

**RESOLUTION 07-06-2007**

**DIGEST**

Judicial Officers: Peremptory Challenge

Amends Code of Civil Procedure section 170.6 to grant each party or attorney for that party one peremptory challenge without a statement of prejudice.

**RESOLUTION COMMITTEE RECOMMENDATION  
DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 170.6 to grant each party or attorney for that party one peremptory challenge without a statement of prejudice. This resolution should be disapproved because the scheme it proposes has been consistently held to be an unconstitutional violation of the separation of powers.

In 1937, the Legislature attempted to allow parties one peremptory challenge without any sort of declaration as to a basis for disqualification. However, the California Supreme Court declared that statute unconstitutional on separation of powers grounds. (*Austin v. Lambert* (1938) 11 Cal.2d 73). The court suggested that the Legislature could adopt a statute which would provide grounds for disqualification such as mental incompetence, arbitrariness, or discourtesy to trial participants, but held expressly that allowing disqualification without a reason was unconstitutional.

The present statute, enacted in 1957, provides that a party may disqualify a judge with a peremptory challenge supported by a declaration of prejudice. The courts have since held that the statute, by requiring a declaration of prejudice, overcame the previous constitutional concerns. (*Johnson v. Superior Court* (1958) 50 Cal.2d 693; *Solberg v. Superior Court* (1977) 19 Cal.3d 182.) Moreover, the proponent’s concern that it is necessary to establish prejudice by fact is not supported, as the statute provides that the declaration can be on the belief of the litigants that they cannot have a fair or impartial trial. The resolution is therefore unnecessary and does not overcome constitutional limitations on the Legislature’s ability to govern the judicial process.

**TEXT OF RESOLUTION**

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

- 1 §170.6.
- 2 (a)(1) ~~No~~ Any party to or any attorney appearing in any action or proceeding shall
- 3 be entitled to one peremptory challenge of a judge, court commissioner, or referee of any
- 4 superior court of the State of California shall try in any civil or criminal action or special
- 5 proceeding of any kind or character ~~nor hear any matter therein~~ that involves a contested
- 6 issue of law or fact ~~when it shall be established as hereinafter provided that the judge or~~

7 court commissioner is prejudiced against any party or attorney or the interest of any party or  
8 attorney appearing in the action or proceeding.

9 (2) Any party to or any attorney appearing in any action or proceeding may establish  
10 this prejudice by an oral or written motion without notice supported by affidavit or  
11 declaration under penalty of perjury or an oral statement under oath that the judge, court  
12 commissioner, or referee before whom the action or proceeding is pending or to whom it is  
13 assigned is prejudiced against any party or attorney or the interest of the party or attorney so  
14 that the party or attorney cannot or believes that he or she cannot have a fair and impartial  
15 trial or hearing before the judge, court commissioner, or referee. (i) Where the judge, other  
16 than a judge assigned to the case for all purposes, court commissioner, or referee assigned to  
17 or who is scheduled to try the cause or hear the matter is known at least 10 days before the  
18 date set for trial or hearing, the motion peremptory challenge shall be made at least 5 days  
19 before that date.- (ii) If directed to the trial of a cause where there is a master calendar, the  
20 motion peremptory challenge shall be made to the judge supervising the master calendar not  
21 later than the time the cause is assigned for trial. (iii) If directed to the trial of a cause that  
22 has been assigned to a judge for all purposes, the motion peremptory challenge shall be  
23 made to the assigned judge or to the presiding judge by a party within 10 days after notice of  
24 the all purpose assignment, or if the party has not yet appeared in the action, then within 10  
25 days after the appearance.- (iv) If the court in which the action is pending is authorized to  
26 have no more than one judge and the motion peremptory challenge claims that the duly  
27 elected or appointed judge of that court is prejudiced, the motion peremptory challenge shall  
28 be made before the expiration of 30 days from the date of the first appearance in the action  
29 of the party who is making the motion peremptory challenge or whose attorney is making  
30 the motion peremptory challenge.

31 (3) In no event shall any judge, court commissioner, or referee entertain the motion  
32 peremptory challenge if it be made after the drawing of the name of the first juror, or if there  
33 be no jury, after the making of an opening statement by counsel for plaintiff, or if there is no  
34 opening statement by counsel for plaintiff, then after swearing in the first witness or the  
35 giving of any evidence or after trial of the cause has otherwise commenced. If the motion  
36 peremptory challenge is directed to a hearing (other than the trial of a cause), the motion  
37 peremptory challenge shall be made not later than the commencement of the hearing. In the  
38 case of trials or hearings not herein specifically provided for, the procedure herein specified  
39 shall be followed as nearly as may be. The fact that a judge, court commissioner, or referee  
40 has presided at or acted in connection with a pretrial conference or other hearing,  
41 proceeding, or motion prior to trial and not involving a determination of contested fact  
42 issues relating to the merits shall not preclude the later making of the motion peremptory  
43 challenge provided for herein at the time and in the manner hereinbefore provided.

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

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

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

72 (57) Any affidavit peremptory challenge filed pursuant to this section shall be in  
73 substantially the following form:

74 (Here set forth court and cause)

75  
76 State of California, ) PEREMPTORY CHALLENGE  
77 County of \_\_\_\_\_ ) ss.

