

**OPINION 51**

(Issued: September 2001)

**DISQUALIFICATION AND DISCLOSURE REQUIREMENTS  
RELATED TO POSITIONS IN THE LEGAL COMMUNITY HELD  
BY FAMILY MEMBERS OF JUDGES**

**I. Introduction**

In 1997, the Ethics Committee issued Formal Ethics Opinion No. 45. The opinion entitled “Disclosure Requirements Imposed by Canon 3E Pertaining to Judicial Disqualification” addressed 1996 modifications to Canon 3E. More specifically, the opinion provided detailed guidance on matters of disqualification, disclosure, and waiver of disqualification. Since issuing the opinion, the Ethics Committee has been asked to consider the narrower topic of disqualification and disclosure requirements related to positions in the legal community held by family members. This opinion reviews the applicable authority and applies it to specific fact patterns relating to a judge’s family members. The opinion should be read in conjunction with Opinion 45.

The focus of this opinion is the disqualification and disclosure requirements pertaining to the trial courts’ judicial officers. However, the analysis may also be applicable to appellate justices under Canon 3E to the extent the ethical principles embodied in the canon parallel those applicable to trial court judicial officers.

**II. Applicable Authority**

California Code of Civil Procedure section 170 provides that “[a] judge has a duty to decide any proceeding in which he or she is not disqualified.” Similarly, Canon 3B(1) of the Code of Judicial Ethics requires a judge to “hear and decide all matters assigned to the judge except those in which he or she is disqualified.” Further, Canon 2 requires judges to always act in ways that promote public confidence in the integrity and impartiality of the judiciary and to avoid not only impropriety, but also its appearance.

Code of Civil Procedure section 170.1 sets forth the grounds for disqualification. More specifically, the following provisions potentially apply when family members of judges hold positions in the legal community:

- (a) A judge shall be disqualified if any one or more of the following is true:
- (5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or of the judge’s spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.
- (6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. ...

For purposes of section 170.1(a)(5), section 170.5(e) and (f) set forth the following definitions:

- (e) “Private practice of law” includes a fee for service, retainer, or salaried representative of private clients or public agencies, but excludes lawyers as full time employees of public agencies or lawyers working exclusively for legal aid offices, public defender

offices, or similar nonprofit entities whose clientele is by law restricted to the indigent.

- (f) “Proceeding” means the action, case, cause, motion, or special proceeding to be tried or heard by the judge.

Consistent with the statutory scheme, Canon 3E requires that:

A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law. In all trial court proceedings, 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 basis for disqualification.

Finally, it should be noted that the published Terminology for the Code of Judicial Ethics defines a “member of the judge’s family” as “a spouse, child, grandparent, or other relative or person with whom the judge maintains a close familial relationship.” The terms “member” or “family member” in this opinion are synonymous with “member of the judge’s family” as defined by the Canons.

As an additional resource, the *California Judicial Handbook*, Second Edition by David M. Rothman discusses disclosure, disqualification and activities or involvement in proceedings of those with whom the judge has a relationship at sections 7.00, 7.20, 7.21, 7.23, 7.45, and 7.46.

### III. Examples

**A. Facts:** Judge is assigned to family law department and hears dependency matters as part of that assignment. In this county, the district attorney’s office handles dependency matters. Judge’s family member is a deputy district attorney who does no dependency work but who is in a general felony trial division. The family member does not “appear” before the judge.

**Analysis:** Since the district attorney’s office is not a private law practice and the family member does not appear before the judge, disqualification is not required by section 170.1(a)(5). However, disclosure on the record is appropriate under Canon 3E because the parties or lawyers might consider the family relationship relevant to the question of disqualification.

**B. Facts:** Same set of facts presented in example A, except that the family member is the Chief Deputy of the office and his or her name appears on all the pleadings filed by the office. The family member does not “appear” before the judge.

**Analysis:** Although section 170.1(a)(5) does not require disqualification, section 170.1(a)(6)(C) and Canon 3E do require disqualification. The Chief Deputy directly or indirectly supervises the attorneys that appear before the judge. A person aware of these facts might reasonably entertain a doubt that the judge would be able to be impartial. The parties and their attorneys may waive the disqualification. Formal Ethics Opinion No. 45 includes a discussion relating to waiver.

**C. Facts:** Judge’s family member serves as a deputy district attorney. The attorney appears frequently in the criminal courts handling such matters as filings, preliminary hearings and trials. Must the other judges in the county recuse or disclose? Does it matter that the county is small and that everyone knows about the relationship between the judge and the attorney?

**Analysis:** The mere fact that a judge’s family member is appearing before another judge does not create a reasonable doubt that the judge can be fair and impartial. However, if the nature of the

relationship goes beyond professional contacts and “a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial,” recusal would be required.

