RESOLUTION 07-01-2014

DIGEST
Peremptory Challenge: Automatic Right to Challenge After Successful Appeal
Amends Code of Civil Procedure section 170.6 to allow a challenge to the trial judge if, upon remand, the same judge from the prior proceeding is assigned to the case.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Identical to Resolution 10-02-2010, which was approved in principle. Similar to Resolutions 09-05-2005 and 02-03-2007, which were approved in principle.

Reasons:
This resolution amends Code of Civil Procedure section 170.6 to allow a challenge to the trial judge if, upon remand, the same judge from the prior proceeding is assigned to the case. This resolution should be approved in principle because it fosters confidence in the judicial system by removing the potential perception of bias by the judicial officer whose decision was reversed.

Currently, when a case is remanded after appeal and the original trial judge is re-assigned to the matter, a challenge under section 170.6 is permissible only if that judge is assigned to conduct a new trial. This resolution would delete the words "new trial" from the statute and replace it with "the case."

Although proponent argues the statute should be changed because the term "new trial" is ambiguous and leads to more litigation, that assertion is unavailing. In criminal cases, "new trial" means exactly that, a new trial. (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1257; Pen. Code, § 1180.) In civil cases, the term is defined by statute: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee." (Code Civ. Proc., § 656; *State Farm Mut. Automobile Ins. Co. v. Superior Court (Hill)* (2004) 121 Cal.App.4th 490, 497.)

Nevertheless, the resolution is a good idea because it is consistent with the overall statutory goal of affording the parties a renewed peremptory challenge of a judicial officer after an appellate reversal – the parties' ability to avoid the perception of judicial bias and retribution. The public policy rationale is clearest when viewed from the perspective of the appellant who secured a reversal – the potential that the judicial officer may hold an appellate reversal against the party who appealed by rendering discretionary ruling against that party out of spite or retribution. But there are equally compelling justifications from the perspective of respondents who face the potential of a judge, who having been reversed, may unconsciously tend to making rulings favoring the appellant so as to avoid any hint of bias or who may become overly cautious so as to become ineffective by depriving the parties of clear and firm rulings.

TEXT OF RESOLUTION

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

§ 170.6

Motion to disqualify

(a) (1) A judge, court commissioner, or referee of a superior court of the State of California shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it is established as provided in this section that the judge or court commissioner is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding.

(2) A party to, or an attorney appearing in, an action or proceeding may establish this prejudice by an oral or written motion without prior notice supported by affidavit or declaration under penalty of perjury, or an oral statement under oath, that the judge, court commissioner, or referee before whom the action or proceeding is pending, or to whom it is assigned, is prejudiced against a party or attorney, or the interest of the party or attorney, so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing before the judge, court commissioner, or referee. If the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to, or who is scheduled to try, the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date. If directed to the trial of a cause with a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. If directed to the trial of a criminal cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. If directed to the trial of a civil cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance. If the court in which the action is pending is authorized to have no more than one judge, and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion shall be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion. In no event shall a judge, court commissioner, or referee entertain the motion if it is made after the drawing of the name of the first juror, or if there is no jury, after the making of an opening statement by counsel for plaintiff, or if there is no opening statement by counsel for plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing, other than the trial of a cause, the motion shall be made not later than the commencement of the hearing. In the case of trials or hearings not specifically provided for in this paragraph, the procedure specified herein shall be followed as nearly as possible. The fact that a judge, court commissioner, or referee has presided at, or acted in connection with, a pretrial conference or other hearing, proceeding, or motion prior to trial, and not involving a determination of contested fact issues relating to the merits, shall not preclude the later making of the motion provided for in this paragraph at the time and in the manner herein provided.

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

(3) A party to a civil action making that motion under this section shall serve notice on all parties no later than five days after making the motion.

(4) If the motion is duly presented, and the affidavit or declaration under penalty of perjury is duly filed or an oral statement under oath is duly made, thereupon and without any

further act or proof, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chair of the Judicial Council shall assign some other judge, court commissioner, or referee to try the cause or hear the matter as promptly as possible. Except as provided in this section, no party or attorney shall be permitted to make more than one such motion in any one action or special proceeding pursuant to this section. In actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

[Subdivisions (a)(5)-(c) remain unchanged.]

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Code of Civil Procedure section 170.6(a)(2) allows a successful appellant to challenge the trial judge upon remand if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter, regardless of whether the party had previously issued a peremptory challenge in the case. A party is otherwise limited to one peremptory challenge.

Code of Civil Procedure section 656 defines a new trial as "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee." Application of term "new trial" has nonetheless been difficult, as the term remains ambiguous. There has been much law and motion practice on the issue of what constitutes a "new trial" for the purposes of Code of Civil Procedure section 170.6. Parties seeking to challenge the trial judge after a successful appeal and remand and reassignment to the same judge must weigh their chances of success on convincing the trial court judge (sometimes the same judge as they seek to challenge, sometimes not) that the remand requires a new trial. If they risk bringing a challenge and lose on the issue of whether remand requires a "new trial," they are then confronted with bringing their case on remand to the same trial court judge they sought to challenge.

Section 170.6(a)(2) was intended to allow a party to make a peremptory challenge when the same trial judge is assigned for a new trial after reversal on appeal, "in order to avoid potential bias on the part of a judge who had been reversed on appeal" (*Geddes v. Superior Court* (2005) 126 Cal.App.4th 417, 423). This proposed change removes the ambiguity of the term “new trial,” and helps to ensure a successful applicant’s avoidance of any potential judicial bias.

The Solution: Would allow a successful appellant to challenge the trial judge upon remand if the trial judge in the prior proceeding is assigned to the case, regardless of whether the issue(s) on remand require a "new trial."

LEGISLATIVE HISTORY

Not known.

IMPACT STATEMENT
The proposed resolution does not affect any other law, statute or rule.

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