

RESOLUTION 16-11-2017

DIGEST

Continuances: Childbirth as Good Cause

Adds Penal Code section 1050.2 to include childbirth as “good cause” for a continuance in criminal proceedings.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution adds Penal Code section 1050.2 to include childbirth as “good cause” for a continuance in criminal proceedings. This resolution should be approved principle because it is reasonable to grant a short continuance for such a significant event.

Defendants in criminal cases have a constitutional right to a speedy trial. Because of this right, continuances are strictly regulated, with “good cause” required to be shown by the party seeking the delay. The current language of the statute is unclear whether the birth of a child of an assigned prosecutor or defense attorney constitutes “good cause” for a continuance, especially if the attorney’s partner is the one giving birth. Thus, whether an accommodation will be granted for an assigned attorney to either give birth or be present for support depends on the generosity of the court and opposing counsel.

This resolution proposes permitting a five-day continuance for the birth of a child. A new mother or father who is forced out to trial is not an effective advocate. Designating childbirth as “good cause” will prevent an attorney from having to choose between their career and their family and will allow a short delay in the proceedings where the event comes earlier than anticipated because of an unanticipated medical complication.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add California Penal Code section 1050.2 to read as follows:

- 1 § 1050.2
- 2 For purposes of Section 1050, “good cause” to continue a criminal proceeding includes,
- 3 but is not limited to, the birth of a child of a defense attorney or prosecutor assigned to the case.
- 4 Except as stipulated by the parties, a continuance under this section shall be limited to a single
- 5 continuance with a maximum of 5 additional calendar days.

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

PROPONENT: Women Lawyers Association of Los Angeles

STATEMENT OF REASONS

The Problem: “Continuances shall be granted [in criminal cases] only upon a showing of good cause. Neither the convenience of the parties nor a stipulation of the parties is in and of itself good cause.” (Cal. Pen. Code, § 1050(e).) “What constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court.” (*People v. Johnson* (1980) 26 Cal.3d 557, 570.) If good cause exists, a continuance should usually be granted, absent a lack of diligence or other abusive circumstances. (*See Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246-1247.)

Specified circumstances constituting “good cause” include (1) when it is necessary to maintain joinder (Cal. Pen. Code, § 1050.1), (2) when an assigned prosecutor in certain cases is engaged elsewhere (Cal. Pen. Code, §§ 859b(b), 1050(g)(2)), and (3) when the defense presents testimony on matters about which a reasonably diligent prosecutor would not have known (Cal. Pen. Code, § 1051). It is also well-settled that “delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or witnesses constitutes good cause to avoid dismissal.” (*Johnson, supra*, 26 Cal.3d at 570.)

However, it is unclear whether the birth of a child of an assigned attorney constitutes “good cause” for a continuance, especially if the attorney’s partner is the one giving birth. Thus, whether an accommodation will be granted for an assigned attorney to either give birth or be present for support depends on the generosity of the court and opposing counsel. (*See, e.g., Berry, Public Defender, Judge at Odds Over Conduct* (Aug. 4, 2001) Los Angeles Times <http://articles.latimes.com/print/2001/aug/04/local/me-30504>; Schwartz, *Judge Rules for Counsel, Saying Baby Comes First* (Apr. 13, 2011) New York Times <http://www.nytimes.com/2011/04/14/us/14judge.html>; Weiser, *Pregnant Lawyer Fails in Bid to Delay Trial* (Nov. 20, 2014) New York Times <https://www.nytimes.com/2014/11/21/nyregion/pregnant-lawyer-fails-in-bid-to-delay-trial.html>.)

The Solution: This resolution recognizes the uncertainty and stigma in our profession whenever an attorney requests a continuance to attend to a family matter of great personal significance. It permits a brief continuance due to the birth of a child of an assigned attorney, so that she can give birth, or be there for a partner, without putting one’s client, case, or career at risk. Limiting a ‘childbirth’ continuance to a maximum of five days allows for hospital discharge, and for the attorney to either return to work, or take parental leave and arrange for a substitution, while protecting the right to speedy trial possessed by both the prosecution and the defense. (*See Cal. Const., Art. I, §§ 15, 29.*) Clearly stating that childbirth is “good cause” gives guidance to both courts and counsel on this issue, reduces ill-advised advocacy, and promotes work-life balance in the legal profession.

The Florida Bar is considering a similar rule to permit a ‘parental leave’ continuance. (*See Zaretsky, Should Judges Delay Trials for Pregnant Lawyers?* (Jul. 21, 2016) Above the Law <http://abovethelaw.com/2016/07/should-judges-delay-trials-for-pregnant-lawyers/>.)

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

SACRAMENTO COUNTY BAR ASSOCIATION

The appropriate manner in which a court should handle a request for a continuance in the event of childbirth is already clearly established within the law, and it has been achieved in a manner that protects the accused's right to a speedy trial. Both the federal and state constitutions grant an individual accused of a crime the right to a speedy trial. (U.S. Const. amend. VI; Cal. Const., art. I, § 15). As such Resolution 16-11-2017 is neither necessary nor helpful.

The courts have requirements for what constitutes good cause for a continuance in a criminal proceeding. It is good cause for a continuance if defense counsel is physically unavailable to participate in the criminal proceedings. (See *People v. Crovedi* (1966) 65 Cal.2d 199, 207.) Childbirth necessarily falls under this category. It is also important to remember that, in the case of a deputy DA or Attorney General, it is established law that prosecutors are fungible. In the event that a prosecutor is unable to start trial within Penal Code section 1382 time limits, then the prosecutor must seek a stipulated continuance from defense counsel or find another prosecutor to cover the case. (*Batey v. Superior Court* (1977) 71 CalApp.3d 667.) Contrary to established law, carving out a good cause exception for the birth of counsel's child places the personal interests of counsel above the accused's right to a speedy trial.

Additionally, the language in this resolution is ambiguous. It states that good cause to continue a criminal proceeding "includes, but is not limited to, the birth of a child." This language implies that there are other reasons for a good cause continuance that are delineated in a list, but no such list actually exists. This in turn raises the question of why childbirth needs to be defined in its own category. Along these lines, by expressly articulating that childbirth constitutes a good cause continuance, it invites additional good cause exceptions to be defined in the law. This sets a dangerous precedent, suggesting that judges should turn to a list of specified circumstances when considering a request for a good cause continuance. This will likely lead to a court limiting the use of its discretion when faced with a request for a good cause continuance for circumstances that have not been expressly stated in the law.

There is also a notable ambiguity as to when an attorney can exercise this good cause continuance. It is unclear whether only the individual giving birth can exercise this cause for a continuance, or if any parent, grandparent, aunt, uncle, etc., is able to request a good cause continuance for the birth of a child.

Finally, the resolution as articulated is unclear as to who should request the continuance. It appears to necessitate that someone other than the person giving birth must place the request for a five-day continuance so that the individual assigned to the case can return or find a different attorney to handle the court proceeding. (We think the resolution probably doesn't intend to suggest that a person giving birth should be back in trial within five days, although the resolutions as written could be interpreted thusly.)