

RESOLUTION 02-03-2007

DIGEST

Judicial Officers: Post-Appeal Peremptory Challenge

Amends Code of Civil Procedure section 170.6 to expand the availability of peremptory challenges after a reversal on appeal.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedures section 170.6 to expand the availability of peremptory challenges after a reversal on appeal. This resolution should be approved in principle because it would allow peremptory challenges not just when the reversed judge is assigned to conduct a new trial on remand, but also when the judge will be required to make findings of facts or otherwise exercise discretion.

Peremptory challenges upon remand after appeal are intended to eliminate the possibility that a trial judge may harbor bias or resentment against a party that obtained a reversal of that judge's ruling. Existing law allows a party to file a peremptory challenge within 60 days of remand if the reversed judge is assigned to conduct a "new trial." What constitutes a "new trial" has led to much confusion. In criminal cases, "new trial" means just that – an entirely new trial – rather than a remand for resentencing. (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245.) In a civil case, however, a "new trial" is any consideration by the trial court that would result in a termination of the proceedings or otherwise addresses the merits of the case. (*Burdusis v. Superior Court* (2004) 133 Cal.App.4th 88.) Examples of such matters are summary judgment motions, anti-SLAPP motions, and bench trials. (*Geddes v. Superior Court* (2005) 126 Cal.App.4th 417, 424.) In practice, however, it has been difficult for trial courts to determine whether the matters they are considering on remand are in the nature of "new trials" or not.

The prevailing case law creates a concern that a judge who is reversed on appeal may later be ruling on significant factual and legal matters aside from just the conduct of a new trial. If there is any chance a judge reversed on appeal will address such matters following an appeal, the opportunity for peremptory challenge should be provided.

Without the change proposed in this resolution, counsel who believes that the trial judge will harbor a bias as a result of a successful appeal is put into the untenable position of making a claim of bias to that same judge immediately following the reversal. Furthermore, it may not be clear until after reversal that the trial judge is biased. Although judges make every effort to remain unbiased even in the face of a reversal, judges naturally may not be able to totally detach themselves from being reversed. It is unfair to either party in the action to have to demonstrate bias, or the appearance of bias, or to have the losing party in the appeal worry about whether the

judge will bend over backwards to avoid being reversed again. This resolution will give each party the easy remedy of a peremptory challenge in situations beyond just a new trial.

TEXT OF RESOLUTION

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

1 §170.6.

2 (a)(1) No judge, court commissioner, or referee of any superior court of the State of
3 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 in
7 the action or proceeding.

8 (2)(A) Any party to or any attorney appearing in any action or proceeding may
9 establish this prejudice by an oral or written motion without notice supported by affidavit or
10 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 party or attorney or the interest of the party or attorney so
13 that the party or attorney cannot or believes that he or she cannot have a fair and impartial
14 trial or hearing before the judge, court commissioner, or referee. Where the judge, other
15 than a judge assigned to the case for all purposes, court commissioner, or referee assigned to
16 or who is scheduled to try the cause or hear the matter is known at least 10 days before the
17 date set for trial or hearing, the motion shall be made at least 5 days before that date. If
18 directed to the trial of a cause where there is a master calendar, the motion shall be made to
19 the judge supervising the master calendar not later than the time the cause is assigned for
20 trial. If directed to the trial of a cause that has been assigned to a judge for all purposes, the
21 motion shall be made to the assigned judge or to the presiding judge by a party within 10
22 days after notice of the all purpose assignment, or if the party has not yet appeared in the
23 action, then within 10 days after the appearance. If the court in which the action is pending
24 is authorized to have no more than one judge and the motion claims that the duly elected or
25 appointed judge of that court is prejudiced, the motion shall be made before the expiration of
26 30 days from the date of the first appearance in the action of the party who is making the
27 motion or whose attorney is making the motion. In no event shall any judge, court
28 commissioner, or referee entertain the motion if it be made after the drawing of the name of
29 the first juror, or if there be no jury, after the making of an opening statement by counsel for
30 plaintiff, or if there is no opening statement by counsel for plaintiff, then after swearing in
31 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
33 motion shall be made not later than the commencement of the hearing. In the case of trials
34 or hearings not herein specifically provided for, the procedure herein specified shall be
35 followed as nearly as may be. The fact that a judge, court commissioner, or referee has
36 presided at or acted in connection with a pretrial conference or other hearing, proceeding, or
37 motion prior to trial and not involving a determination of contested fact issues relating to the

38 merits shall not preclude the later making of the motion provided for herein at the time and
39 in the manner hereinbefore provided.

