

## **RESOLUTION 12-05-04**

### **DIGEST**

Peremptory Judicial Challenges: Right Preserved Where Challenge for Cause Asserted  
Amends Code of Civil Procedure section 170.6 to provide that a Code of Civil Procedure section 170.3 challenge, where filed within the time allowed for challenges section 170.6, will, if unsuccessful, be treated as a timely challenge under Code of Civil Procedure section 170.6.

### **RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Code of Civil Procedure section 170.6 to provide that a Code of Civil Procedure section 170.3 challenge, where filed within the time allowed for challenges section 170.6, will, if unsuccessful, be treated as a timely challenge under Code of Civil Procedure section 170.6. This resolution should be approved in principle because it would preserve a party's right to a single peremptory challenge to a judicial officer without requiring the party to waive the right to a challenge for cause under Code of Civil Procedure section 170.3.

Under present law, a challenge to a judicial officer for cause might not be determined before the time for filing a peremptory challenge expires. Therefore, where a party deems it advisable to disqualify a judicial officer, the challenge for cause based on objective facts may have to be waived so as not to lose the opportunity to assert a peremptory challenge. This resolution would deem the timely filing of a challenge for cause under Code of Civil Procedure section 170.3 to satisfy the timeliness requirement of a peremptory challenge under Code of Civil Procedure section 170.6 in the event the challenge for cause is unsuccessful. This preserves, as the legislature intended, both challenges for cause where appropriate, and the right to a single peremptory challenge.

### **SECTION/COMMITTEE REPORT**

### **COMMITTEE ON ADMINISTRATION OF JUSTICE RECOMMENDATION**

APPROVE AS AMENDED

This resolution would add to Code of Civil Procedure section 170.6 a provision that a statement of disqualification filed pursuant to Code of Civil Procedure section 170.3 shall, if the judge is not disqualified, "be construed" as a motion filed pursuant to section 170.6 and "have like effect" provided the statement of disqualification is filed within the time period set by section 170.6. The proposal is designed to deal with the 10-day limit for a motion pursuant to section 170.6, and the prospect that the challenge pursuant to section 170.3 would be denied beyond that 10-day period.

The Committee on Administration of Justice (“CAJ”) agrees that there is a timing problem that should be addressed, but believes the solution proposed by this resolution should be modified. There may be circumstances under which a party does *not* want a 170.3 challenge to be automatically “construed” as a 170.6 motion, if the judge is not disqualified. Moreover, there are different rules that govern sections 170.3 and 170.6. A motion pursuant to section 170.6 requires that the party or attorney for the party swear to certain facts, and the required statements might never have been made in connection with the section 170.3 challenge. In addition, CAJ understands that some counties are tracking and logging 170.6 and 170.3 motions, and the automatic conversion of a 170.3 challenge to a 170.6 motion could interfere with this process. CAJ believes that a better way to deal with the situation addressed by this resolution would be to provide the moving party with the *option* of filing a 170.6 motion, upon the denial of a 170.3 challenge. To deal with the timing problem addressed by this resolution, CAJ recommends that the resolution be modified to propose that section 170.6 be amended to allow a 170.6 motion to be filed by a party within 10 days after the denial of a that same party’s 170.3 challenge becomes final, provided the statement of disqualification filed pursuant to section 170.3 is filed by that party within the time period prescribed by section 170.6.

**This position is only that of the of the Committee On Administration of Justice of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities related to this position are funded from voluntary sources.**

#### **TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates recommends that legislation be sponsored to amend Code of Civil Procedure section 170.6, as follows:

- 1 §170.6
- 2 (a) (1) No judge, court commissioner, or referee of any superior court of the State
- 3 of California shall try any civil or criminal action or special proceeding of any kind or
- 4 character nor hear any matter therein that involves a contested issue of law or fact when it
- 5 shall be established as hereinafter provided that the judge or court commissioner is
- 6 prejudiced against any party or attorney or the interest of any party or attorney appearing
- 7 in the action or proceeding.
- 8 (2) Any party to or any attorney appearing in any such action or proceeding may
- 9 establish this prejudice by an oral or written motion without notice supported by affidavit
- 10 or declaration under penalty of perjury or an oral statement under oath that the judge, court
- 11 commissioner, or referee before whom the action or proceeding is pending or to whom it is
- 12 assigned is prejudiced against any such party or attorney or the interest of the party or
- 13 attorney so that the party or attorney cannot or believes that he or she cannot have a fair
- 14 and impartial trial or hearing before the judge, court commissioner, or referee. Where the
- 15 judge, other than a judge assigned to the case for all purposes, court commissioner, or
- 16 referee assigned to or who is scheduled to try the cause or hear the matter is known at least
- 17 10 days before the date set for trial or hearing, the motion shall be made at least five days
- 18 before that date. In the event a statement of disqualification is filed pursuant to Code of

