



California Supreme Court Committee on Judicial Ethics Opinions

350 McAllister Street, San Francisco, California 94102

www.JudicialEthicsOpinions.ca.gov

INVITATION TO COMMENT

[CJEO Draft Formal Opinion 2022-021]

Title

CJEO Draft Formal Opinion 2022-021,
*Disqualification Obligations of a Trial Judge
Based on Prior Judicial Involvement in
Criminal Trial Court Proceedings*

Action Requested

Review and submit comments by
December 22, 2022

Proposed Date of Adoption or Other Action

To be determined

Prepared by

The California Supreme Court
Committee on Judicial Ethics Opinions

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For information about the committee and its
members, visit the [CJEO website](#)

CJEO Invites Public Comment

The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) has adopted a draft formal opinion and approved it for posting and public comment pursuant to California Rules of Court, rule 9.80(j), and CJEO Internal Operating Rules and Procedures, rule 7(d). ([Rule 9.80](#); [CJEO Rules](#).) The public is invited to comment on the draft opinion before the committee considers adoption of an opinion in final form, or other action.

This CJEO Draft Formal Opinion has not been adopted by the committee in final form and is circulated for comment purposes only.

CJEO Draft Formal Opinion 2022-021 concludes that, for distinct statutory and policy reasons that are supported by the Code of Judicial Ethics, a trial judge who authorizes the issuance of a bench warrant for a failure to appear or who presides over a change of plea hearing is not disqualified from a subsequent proceeding in which a defendant is charged with a failure to appear violation or challenges whether a felony conviction arising from the change of plea hearing qualifies as a prior strike.

After receiving and reviewing comments, the committee will decide whether the draft opinion should be published in its original form, modified, or formally withdrawn. (Rule 9.80(j)(2); CJEO rule 7(d)). Comments are due by **December 22, 2022** and may be submitted as described below.

How to Submit Comments

Comments may be submitted: (1) [online](#); (2) by email to Judicial.Ethics@jud.ca.gov; or (3) by regular mail to:

The California Supreme Court Committee on Judicial Ethics Opinions
350 McAllister Street
San Francisco, California 94102

Comments Due by December 22, 2022.

At the close of the comment period, or after **December 22, 2022**, the committee will post on its [website](#) all comments that are not clearly identified as confidential.

Attachment: CJEO Draft Formal Opinion 2022-021

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CJEO Draft Formal Opinion 2022-021

**DISQUALIFICATION OBLIGATIONS OF A TRIAL JUDGE BASED ON
PRIOR JUDICIAL INVOLVEMENT IN CRIMINAL TRIAL COURT
PROCEEDINGS**

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I. Question

The Committee on Judicial Ethics Opinions (CJEO or committee) has been asked the following questions regarding the statutory disqualification obligations of a trial judge¹ in criminal trial court proceedings:

- (1) Is a trial judge who issues a bench warrant based on a failure to appear in a felony matter disqualified from hearing: (a) the underlying felony matter in which the judge issued the warrant; or (b) a separate subsequent matter in the trial court in which the defendant is charged with failure to appear pursuant to California Penal Code section 1320; and
- (2) Is a trial judge who accepts a plea agreement in a criminal matter disqualified from hearing a subsequent case in which the crime that was the subject of the plea agreement is alleged as a prior strike and the defendant intends to challenge whether the underlying crime qualifies as a strike?

II. Summary of Conclusions

Judges are ethically obligated to be neutral decision-makers who must regularly consider whether their adjudicatory actions give rise to a basis for disqualification. For three distinct reasons, a trial judge who authorizes the issuance of a bench warrant for a failure to appear or who presides over a change of plea hearing is not required to disqualify in a subsequent proceeding in which a defendant is charged with a failure to

¹ This advisory opinion relates to the statutory disqualification obligations of a trial judge in trial court proceedings, not of a trial judge in proceedings in the appellate division of the superior court or of an appellate justice. Notably, appellate justices must make individual disqualification decisions pursuant to canons in the Code of Judicial Ethics that apply specifically to them. (Canon 3E(4), (5), (6); *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 935, 938-940 [statutory grounds for trial court disqualification are not applicable to appellate justices].)

