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**Disqualification and  
Disclosure Checklist**

## Examining Issues of Disqualification and Disclosure

Appendix F of Rothman, *California Judicial Conduct Handbook*, 3d ed.

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### **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?

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### **STEP 2 - DISQUALIFICATION DECISION MAKING PROCESS.**

*ALL* grounds for disqualification are set out in CCP § 170.1 (plus the definitions in CCP § 170.5). Unless a judge is disqualified under these sections the judge *must* hear the matter as required by CCP § 170.

#### **LOOK AT THE *SPECIFIC* DISQUALIFICATION GROUNDS IN CCP § 170.1(a)(1) to (5), and (8)**

Look at “the things that came to mind” in STEP 1 and decide if there is any specific ground requiring disqualification by reviewing CCP § 170.1(a)(1) through (5).

#### **LOOK AT THE *GENERAL* DISQUALIFICATION GROUNDS - CCP § 170.1(a)(6)**

Apply the tests set forth in CCP § 170.1(a)(6) to “the things that came to mind” in STEP 1. Is there some general ground that requires disqualification?

Be sure to note that CCP § 170.2 contains a list of specific circumstances which are not grounds for disqualification, such as member of a racial, ethnic, religious, sexual or similar group, having expressed views in any capacity on legal or factual issues in the matter, or activities as a lawyer or public official regarding drafting laws.

#### **MAKE THE DISQUALIFICATION DECISION.**

After review of the specific and general grounds under CCP § 170.1 as 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.

#### **DECIDE:**

(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 CCP § 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 DISCLOSURE is required.

**If you *ARE* disqualified -**

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

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### **STEP 3 - WHEN IS A WAIVER OF DISQUALIFICATION ALLOWED?**

All statutory grounds for disqualification in CCP § 170.1 may be waived **EXCEPT** the following. These three grounds for disqualification set out in CCP § 170.3(b)(2) **MAY NOT BE WAIVED**:

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

**If disqualification *MAY NOT* BE WAIVED per CCP § 170.3(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** even if counsel and 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.**

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**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 parties of the basis for disqualification; ask whether they wish to waive the disqualification. CCP § 170.3(b)(1).

DO NOT seek to induce a waiver or try to find out which lawyers favored or opposed the waiver. CCP § 170.3(b)(3).

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.**

Do not try to discover which lawyers or parties favored or opposed a waiver. CCP § 170.3(b)(3).

Go to **STEP 6** on MAKING THE RECUSAL.

**IF THE PARTIES WISH TO EXECUTE A WAIVER:**

If the parties wish to waive disqualification follow CCP § 170.3(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** on MAKING THE RECUSAL.

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

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**STEP 5 - DISCLOSURE DECISION MAKING PROCESS - CANON 3E(2)**

**Even if you are not disqualified (see STEP 2 decision) you must decide whether or not you should make a disclosure.** Canon 3E(2) requires disclosure on the record of “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.”

**Purposes of this provision:** To assure the reality and appearance of the integrity and impartiality of the courts; to allow the judge to hear from the parties if there are issues that the

disclosure raises which the judge might want to consider; to provide information that could form a basis for seeking recusal.

**What should the judge focus on in making a decision as to what to disclose?** The information to be disclosed should be “**relevant to the question of disqualification**” where the judge has already decided that there is “no actual basis for disqualification.” The word “disqualification” used in canon 3E(2) refers to the rules set out for disqualification in CCP § 170.1. The word “relevant” as used here must refer to the definition in Evidence Code § 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 CCP § 170.1(a)(1) through (6) and the definitions set out in § 170.5, and examine closely § 170.1(a)(6).

**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, CCP § 170 requires a judge to hear all matters unless disqualified.

**Hear from parties.**

**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 author, believe it is a good practice to at least hear what they 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.

**Consider new information provided by the parties and decide whether to revisit disqualification or hear the matter.**

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.

**If there is something that leads you to revisit the issue of disqualification,** go back to STEP 2. You should only disqualify yourself if you are IN FACT DISQUALIFIED as that is defined by CCP § 170.1.

**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 CCP § 170.3(c) is timely after the disclosure and must be handled by the judge in strict compliance with this statute.

**ONLY A TIMELY peremptory challenge for cause may be filed after disclosure.** A party may file a timely affidavit of prejudice under CCP § 170.6 following disclosure, and the judge must honor it. If the challenge is untimely, the making of the disclosure DOES NOT allow the judge to reopen the timeliness requirements. *Briggs v. Superior Court* (2001) 87 Cal.App.4th 312. Judges are required to hear all matters in which they are not disqualified. See CCP § 170.

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**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 CCP § 170.4 (see below).

**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 CCP § 170.4(a), see below.
- Assign the case to another judge without the agreement of the parties or the direction of the master calendar 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.
- Communicate about the matter in any way whatsoever with the judge to whom the case is assigned after your 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.

**What a judge MAY DO after disqualification:**

Once disqualified, a judge may, but is not required to, engage in certain very limited activities in regard to the matter in which he/she was disqualified per CCP § 170.4(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. Purely default matters are not noticed proceedings where parties do not appear, for example: law and motion or probate matters.
- Issue an order for possession prior to judgment in eminent domain.
- Set proceedings for trial or hearing.
- Conduct settlement conferences.

**Rules on giving reasons for disqualification:**

- If a waiver of disqualification is involved, the reason must be stated in writing. 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**, the judge must state reasons for not hearing the matter in writing to the master calendar judge. CRC Rule 10.910.