Still further, Canon 3E does not require the disclosure of the “mere” fact that a judge’s family member is appearing before another judge. However, Canon 3E generally requires disclosure on the record of information relating to contacts with the judge and judge’s family member that go beyond professional contacts, because the parties or their lawyers might consider this information relevant to the question of disqualification.

Finally, the size of the county may, but does not necessarily, affect disqualification and disclosure requirements.

**D. Facts:** Judge sits in a civil trial department. Judge’s family member works for a large private law firm. The private law firm appears on cases regularly in the judge’s department; however, the judge’s family member does not make appearances before the judge. What should the judge do in the following situations:

- 1) Family member is an attorney in the law firm; another member of the law firm appears before the judge.

**Analysis:** If the family member is a spouse, former spouse, sibling, child, or parent or a spouse of any of those persons, section 170.1(a)(5) requires disqualification. The parties and their attorney may waive the disqualification. Again, Formal Ethics Opinion 45 includes a discussion relating to waiver.

If the family member is a “grandparent or other relative or person with whom the judge maintains a close familial relationship,” section 170.5(a)(5) does not specifically require recusal. However, under section 170.1(a)(6), disqualification may be appropriate.

If the family member is an equity partner, the argument for disqualification is even stronger due to the financial considerations. If disqualification is required, the parties and their attorneys may waive the disqualification. In the event that the judge concludes that disqualification is not necessary, Canon 3E requires disclosure of the close familial relationship on the record.

- 2) Family member is a paralegal or support staff person; a member of the firm appears before the judge.

Since section 170.1(a)(5) applies only to lawyers and a spouse of a lawyer, disqualification is not mandated if the family member paralegal or support staff employee is a spouse, former spouse, sibling, child, or parent or a spouse of any of those persons. Again, the judge should review the requirements of section 170.1(a)(6) to determine whether the pending matter and the family member’s employment present facts which would lead a person to reasonably entertain a doubt that the judge would be able to be impartial in the matter. Factors to be considered include, but are not limited to, the extent of the family member’s involvement in the subject matter of the proceeding, the relationship, if any, between the family member and the attorney appearing before the judge, and whether the family member’s continued employment would be in any way related to the outcome of the case. If the family member is a spouse or a child still living in the judge’s household, especially careful scrutiny should be applied. If disqualification is necessary, the disqualification may be waived; if disqualification is not required, disclosure is required.

- 3) The family member is a paralegal or support staff person performing legal work for the client/party in other matters not pending before the judge?

As to section 170.1(a)(5), the analysis is unchanged. With regard to section 170.1(a)(6), the argument in favor of disqualification is stronger. In analyzing disqualification under this alternative section, the judge should consider, among other factors, the nature and extent of the work performed by the family member for the client/party in other matters (to the extent ascertainable), the relationship between the family member and the client/party, and the case's relationship to the family member's continued employment in the firm.

**E. Facts:** Family member works as an attorney for a public agency; other attorneys in the agency appear before the judge.

Since section 170.1(a)(5) only applies to the "private practice of law," a judge is not necessarily disqualified if the judge's family member is a lawyer for a public agency because the language of the statute refers specifically to private practice.

However, the analysis under section 170.1(a)(6) is not changed.

**F. Facts:** Judge is assigned to a criminal trial calendar. Judge's family member is not a lawyer but is employed by the district attorney or public defender's office in a management position.

**Analysis:** Under sections 170.1(a)(5) or (6), disqualification is not necessary. However, Canon 3E requires disclosure to all parties on the record in criminal proceedings.

**G. Facts:** Judge sits in a criminal trial department. Judge's family member is a police officer.

**Analysis:** Section 170.1 does not require disqualification. However, pursuant to section 170.3(b)(2), disqualification would be required if the family member is actually involved in the proceedings or likely to be a material witness. Under certain circumstances, disclosure may be appropriate.

**H. Facts:** A judge's family member appears before a commissioner or referee, who is supervised by the judge.

**Analysis:** Code of Civil Procedure section 170.5 provides that for purposes of sections 170 to 170.5, inclusive, "Judge" means judges of the superior courts, and court commissioners and referees.

While section 170.1(a)(5) does not specifically require disqualification, section 170.1(a)(6) and Canon 3E may require recusal. The commissioner should disclose on the record the professional relationship as well as any information relating to contacts with the judge and judge's family member that go beyond professional contacts, if the commissioner believes the parties or their lawyers might consider this information relevant to the question of disqualification.

#### **IV. Conclusion**

Undoubtedly, there are numerous additional fact patterns that could have been addressed in this opinion. The hypotheticals were selected to provide a basic framework to analyze disqualification and disclosure requirements related to positions in the legal community held by family members of judges.

In summary, the judge should consider two things. First, does Code of Civil Procedure section 170.1(a)(5) or (6) require disqualification. Second, if the judge is satisfied that the family member's position does not require disqualification, does Canon 3E require a disclosure on the record to all parties.