78  
79 \_\_\_\_\_, ~~being duly sworn, deposes and says: That he or she is a party (or~~  
80 ~~attorney for a party) to the within action (or special proceeding). That \_\_\_\_\_~~  
81 invoke the right of a peremptory challenge under California Code of Civil  
82 Procedure § 170.6 of the judge, court commissioner, or referee before whom  
83 the trial of the (or a hearing in the) aforesaid action (or special proceeding) is  
84 pending (or to whom it is assigned) is prejudiced against the party (or his or  
85 her) attorney) or the interest of the party (or his or her attorney) so that  
86 affiant cannot or believes that he or she cannot have a fair and impartial trial  
87 or hearing before the judge, court commissioner, or referee. Subscribed and  
88 sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. (Clerk or notary public or  
89 other officer administering oath)

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

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

94 (c) If any provision of this section or the application to any person or circumstance is  
95 held invalid, that invalidity shall not affect other provisions or applications of the section

96 that can be given effect without the invalid provision or application and to this end the  
97 provisions of this section are declared to be severable.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing law: Existing law provides that any party, or attorney for the party may challenge an assigned judicial officer by filing a declaration that the judge, court commissioner or referee is prejudiced against the party or its attorney such there cannot be a fair and impartial trial or hearing.

This Resolution: This resolution alters the statute by removing the requirement of a specific statement the judicial officer is prejudiced against the party or attorney and simply grants each party or attorney for that party one peremptory challenge.

The Problem: C.C.P. § 170.6 requires a sworn statement that a judge, court commissioner or referee is prejudiced against a party or attorney. If timely filed, the challenge to that judicial officer is automatic. The truth often times is that an attorney or party chooses to file the 170.6 challenge for reasons that do not rise to the level of actual prejudice against a party or attorney. Thus, the required sworn statement compels the attorney to swear to facts which are not entirely true. This resolution changes that law so that attorneys and/or parties do not have to potentially commit perjury in order challenge the judicial officer, but simply gives the right to one peremptory challenge.

IMPACT STATEMENT: This resolution will not affect any other statute or rule.

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RESPONSIBLE FLOOR DELEGATE: John D. Ott

## COUNTERARGUMENTS

### BEVERLY HILLS BAR ASSOCIATION

This resolution proposes the same scheme that was adopted by the Legislature in 1937 – and promptly declared unconstitutional as an unwarranted and unlawful interference with the constitutional powers and duties of the trial courts. *Austin v. Lambert* (1938) 11 Cal.2d 73. As the court aptly remarked, to provide litigants with an uncontrolled power to dislodge, without reason or for an undisclosed reason, a qualified judge where the only real objection might be that he would be fair and impartial would be to characterize the statute not as a regulation but as a concealed weapon to be used to the judicial department’s manifest detriment. *Id.* at 79.

The existing statute was first enacted two decades later and twice has been upheld by the California Supreme Court in the face of constitutional challenges on analogous grounds. *Johnson v. Superior Court* (1958) 50 Cal.2d 693; *Solberg v. Superior Court* (1977) 19 Cal.3d 182.

*Johnson* and *Solberg* also demonstrate that this resolution's premise is unfounded. Both cases reaffirmed that the affidavit procedure is reasonable not because it establishes prejudice "as a fact", but because it expresses "the belief of a litigant" that he cannot have a fair trial before the assigned judge. Indeed, section 170.6 explicitly recognizes this belief as a sufficient ground for disqualification. Subdivision (1) speaks generally of establishing by affidavit that the judge in question "is prejudiced" and subdivision (2) explains that prejudice will be deemed "established" if the party or his attorney swears that he "cannot or believes that he cannot have a fair and impartial trial or hearing before such judge". *Solberg* at 193.

### **SACRAMENTO COUNTY BAR ASSOCIATION**

This proposal is unconstitutional. *Austin v. Lambert* (1938) 11 C.2d 73, 79, is squarely on point. *See also Daigh v. Shaffer* (1937) 23 Cal.App.2d 449.

The Legislature adopted the first peremptory disqualification statute in 1937, CCP 170.5. As this resolution proposes, § 170.5 allowed a party to disqualify a judge by simply filing a peremptory challenge unsupported by a declaration or any other evidence that might show a basis for disqualification. A year later, in *Austin*, the Supreme Court held the statute unconstitutional on separation of powers grounds. *Id.*, 11 Cal.2d at 79. The Court acknowledged that the Legislature could adopt a statute to deal with cases in which a party or counsel had good reasons why a judge should not hear a case—" [m]ental incompetence, irascibility, arbitrariness, discourtesy to counsel, litigants, and witnesses, and other temperamental obliquity"—reasons that it would not be proper to allege or even possible to prove. *Id.* at 78. But, the Court held, to allow a party to disqualify the judge with *no* grounds or evidence whatsoever was "an unwarranted and unlawful interference with the constitutional and orderly processes of the courts." *Id.* at 78.

In 1957, Legislature adopted 170.6, allowing a party to disqualify a judge by filing a peremptory challenge supported by declaration of prejudice. The Court held that the requirement of the declaration overcame the constitutional objection in *Austin*. *Johnson v. Superior Court*, 50 C.2d 693 (1958). The *Johnson* Court answered the concern of this resolution's proponent, that parties or attorneys might file 170.6 declarations without a genuine basis for alleging prejudice: "We cannot properly assume that there will be a wholesale making of false statements under oath, and the fact that some persons may abuse the section is not a ground for holding the provision to be unconstitutional." 50 Cal.2d at 697.

The requirement of the affidavit of prejudice in current § 170.6 is not a hollow formality. It is what makes the peremptory disqualification procedure constitutional. *Id.*

## **SAN DIEGO COUNTY BAR ASSOCIATION**

The resolution would, in the opinion of the SDCBA delegation, result in an unconstitutional law. Originally, when the peremptory challenge statute was enacted, it permitted the “papering” of a judge without evidence of some prejudice. The law was ruled unconstitutional until the prejudice requirement was added. This resolution seeks to return the law to its prior unconstitutional state. We cannot support it.