

RESOLUTION 7-04-2002

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 170.6 to read as follows:

1 §170.6

2 (1) Any party shall have the right to challenge the designation of a particular No judge, court
3 commissioner, or referee of any superior or municipal court of the State of California to shall try any
4 civil or criminal action or special proceeding of any kind or character or nor hear any matter therein
5 that involves a contested issue of law or fact, ~~where it shall be established as hereinafter provided~~
6 ~~that the judge or court commissioner is prejudiced against any party or attorney or the interest of~~
7 ~~any party or attorney appearing in the action or proceeding.~~ Such challenge shall be peremptory in
8 nature, and may be made either orally or in writing without notice, pursuant to the procedure
9 outlined hereinafter.

10 (2) ~~Any party to or any attorney appearing in any such action or proceeding may establish~~
11 ~~this prejudice by an oral or written motion without notice supported by affidavit or declaration~~
12 ~~under penalty or perjury or an oral statement under oath that the judge, court commissioner, or~~
13 ~~referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced~~
14 ~~against any such party or attorney or the interest of the party or attorney so that the party or~~
15 ~~attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the~~
16 ~~judge, court commissioner, or referee. Where the judge, other than a judge assigned to the case~~
17 ~~for all purposes, court commissioner, or referee assigned to or who is scheduled to try the cause or~~
18 ~~hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be~~
19 ~~made at least five days before that date. If directed to the trial of a cause where there is a master~~
20 ~~calendar, the motion shall be made to the judge supervising the mater calendar not later than the~~
21 ~~time the cause is assigned for trial. If directed to the trial of a cause that has been assigned to a~~
22 ~~judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a~~
23 ~~party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared~~
24 ~~in the action, then within 10 days after the appearance. If the court in which the action is pending is~~
25 ~~authorized to have no more than one judge and the motion claims that the duly elected or appointed~~
26 ~~judge of the court is prejudiced, the motion shall be made before the expiration of 30 days from the~~
27 ~~date of the first appearance in the action of the party who is making the motion or whose attorney is~~
28 ~~making the motion. In no event shall any judge, court commissioner, or referee entertain the motion~~
29 ~~if it be made after the drawing of the name of the first juror, or if there be no jury, after the making~~
30 ~~of an opening statement by counsel for plaintiff, or if there is no such statement, then after swearing~~
31 ~~in the first witness or the giving of any evidence or after trial of the cause has otherwise~~
32 ~~commenced. If the motion is directed to a hearing (other than the trial of a cause), the motion shall~~
33 ~~be made not later than the commencement of the hearing. In the case of trials or hearing not herein~~
34 ~~specifically provided for, the procedure herein specified shall be followed as nearly as may be. The~~
35 ~~fact that a judge, court commissioner, or referee has presided at or acted in connection with a~~
36 ~~pretrial conference or other hearing, proceeding or motion prior to trial and not involving a~~
37 ~~determination of contested fact issues relating to the merits shall not preclude the later making of the~~
38 ~~motion provided for herein at the time and in the manner hereinbefore provided.~~

39 A motion under this paragraph may be made following reversal on appeal of a trial court's
40 decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior
41 proceeding is assigned to conduct a new trial on the matter. ~~Notwithstanding paragraph (3) of this~~

42 ~~section; the~~ The party who filed the appeal that resulted in the reversal of a final judgment of a trial
43 court may make a motion under this section regardless of whether that party or side has previously
44 done so. The motion shall be made within 60 days after the party or the party's attorney has been
45 notified of the assignment.

46 (3) Once ~~If the motion is duly presented and the affidavit or declaration under penalty of~~
47 ~~perjury is~~ duly filed or such oral statement ~~under oath~~ is duly made, thereupon and without any
48 further act or proof, the judge supervising the master calendar, if any, shall assign some other judge,
49 court commissioner, or referee to try the cause or hear the matter. In other cases, the trial or the
50 cause or the hearing of the matter shall be assigned or transferred to another judge, court
51 commissioner, or referee of the court in which the trial or matter is pending or, if there is no other
52 judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chair
53 of the Judicial Council shall assign some other judge, court commissioner, or referee to try the
54 cause or hear the matter as promptly as possible. Except as provided in this section, no party or
55 attorney shall be permitted to make more than one such motion in any one action or special
56 proceeding pursuant to this section; and in actions or special proceedings where there may be more
57 than one plaintiff or similar party or more than one defendant or similar party appearing in the action
58 or special proceeding, only one motion for each side may be made in any one action or special
59 proceeding.