appear violation (Penal Code § 1320) or challenges whether a felony conviction arising from the change of plea hearing qualifies as a prior strike (Penal Code § 1025). First, under Code of Civil Procedure, section 170.2, the fact that a judge has expressed a view on a legal or factual issue in a proceeding does not constitute grounds for disqualification unless the judge falls within certain exceptions that are not relevant here. Second, the grounds for disqualification contained in Code of Civil Procedure, section 170.1, would not support a decision to disqualify based solely on the fact that the judge issued a bench warrant or accepted a plea agreement. Third, public policy considerations weigh against disqualification under these facts.²

III. Authorities

A. Applicable Canons

Canon 2A: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”

Canon 3B(5): “A judge shall perform judicial duties without bias or prejudice.”

Canon 3B(8): “A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.”

Canon 3E(3)(a): “A judge is disqualified if the judge, while a judge or candidate for judicial office, made a statement, other than in a court proceeding, judicial decision, or opinion, that a person aware of the facts might reasonably believe commits the judge to reach a particular result or rule in a particular way in a proceeding.”

² The disqualification analysis in this opinion is specific to the questions that the committee was asked to address.

B. Constitutional Provisions, Statutes, and Other Authorities

Code of Civil Procedure section 170.1, subdivisions (a)(1)(A), (B), and (a)(6)(A)

Code of Civil Procedure section 170.2, subdivision (b)

Penal Code section 1025

Penal Code section 1320

Brown v. American Bicycle Group, LLC (2014) 224 Cal.App.4th 665

Eith v. Ketelhut (2018) 31 Cal.App.5th 1

Inquiry Concerning Wasilenko (2005) 49 Cal.4th CJP Supp. 26

Jolie v. Superior Court (2021) 66 Cal.App.5th 1025

Kaufman v. Court of Appeal (1982) 31 Cal.3d 933

Kloepfer v. Commission on Judicial Performance (1989) 49 Cal.3d 826

People v. Pierce (1967) 66 Cal.2d 53, 61

People v. Smith (1975) 53 Cal.App.3d 655

People v. Williams (1997) 16 Cal.4th 635

Ross v. Superior Court (2022) 77 Cal.App.5th 667, 680

Say & Say, Inc. v. Ebershoff (1993) 20 Cal.App.4th 1759

United Farm Workers of America v. Superior Court (1985) 170 Cal.App.3d 97

Valderas v. Superior Court (2021) 72 Cal.App.5th 172

Wechsler v. Superior Court (2014) 224 Cal.App.4th 384

Commission on Judicial Performance, *Decision and Order Imposing Public Admonishment on Judge Robert M. Letteau* (2004)

CJEO Formal Opinion 2022-019 (2022), *Disqualification and Disclosure Obligations When Coaching Youth Sports*, California Supreme Court Committee on Judicial Ethics Opinions

CJEO Formal Opinion 2015-007 (2015), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, California Supreme Court Committee on Judicial Ethics Opinions

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CJEO Expedited Opinion 2022-046, *Disqualification When a Judge's Spouse may be a Material Witness*, California Supreme Court Committee on Judicial Ethics Opinions

CJEO Oral Advice Summary 2016-017 (2016), *Disqualification for Prior Appearance as a Deputy District Attorney in Another Proceeding*, California Supreme Court Committee on Judicial Ethics Opinions

Rothman et al., *California Judicial Conduct Handbook* (4th ed. 2017), sections 1:13, 7:16, 7:43, 7:58, 7:65

IV. Discussion

A. Introduction

There are at least three independent reasons that a trial judge who issues a bench warrant for a failure to appear or approves a plea agreement is not disqualified from subsequent hearings involving those matters. First, absent exceptions not relevant here, the fact that a judge has expressed a view on a legal or factual issue in a proceeding is not grounds for disqualification (Code Civ. Proc. § 170.2(b).)³ Second, section 170.1, subdivision (a) does not require disqualification based on the fact that a judge previously took actions that are related to subsequent matters assigned to the judge for adjudication. Third, policy reasons weigh against disqualification and support the rationale upon which the applicable statutes are based.