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

47 (B) A party may make a motion under this section regardless of whether that party
48 or that party's side has previously done so, if: (i) an order or judgment of the trial court has
49 been reviewed by an appellate court by appeal or writ, (ii) the disposition directed by the
50 appellate court is a reversal in an appeal or the equivalent of a reversal in a writ matter, and
51 (iii) a judge whose order or judgment was reversed is assigned in the same case, including a
52 consolidated case, to conduct any proceeding involving finding facts or exercising
53 discretion. The trial court's vacation of its order or judgment and entry of a different order
54 or judgment in response to an alternative writ or a notice given pursuant to the procedure
55 described in *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 is the equivalent
56 of a reversal for the purpose of this subdivision.

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

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

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

77 (Here set forth court and cause)

78 State of California,

PEREMPTORY CHALLENGE

79 County of _____

ss.

80

81 _____, being duly sworn, deposes and says: That he or she is a party (or attorney for a
82 party) to the within action (or special proceeding). That _____ the judge, court
83 commissioner, or referee before whom the trial of the (or a hearing in the) aforesaid action

84 (or special proceeding) is pending (or to whom it is assigned) is prejudiced against the party
85 (or his or her attorney) or the interest of the party (or his or her attorney) so that affiant
86 cannot or believes that he or she cannot have a fair and impartial trial or hearing before the
87 judge, court commissioner, or referee.

88 _____
89 Subscribed and sworn to before me this ____ day of ____, 20__.

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

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

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

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

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: Provides that after a reversal on appeal, any party to the case may make a peremptory challenge if the judge who was reversed “is assigned to conduct a new trial.” That paragraph of section 170.6, subdivision (a)(2) was adopted by chapter 715 of the Statutes of 1985 based on a resolution adopted by the Conference of Delegates of the State Bar of California.

This Resolution: Expands the availability of a peremptory challenge after a reversal on appeal whenever the reversed judge will have the power to find fact or exercise discretion. The resolution also codifies case law providing that a writ compelling the court to vacate an order and enter a different order is the equivalent of a reversal. (*Overton v. Superior Court* (1994) 22 Cal.App.4th 112.)

The Problem: As originally envisioned by the Conference, the post-reversal peremptory challenge would allow a party who already had exercised a peremptory challenge to remove a judge who had been reversed if that judge was reassigned to the case to do something important. In *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, the court instead construed “new trial” in criminal cases narrowly to mean only a literal new trial as defined by Code of Civil Procedure section 656. Basically, *Peracchi* limited the post-reversal challenge to situations in which a court would make a new factual determination on a subject as to which it had previously made a factual determination. In *Bardusis v. Superior Court* (2004) 133 Cal.App.4th 88, the court substantially applied the same principle to civil cases.

A peremptory challenge after appeal is a remedy for judges who: (a) cannot stand to be reversed and may exercise their wrath against any party involved in a reversal; (b) cannot or will not consider matters of the truth or ultimate justice of a case freshly after being instructed by an

appellate court; and (c) in a particular case cannot overcome offense they have taken at occurrences in the trial or appellate process. Anyone who has served in more than a handful of cases after reversals knows that such a remedy is occasionally needed. Contrary to comments in *Peracchi* and *Bardusis*, the option to ask the appellate court to direct assignment to a new judge (Code Civ. Proc., § 170.1, subd. (c)) is not effective for the problems addressed by Code of Civil Procedure section 170.6. A request under Code of Civil Procedure section 170.1(c) requires demonstrating bias or misconduct *before* the appellate court's action, and a failed request under that section likely will make a touchy judge even worse.

In the balance of fairness and efficiency, here the assurance of fairness should prevail. In the balance between public confidence that justice is dispensed impartially and judicial distaste for peremptory disqualification, the need for public confidence should prevail.

IMPACT STATEMENT

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

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