60 (4) Unless required for the convenience of the court or unless good cause is shown, a
61 continuance of the trial or hearing shall not be granted by reason of the making of a motion under
62 this section. If a continuance is granted, the cause or matter shall be continued from day to day or
63 for other limited periods upon the trial or other calendar and shall be reassigned or transferred to
64 trial or hearing as promptly as possible.

65 (5) ~~Any affidavit filed pursuant to this section shall be in substantially the following form:~~
66 ~~[form omitted -- to be deleted]~~

67 (6) ~~Any oral statement under oath or declaration under penalty of perjury made pursuant to~~
68 ~~this section shall include substantially the same contents as the affidavit above.~~

69 (7) Nothing in this section shall affect or limit Section 170 or Title 4 (commencing with
70 Section 392) of Part 2, and this section shall be construed as cumulative thereto.

71 (68) If any provision of this section or the application to any person or circumstance is held
72 invalid, that invalidity shall not affect other provisions or applications of the section that can be given
73 effect without the invalid provision or application and to this end the provisions of this section are
74 declared to be severable.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Provides that parties to a criminal or civil trial, hearing, or other such proceeding may

challenge the assignment of such matter to a particular judge, commissioner or court referee, if the party making the challenges makes either an oral or a written declaration under penalty of perjury stating that the judicial officer is prejudiced against either the party or the attorney such that the party or attorney could not get a fair trial or hearing from the judicial officer. Each party is allowed only one such challenge during the pendency of a matter, and it must be made in advance of the commencement of any such proceeding.

This Resolution: Would change the law to make the challenge peremptory in nature, thus not requiring the party to make declaration under penalty of perjury that the judicial officer is prejudiced against the attorney or her client.

The Problem: One of the more vexing of legal fictions is the challenge to a judicial officer pursuant to Code of Civil Procedure Section 170.6. By requiring the party making the challenge to declare under penalty of perjury that the judicial officer is “prejudiced” against the party or the party’s counsel, the section sets up an awkward situation which does a disservice both to the challenger and the challenged. The imprecision of the standard of “prejudice” flies in the face of the practical reality of litigation, and implies a trait of judicial temperament that is frequently untrue.

As civil and criminal litigators will agree, there are *many* reasons why a party may wish to challenge a judge, with “prejudice” being only one possibility. However, because that is the only standard available, attorneys face a real and ethical dilemma when it is necessary to challenge a judge based on some other no less compelling reason. The reason could be as simple as not wanting to conduct a trial in an inconvenient location, yet the attorney still must declare “prejudice”. Additionally, such declarations often lead to animosity between the bench and bar. We allow peremptory challenges of jurors for similar reasons. There is no reason why a challenge of a bench officer should be treated any differently.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Henry Doering

COUNTERARGUMENT

SACRAMENTO COUNTY BAR ASSOCIATION

This proposal is unconstitutional. The original version of C.C.P. §170.5 allowed true, peremptory disqualification of a judge without any stated reason or cause. The California Supreme Court held that it violated the separation of powers doctrine “unwarranted and unlawful interference with the constitutional

and orderly processes of the courts.” *Austin v. Lambert* (1938) 11 C.2d 73, 79, 77 P.2d 849; see also *Daigh v. Shaffer* (1937) 23 Cal.App.2d 449.

The requirement of an affidavit of prejudice in current §170.6 is not a hollow formality. It is what makes the peremptory disqualification procedure constitutional. *Johnson v. Superior Court* (1958) 50 Cal.2d 693; *Solberg v. Superior Court* (1977) 19 Cal.3d 182.