Underlying each of these considerations is a trial judge's fundamental role as a neutral decision-maker and not as an advocate.⁴ The Code of Judicial Ethics requires

³ Further undesignated references are to this code.

⁴ The committee has examined the disqualification obligations of a judge who previously served as a lawyer in the matter before the judge. (CJEO Formal Opn. 2015-007 (2015), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, Cal. Supreme Ct. Com. Jud. Ethics Opns.; CJEO Oral Advice Summary 2016-017 (2016), *Disqualification for Prior Appearance as a Deputy District Attorney in Another Proceeding*, Cal. Supreme Ct. Com. Jud. Ethics Opns.). These

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judges to impartially resolve all matters that come before the court. Canons 1 and 2 require judges to uphold the integrity and independence of an impartial judiciary, canon 3B(5) imposes a duty on judges to perform judicial duties without bias or prejudice, and canon 3B(8) obligates judges to promptly and fairly dispose of all judicial matters and to manage the courtroom so that all litigants have the opportunity to have their matters heard in accordance with the law.

1. No grounds for disqualification under section 170.2

Section 170.2 defines specific circumstances that do not constitute grounds for disqualification. As relevant here, the fact that a judge “has in any capacity expressed a view on the legal or factual issue presented in the proceeding” is not a basis for disqualification unless the judge served as a lawyer in the prior proceeding or the judge has been assigned to serve in an appellate capacity considering the validity of the underlying proceeding. (§ 170.2, subd. (b).) The fundamental duty to impartially decide every case requires a judge to issue orders that necessarily express views on legal or factual issues presented in various proceedings. Unless a statutory exception applies, the issuance of orders, including in connection with a bench warrant or a plea agreement, does not constitute grounds for disqualification even if an order was erroneous.⁵ (Rothman, et al., Cal. Judicial Conduct Handbook (4th ed. 2017), § 7:16, pp. 410-411; § 7:58 at pp. 479-480 (Rothman) [a judge’s expression of an opinion on a matter before the court does not raise disqualification issues under section 170.2 even if the judge’s

opinions rest on the advocational function of a prosecutor and, ultimately, on whether a person aware of the facts would reasonably doubt the judge’s ability to remain impartial. (Code Civ. Proc. § 170.1, subd. (a)(6)(A)(iii).)

⁵ If, however, a trial judge made extrajudicial statements that would cause a person aware of the facts to reasonably believe that the judge was committed to reaching a particular result or ruling in a particular way in a proceeding, disqualification would be required. (Canon 3E(3)(a).)

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opinion was erroneous]; *Say & Say, Inc. v. Ebershoff* (1993) 20 Cal.App.4th 1759, 1764, fn. 8 [merely making rulings on the legal and factual issues is not a basis for disqualification].) Thus, a trial judge who issues a bench warrant based on a failure to appear or approves a plea agreement within the parameters of section 170.2, subdivision (b) is not disqualified.

2. *Statutory disqualification*

California law provides mandatory and discretionary grounds for disqualification and trial judges must make a disqualification decision in each matter before them.⁶ (CJEO Formal Opn. 2022-019 (2022), *Disqualification and Disclosure Obligations When Coaching Youth Sports*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 6-7.) If a judge determines that a basis for disqualification has been met, the judge must disqualify. (§ 170.1 [trial court disqualification is required if any specified grounds are met].)

Section 170.1(a) identifies eight mandatory grounds for disqualification⁷ and one ground requiring the exercise of discretion (§ 170.1(a)(6)(A)(i-iii)). As relevant here,

⁶ The terms *mandatory* and *discretionary* disqualification are used to distinguish between (a) grounds that require disqualification when a judicial officer identifies mandatory criteria set by the statute or code that has been met in any proceeding (*mandatory grounds*), and (b) grounds that require disqualification when a judicial officer exercises discretion after evaluating whether objective or subjective disqualifying circumstances have been met in any proceeding (*discretionary grounds*). (CJEO Expedited Opn. 2022-046 (2022), *Disqualification When a Judge’s Spouse May be a Material Witness*, Cal. Supreme Ct. Com. Jud. Ethics Opns., p. 3, fn. 3; *Eith v. Ketelhut* (2018) 31 Cal.App.5th 1, 13-14 [citing CJEO Formal Opn. 2013-003 (2013), *Disqualification Based on Judicial Campaign Contributions from a Lawyer in the Proceeding*, Cal. Supreme Ct. Com. Jud. Ethics Opns. regarding disqualification and adopting the terms “mandatory disqualification” and “discretionary disqualification”].).

