

RESOLUTION 7-03-2002

DIGEST

Appellate Review of Trial Judge Challenges

Amends Code of Civil Procedure section 170.3 to provide for post-judgment, post-writ appellate review of the denial of a judicial challenge.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Identical to Resolution 02-13-2001, which was disapproved.

Reasons:

This resolution amends Code of Civil Procedure section 170.3 to provide for post-judgment, post-writ appellate review of the denial of a judicial challenge. This resolution should be approved in principle because it would ensure meaningful appellate review when a litigant has been deprived of the right to disqualify a judge perceived to be biased.

Section 170.6 was enacted in order to promote the integrity and fairness of the judiciary and to ensure the business of the courts is conducted in a manner that avoids suspicion of unfairness. (*La Seigneurie U.S. Holdings, Inc. v. Superior Court* (1994) 29 Cal.App.4th 1500, 1505.) “The underlying thrust of . . . section 170.6 [is] to grant to the litigant a single reasonable opportunity to disqualify a known trial judge.” (*Bouchard v. Insona* (1980) 105 Cal.App.3d 768, 772.) Thus, where a disqualification motion is timely filed and in proper form, the trial court is bound to accept it without further inquiry, even if the court suspects the party is abusing its right to utilize the procedure.

Because a court has no discretion to deny a properly brought motion for disqualification, any judgment or orders entered after the wrongful denial of a disqualification motion are void. A party whose section 170.6 motion has been denied should therefore be afforded a meaningful opportunity to have that denial reviewed. If that litigant seeks review by means of a petition for writ of mandate or prohibition, and that petition has been denied without a finding on the merits, review by way of a post-judgment appeal should be available to ensure the litigant has not been subjected to void proceedings. Limiting the party to review only of judicial misconduct which appears on the face of an appellate record is not adequate protection.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 170.3 to read as follows:

- 1 §170.3
- 2 [Subdivisions (a) through (c) remain unchanged.]
- 3 (d) The determination of the question of the disqualification of a judge is not itself an appealable
- 4 order ~~and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10~~
- 5 ~~days of notice to the parties of the decision and only by the parties to the proceeding. Such a determination~~
- 6 may be reviewed by a writ of mandate from the Court of Appeal or appellate division of the superior court,
- 7 whichever is appropriate, only if such petition is sought within 10 days of notice to the parties of the decision.
- 8 Such petition may be sought only by the parties to the proceeding. If a party has timely filed such a petition for
- 9 writ of mandate, and that petition has been denied without the issuance of an order to show cause or alternative
- 10 writ, then the determination of the question of the disqualification of a judge may be raised on appeal from any
- 11 appealable order or judgment

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: Orange County Bar Association, Criminal Law Section

STATEMENT OF REASONS

Existing Law: Under present law, should a judge erroneously fail to honor a challenge, especially a summary challenge under section 170.6, as a practical matter that decision is unreviewable.

This Resolution: Amends Code of Civil Procedure section 170.3 to ensure such decisions are reviewable.

The Problem: Rulings made by a judge following the erroneous failure to honor a peremptory challenge are void. (In re Robert P. (1981) 121 Cal.App.3d 36, 43.)

There are two methods of challenging judges in California. The first is for actual bias or other disqualification, pursuant to Code of Civil Procedure section 170.1. Additionally, every litigant can summarily challenge one judge, without proving bias, pursuant to Code of Civil Procedure section 170.6, sometimes called a peremptory challenge.

Prior to 1985, the courts of California determined that an order concerning the qualifications of a judge was not itself an appealable order, but such an order could be contested by a pretrial petition for extraordinary writ. Additionally, the validity of the order could be reviewed upon appeal from a resulting judgment, and a void order or judgment would be reversed. (See Reichert v. General Insurance Co. (1968) 68 Cal.2d 822, 825, fn. 1; Oak Grove School District v. City Title Insurance Co. (1963) 217 Cal.App.2d 678, 693, fn. 9.)

In 1984, the State Bar sponsored extensive amendments to the procedures for challenging judges. The Legislature enacted those changes as Stats. 1984, chap. 1555, which included the present language of subdivision (d). That language was intended only to guarantee that if a petition for writ was filed, it was filed promptly.

Despite the Legislature's intent, in 1991 the California Supreme Court interpreted section 170.3(d) to mean that a trial court's determination of the qualifications of a judge cannot ever be addressed on appeal, but may be reviewed only in a writ petition. (People v. Hull (1991) 1 Cal.4th 266.) If the writ petition is denied, even summarily, then there is no further review of the qualifications of the judge whatsoever. (Later cases have held that, as a matter of due process, the actual bias of the trial judge may be advanced on appeal in restricted situations, at least if a challenge was filed and peremptory relief was summarily denied.)

Reviewing courts have discretion in writ matters. Since 1991, the vast majority of writ petitions under section 170.3(d) are summarily denied, without any review of the merits of the petition. In other words, there is no substantive review of the trial judge's decision. This is not a problem which is unique to those representing the defense in criminal cases. The lack of substantial review extends to the prosecution as well, and to civil litigants.

If a litigant seeks prompt writ review, that litigant should be entitled to review on the merits, whether in that writ action or, if the petition is summarily denied, in a later appeal. This resolution will give litigants that right.

IMPACT STATEMENT

This proposed resolution does not effect any other law, statute, or rule.

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