19 Civil Procedure §170.3, and the judge is not disqualified, the statement of disqualification  
20 shall be construed as a motion pursuant to this section and have like effect, provided the  
21 statement of disqualification was filed within the time period prescribed by this section. If  
22 directed to the trial of a cause where there is a master calendar, the motion shall be made to  
23 the judge supervising the master calendar not later than the time the cause is assigned for  
24 trial. If directed to the trial of a cause that has been assigned to a judge for all purposes, the  
25 motion shall be made to the assigned judge or to the presiding judge by a party within 10  
26 days after notice of the all purpose assignment, or if the party has not yet appeared in the  
27 action, then within 10 days after the appearance. If the court in which the action is pending  
28 is authorized to have no more than one judge and the motion claims that the duly elected or  
29 appointed judge of that court is prejudiced, the motion shall be made before the expiration  
30 of 30 days from the date of the first appearance in the action of the party who is making  
31 the motion or whose attorney is making the motion. In no event shall any judge, court  
32 commissioner, or referee entertain the motion if it be made after the drawing of the name  
33 of the first juror, or if there be no jury, after the making of an opening statement by  
34 counsel for plaintiff, or if there is no such statement, then after swearing in the first witness  
35 or the giving of any evidence or after trial of the cause has otherwise commenced. If the  
36 motion is directed to a hearing (other than the trial of a cause), the motion shall be made  
37 not later than the commencement of the hearing. In the case of trials or hearings not herein  
38 specifically provided for, the procedure herein specified shall be followed as nearly as may  
39 be. The fact that a judge, court commissioner, or referee has presided at or acted in  
40 connection with a pretrial conference or other hearing, proceeding or motion prior to trial  
41 and not involving a determination of contested fact issues relating to the merits shall not  
42 preclude the later making of the motion provided for herein at the time and in the manner  
43 hereinbefore provided.

44 A motion under this paragraph may be made following reversal on appeal of a trial  
45 court's decision, or following reversal on appeal of a trial court's final judgment, if the trial  
46 judge in the prior proceeding is assigned to conduct a new trial on the matter.  
47 Notwithstanding paragraph (3), the party who filed the appeal that resulted in the reversal  
48 of a final judgment of a trial court may make a motion under this section regardless of  
49 whether that party or side has previously done so. The motion shall be made within 60  
50 days after the party or the party's attorney has been notified of the assignment.

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

64 the action or special proceeding, only one motion for each side may be made in any one  
65 action or special proceeding.

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

71 (5) Any affidavit filed pursuant to this section shall be in substantially the following  
72 form:

73 (Here set forth court and cause)

74 State of California, ) PEREMPTORY CHALLENGE

75 County of \_\_\_\_\_ ) ss.

76 \_\_\_\_\_, being duly sworn, deposes and says: That he or she is a party (or  
77 attorney for a party) to the within action (or special proceeding). That \_\_\_\_\_  
78 the judge, court commissioner, or referee before whom the trial of the (or a  
79 hearing in the) aforesaid action (or special proceeding) is pending (or to whom  
80 it is assigned) is prejudiced against the party (or his or her attorney) or the  
81 interest of the party (or his or her attorney) so that affiant cannot or believes  
82 that he or she cannot have a fair and impartial trial or hearing before the judge,  
83 court commissioner, or referee.

84 Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_, 20\_\_.

85 (Clerk or notary public or other officer administering oath)

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

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

90 (c) If any provision of this section or the application to any person or circumstance  
91 is held invalid, that invalidity shall not affect other provisions or applications of the section  
92 that can be given effect without the invalid provision or application and to this end the  
93 provisions of this section are declared to be severable.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS:

Existing Law: A judge may be challenged for cause pursuant to Code of Civil Procedure §170.3 by filing a statement of disqualification. Within 10 days, the challenged judge may step aside; may take no action, in which event the disqualification takes effect; or may file an answer, with the challenge then to be acted upon by another judge. As an alternative, the judge may be “peremptorily” challenged through the filing of a motion pursuant to Code of Civil Procedure §170.6 which requires a statement under penalty of perjury, but which is automatically granted. Only one such motion may be filed.

This Resolution: Would add to §170.6 a provision that the filing of an unsuccessful statement of disqualification under §170.3 will satisfy the provisions of §170.6 providing the statement is filed within the time period prescribed by §170.6.

The Problem: Where a judge is assigned to a case for all purposes, and it appears that the judge should recuse himself or herself, filing a statement of disqualification might effect such recusal, without the loss of the single “bullet” under §170.6. However, unless the judge promptly acts to accept the disqualification, it becomes necessary to withdraw that disqualification and file a motion pursuant to §170.6. This is so given the 10-day limit for the §170.6 motion, and the prospect that a challenge pursuant to §170.3 would be denied.

It is anomalous that where there is the strongest of needs to disqualify a judge, and there are objective facts which may be put forth in support of that disqualification, the §170.3 approach is too perilous to maintain where it means a loss of the ability to recuse the judge pursuant to the sure-proof §170.6.

#### IMPACT STATEMENT

This proposed resolution does not affect any other law, statute, or rule, except that it broadens the effect of a statement of disqualification pursuant to §170.3.

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