⁷ The specific grounds for mandatory disqualification of a trial judge are contained in the Code of Civil Procedure. (§ 170.1, subd. (a)(1) [judicial officer has personal knowledge of disputed facts in the case]; *id.* at subd. (a)(2) [judicial officer previously served as a lawyer, or, in certain situations, was affiliated with lawyers in the case]; *id.* at subd. (a)(3) [judicial officer has a financial interest in the outcome of the case]; *id.* at

subdivision (a)(1)(A) mandates disqualification where the “the judge has personal knowledge of disputed evidentiary facts concerning the proceeding” and is “likely to be a material witness in the proceeding” (§ 170.1(a)(1)(B)).

a. Issuance of a bench warrant

When authorizing the issuance of a bench warrant based on a failure to appear, the judge—acting in an official capacity—determines whether probable cause exists to justify the issuance of the warrant. (*Valderas v. Superior Court* (2021) 72 Cal. App.5th 172, 182 [issuing a bench warrant for failure to appear is not a decision on the merits and does not require a judge to receive evidence to satisfy all elements of willful failure to appear]). Typically, that determination occurs in two scenarios: (1) decisions based on sworn declarations; and (2) decisions based on conduct that the judge and others observed at a hearing. Where the facts underlying the judge’s legal conclusion that probable cause exists are presented in sworn declarations stating facts known to others, but not the judge, section 170.1(a)(1)(A) is not implicated. However, if facts unfold at a hearing over which the judge is presiding, and thus within the judge’s personal knowledge, disqualification is not required unless the judge is a “material witness” in a subsequent proceeding relating to the failure to appear. (§ 170.2(a)(1)(B)).

Our Supreme Court previously defined “material witness” in *People v Williams* (1997) 16 Cal.4th 635, 653 as one “who can give testimony . . . no one else, or at least very few, can give” (quoting Black’s Law Dict. (6th ed. 1990) p. 977 col. 2) or if the testimony “has some likelihood of affecting the outcome of the case” (*People v. Pierce* (1967) 66 Cal.2d 53, 61). Similarly, in analogous circumstances arising from efforts to

subd. (a)(4) & (5) [judicial officer is closely related to a party or lawyer in the case]; *id.* at subd. (a)(7) [judge is unable to perceive evidence or conduct a proceeding based on a physical impairment]; *id.* at subd. (a)(8) [judge has prospective employment in private dispute resolution]; *id.* at subd. (a)(9) [judge received campaign contribution in excess of \$1,500 from a party or lawyer in the proceedings within certain time limits].)

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compel the deposition of a top governmental executive or constitutional officer, the party requesting the deposition must show “the information to be gained from the deposition is not available through any other source.” (*Ross v. Superior Court* (2022) 77 Cal.App.5th 667, 680 [the plaintiff could depose the district attorney on the narrow issue for which he had personal factual information pertaining to a material issue that could not be obtained from another source]). Because other individuals, such as attorneys or court staff who were present at the hearing, can provide the same testimony as the judge, mandatory disqualification is not required.

However, even if mandatory disqualification is not required, the judge must determine whether disqualification is required for any of the following reasons: (i) the judge believes that disqualification is required in the interests of justice; (ii) the judge substantially doubts his or her capacity to be impartial; or (iii) a person aware of the facts would reasonably doubt the judge’s ability to be impartial. (§ 170.1, subd. (a)(6)(A).) The first two grounds require a trial judge to make subjective determinations, but the final ground is an objective standard that requires an analysis of whether “a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial.” (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391; accord, *Jolie v. Superior Court* (2021) 66 Cal.App.5th 1025, 1040-1041; *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104 [under the objective standard, a judge should consider how participation in each case would appear to the “average person on the street”].)

