

There may be reasons other than disqualification that a judge cannot hear a matter. For example, a judge may be unavailable because of a planned vacation or medical condition. In those situations, the judge would have to state in writing why he or she cannot hear the matter. In addition, the proposed amendment would merely clarify the circumstances under which a judge must state reasons in writing; it does not create new situations in which a judge can refuse to hear a case that did

not already exist under the rule. As to the suggestion that judges be required to state in writing why they are recusing themselves, the statutory provisions governing disqualification in Code of Civil Procedure section 170 et seq. do not contemplate approval by a presiding or supervising judge. As noted above, Code of Civil Procedure section 170.3(a)(1) states that when a judge decides he or she is disqualified, the judge must notify the presiding judge.

Implementation Requirements and Costs

The recommended amendment will result in no costs.

Attachments

Rule 6.608 of the California Rules of Court would be amended effective January 1, 2006, to read:

1 **Rule 6.608. Duties of All Judges**

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3 Each judge ~~shall~~ must:

- 4
5 (1) Hear all assigned matters unless: (a) he or she is disqualified; or (b) he
6 or she has stated in writing the reasons for refusing to hear a cause
7 assigned for trial; and the presiding judge, supervising judge, or
8 master calendar judge has concurred;
9
10 (2) Immediately notify the master calendar judge or the presiding judge
11 upon the completion or continuation of a trial or any other matter
12 assigned for hearing;
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14 (3) Request approval of the presiding judge for any intended absence of
15 one-half day or more, within a reasonable time before the intended
16 absence;
17
18 (4) Follow the court's personnel plan in dealing with employees; and
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20 (5) Follow directives of the presiding judge in matters of court
21 management and administration, as authorized by the rules of court
22 and the local rules and internal policies of the court.

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| 1. | Mr. Mike Belote California Advocates, Inc. Sacramento | A | Y | No specific comment. | No response required. |
| 2. | Ms. Mary Carnahan Criminal Division Program Manager Superior Court of California, County of Solano Fairfield | A | N | No specific comment. | No response required. |
| 3. | Superior Court of California, County of Los Angeles Los Angeles | AM | Y | <p>The current rule 6.608(1) requires a judge to hear all assigned matters unless he or she is disqualified or has stated in writing the reasons for refusing to hear a cause assigned for trial, and the presiding judge or master calendar judge has concurred.</p> <p>The amendment would clarify the provision to make it clear that a judge must state the reasons for refusing to hear a cause assigned for trial and obtain the concurrence of the presiding judge or master calendar judge only when the refusal to hear the case is based upon a reason other than disqualification.</p> <p>Requiring the concurrence of the presiding judge or the master calendar judge in a recusal conflicts with the personal ethical duty of a judge to disqualify himself or herself in any proceeding in which</p> | <p>There may be reasons other than disqualification that a judge cannot hear a matter. For example, a judge may be unavailable because of a planned vacation or medical condition. In those situations, the judge would have to state in writing why he or she cannot hear the matter. In addition, the proposed amendment would merely clarify the circumstances under which a judge must state reasons in writing; it does not create situations in which a judge can refuse to hear a case that did not already exist under the rule. As to the suggestion that judges be required to state in writing why they are</p> |

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| | | | <p>disqualification is required by law. See Code of Judicial Ethics, Canon 3E(1). That duty is personal, and cannot be conditioned upon the concurrence of another. Accordingly, amendment of the existing rule is required.</p> <p>However, to the extent the current rule or the proposed rule would permit a judge to refuse to hear a matter in which the judge is not disqualified, whether with or without the concurrence of the presiding or master calendar judge, appears to be in direct conflict with Code of Civil Procedure section 170, which provides: “A judge has a duty to decide any proceeding in which he or she is not disqualified.” As stated by the court in <i>United Farm Workers of America v. Superior Court</i> (1985) 170 Cal.App.3d 97, 103: “Section 170, which introduces the disqualification statutes... expresses the proposition ... that ‘[a] judge has a duty to decide any proceeding in which he or she is not disqualified.’ The legislative history shows this section was prompted by statements suggesting that certain judges did not believe they had such a duty. (See <i>Olson v. Cory</i> (1980) 27 Cal.3d 532, 576–578....) Thus, the section serves to remind judges of their duty to hear cases which are controversial and might subject them to</p> | <p>recusing themselves, the statutory provisions governing disqualification in Code of Civil Procedure section 170 et seq. do not contemplate approval by a presiding or supervising judge. Code of Civil Procedure section 170.3(a)(1) states that when a judge decides he or she is disqualified, the judge must notify the presiding judge. There is no other statutory requirement.</p> |
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| | | | | <p>public disapproval as well as to protect them from public criticism by a clear statement of their responsibility.”</p> <p>Accordingly, to the extent that the existing or proposed new rule would permit a judge to refuse to hear a matter in which the judge is not disqualified, it would be invalid as in conflict with statute. See Government Code section 68070, which provides in pertinent part: “Every court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council.”</p> <p>However, a requirement that a judge who recuses himself or herself from presiding at a trial state the reasons therefore in writing is warranted and appropriate to ensure that the court has done so only for a permissible reason of disqualification.</p> <p>Accordingly, I suggest the rule be amended to read: “A judge shall: (1) Hear all assigned matters unless he or she is disqualified; and shall state in writing the reasons for any recusal.”</p> | |
| 4. | Mr. Stephen V. Love Executive Officer | A | N | No specific comment. | No response required. |

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| | Superior Court of California, County of San Diego San Diego | | | | |
| 5. | Hon. John R. Smiley Presiding Judge Superior Court of California, County of Ventura Ventura | AM | N | Add “the presiding judge, master calendar judge, or supervising judge has concurred.” | Agreed. The proposed amendment to rule 6.608 has been modified to add the term “supervising judge” to the list of those who can concur. |
| 6. | Mr. Dean Zipser President Orange County Bar Association Irvine | A | Y | No specific comment. | No response required. |