In the committee’s view, absent a showing the trial judge engaged in conduct relating to the issuance of a bench warrant that would lead a person aware of the facts to reasonably doubt the judge’s impartiality, discretionary disqualification would not be required in a subsequent hearing involving the warrant. (§ 170.1, subd. (a)(6)(A)(iii); Com. on Jud. Performance, *Decision and Order Imposing Public Admonishment on Judge Robert M. Letteau* (2004) pp. 6-7 [a trial judge made numerous statements

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displaying hostility against an attorney based at least in part on the attorney's statements in a fee request that were critical of the court]; *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 858-861 [a trial judge failed to remain objective, engaged in improper personal involvement, and displayed a distaste for a party that overrode judge's objectivity].) Further, the issuance of a bench warrant would not, by itself, constitute bias or the appearance of bias that would require discretionary disqualification. (*Brown v. American Bicycle Group, LLC* (2014) 224 Cal.App.4th 665, 674 (*Brown*) [the issuance of an adverse ruling does not indicate an appearance of bias, or demonstrate actual bias, against a party].)

b. Acceptance of a plea agreement

At a change of plea hearing, a judge is responsible for ensuring that procedural safeguards are satisfied, informing the defendant of constitutional rights, determining whether the defendant's plea is voluntary and deciding whether the conduct to which the defendant admits satisfies the elements of the crimes and enhancements at issue. In this capacity, the judge makes factual and legal findings and acts as a neutral, independent decision-maker, not as an advocate. (*People v. Smith* (1975) 53 Cal.App.3d 655, 658 [a trial judge's participation in a plea agreement is limited to approving the agreement after evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant].) Thus, like the issuance of a bench warrant for failure to appear, acceptance of a plea agreement by itself would not satisfy any basis for mandatory disqualification in a subsequent matter to determine whether the crime legally qualifies as a strike. Because a judge's duties in connection with a plea agreement are anchored in making factual findings that satisfy legal standards, discretionary disqualification in a subsequent case involving the plea agreement would not be required unless other circumstances exist that would cause a person aware of the facts to reasonably doubt the judge's impartiality in a later case or unless the plea agreement proceedings unfolded in a

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manner that would cause the judge to doubt his or her own impartiality.
(§ 170.1(a)(6)(A)(ii), (iii); *Brown, supra*, 224 Cal.App.4th at 674.)

3. *Policy Considerations*

Practical factors also support the conclusion that a trial judge who issues a bench warrant or accepts a plea agreement is not required to disqualify in future proceedings. For example, some courts may have a practice of assigning a case involving an earlier matter to the trial judge who handled that matter. This approach fosters efficiency and consistency, and should not, in the absence of other disqualifying circumstances, require disqualification. Indeed, a judge has a fundamental duty to decide each case independently based only on the applicable law and relevant evidence and without bias or prejudice. (Canon 2 [judges are required to uphold the integrity and independence of an impartial judiciary]; Canon 3B(5) [judges must perform judicial duties without bias or prejudice]; Rothman, *supra*, § 7:43, p. 457 [trial judges must maintain “exquisite impartiality” and put aside personal opinions in every case to base decisions only on the evidence and the applicable law].) Moreover, given the number and types of appearances required of all criminal defendants, a requirement that a trial judge disqualify based solely on having issued a bench warrant based on a failure to appear or accepted a plea agreement would lead to an increase in unnecessary disqualifications, which would have a disproportionate effect in smaller counties that have fewer judges.⁸

⁸ The code imposes identical standards throughout the state, and “a judge's ethical duties are the same irrespective of population statistics.” (*Inquiry Concerning Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 46; Rothman, *supra*, § 1:13, p. 12; *id.* at § 7:65, p. 490 [judges in a small community will likely know, and have social and professional relationships with, many local lawyers and citizens, and so must be alert to ensure impartiality when a party that the judge knows appears in court].)

V. Conclusion

For substantive and policy reasons, a trial judge who issued a bench warrant based on a failure to appear or accepted a plea agreement in a criminal trial court is not required to disqualify from subsequent hearings or cases involving those matters based on having taken those judicial actions unless other circumstances justify disqualification.



This opinion is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rule 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rule 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)). The conclusions expressed in this opinion are those of the committee and do not necessarily reflect the views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a).)

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