CALIFORNIA JUDGES BENCHGUIDES

Benchguide 2

DISQUALIFICATION OF JUDGE

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DISQUALIFICATION OF JUDGE

I. [§2.1] SCOPE OF BENCHGUIDE

This benchguide provides a procedural overview of judicial disqualification both for cause (CCP §170.1) and as a result of a peremptory challenge (CCP §170.6). It covers disqualification in both criminal and civil cases, and is intended to be used both by the judge who is challenged and by the judge who is selected to rule on the disqualification.

II. PROCEDURAL CHECKLISTS

A. [§2.2] Checklist: Voluntary Recusal by Judge

(1) *Determine if there are any reasons for recusal.* A judge should take the initiative and review the file for the parties' and attorneys' names, as well as the subject matter of the case to determine whether there are any grounds for recusal, *e.g.,* a family connection to a party or counsel or a financial interest in the proceedings or a party. See §§2.11–2.21. For a detailed discussion of the grounds for disqualification, see CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL §§7.3–7.23 (Cal CJER 1995).

(2) *If there is no ground for recusal, proceed with the case.*

(3) *If there is a ground for recusal, notify the presiding judge of the recusal unless the parties waive the disqualification.* On circumstances under which disqualification may be waived, see §2.24. If the case is in progress when the grounds for disqualification arise or are learned, the judge must recuse himself or herself in the absence of a waiver. See CCP §170.3(b)(4). However, if the case is in progress, the judge may order the trial or hearing to continue pending resolution of the disqualification issue. CCP §170.4(c)(1). See §§2.30, 2.33.

(4) *To obtain a waiver, disclose the basis for the disqualification on the record and ask the parties and attorneys whether they wish to waive the disqualification.*

The waiver must be in writing, recite the basis for the disqualification, be signed by all parties and attorneys, and filed in the record. CCP §170.3(b)(1). For a form of waiver, see §2.80.

B. [§2.3] Checklist: Response by Challenged Judge to Statement of Disqualification for Cause

(1) *Review the statement for timeliness and contents.* The statement must be filed as soon as the grounds for disqualification are learned. See

§2.27. It must be verified and must set forth facts constituting the basis for the disqualification. See §2.25.

(2) *If the statement is not timely filed or fails to disclose legal grounds for disqualification on its face, order it stricken.* CCP §170.4(b). See §2.31. For a form of order, see §2.81.

(3) *If the statement is timely and in proper form, respond in one of three ways (see §2.28):*

- *Without conceding the basis for the disqualification, ask the presiding judge to assign another judge to the case.* CCP §170.3(c)(2).
- *Consent to the disqualification within ten days of filing or service of the statement, whichever is later, and notify the presiding judge.* CCP §170.3(c)(3).
- File a verified written answer within ten days of filing or service of the statement, admitting or denying the allegations *and* setting forth additional facts, if any. CCP §170.3(c)(3). See §2.29. If no action is taken within the applicable time limits, the judge is deemed to have consented to the disqualification. CCP §170.3(c)(4).

(4) *If the statement of disqualification is filed in mid-trial or mid-hearing, order the trial or hearing to continue pending resolution of the disqualification issue*. See CCP §170.4(c)(1). For a discussion of the judge's authority to proceed with the trial when the challenge is raised during trial, see §§2.30, 2.33.

(5) *If disqualified, either by consent or after a determination by another judge, limit actions in the proceedings to those set out in CCP §170.4, e.g., actions to maintain court's jurisdiction, setting proceedings for trial or hearing*. See §2.33.

C. [§2.4] Checklist: Peremptory Challenge

(1) *Determine if the challenge is properly and timely made; if so, withdraw from the case.* Review the file to determine if a prior challenge has been made by a party or attorney on the same "side." See CCP §170.6(a)(3) (only one motion per side). On what constitutes a "side," see §§2.52–2.56. For a discussion of timeliness, see §§2.42–2.51.

(2) *If the challenge is timely but not in proper form, explain the requirements of CCP §170.6 to the attorney or pro per litigant who is making the challenge.* Generally, a judge should not keep silent when an attorney or pro per litigant makes a defective challenge and an explanation of the requirements could easily cure the defect. See *People v St. Andrew* (1980) 101 CA3d 450, 456, 161 CR 634. Judges should permit litigants and attorneys to cure technical irregularities. *Retes v Superior Court*

(1981) 122 CA3d 799, 807, 176 CR 160 (judge should have given counsel opportunity to remedy failure to sign declaration). See §2.38. For a discussion of the requirements for a peremptory challenge, see §2.41.

(3) *If the challenge is valid, request the judge supervising the master calendar or presiding judge to assign another judicial officer of the court in which the case is pending.* If there is no other judicial officer, the request should be made to the chairperson of the Judicial Council. CCP §170.6(a)(3). Generally, the clerk notifies the Assignments Unit of the Administrative Office of the Courts to obtain a new judicial officer for reassignment of the case. If the case must be delayed, it must be continued only from day to day, and reassigned for trial or hearing as soon as possible. CCP §170.6(a)(4). See §2.78.

(4) *If the challenge is not valid, e.g., because it is not timely, deny the challenge.* For a form of order denying a peremptory challenge, see §2.82.

D. [§2.5] Checklist: Determination of Disqualification for Cause by Judge Selected To Rule on Disqualification

(1) *If selected to determine the issue of disqualification, rule on the basis of information in the file, if possible.* The file should contain the statement of disqualification and the answer, and may also contain written arguments on request. CCP §170.3(c)(6). If the judge whose disqualification has been sought has made no answer within ten days, he or she is considered to have consented to the disqualification. CCP §170.3(c)(4). On matters to consider in ruling on a disqualification motion, see §2.32.

(2) *If a hearing is desired, set the matter for hearing as soon as practicable.* CCP §170.3(c)(6). Judges rarely require hearings in these matters.

(3) *At the hearing, hear the arguments of the parties and the judge whose disqualification is sought.* Evidence may be presented on a showing of good cause. CCP §170.3(c)(6). See §§2.11–2.22 for a discussion of grounds for disqualification.

(4) *Prepare a ruling on the disqualification issue.* If grounds for disqualification are not proved, the original judge should proceed with the case.

(5) *If disqualification is warranted, notify the presiding judge or person having authority to appoint a replacement.* CCP §170.3(c)(6). For a form of order granting disqualification, see §2.81.

III. APPLICABLE LAW

A. Disqualification for Cause

1. Judge's Duty To Hear Cases

a. [§2.6] Judge's Duty To Accept Assignments

A judge must decide any proceeding in which the judge is not disqualified. CCP §170. Unless disqualified, a judge must accept all assignments (see Cal Rules of Ct 226) or provide the presiding judge with a statement of reasons for refusing to hear a case (Cal Rules of Ct 6.608(1)). See *Briggs v Superior Court* (2001) 87 CA4th 312, 319, 104 CR2d 445 (judge's duty to hear cases when not disqualified is as strong as judge's duty not to hear cases when disqualified); see also Rothman, *California Judicial Conduct Handbook* §7.01 (CJA 2007) on a judge's obligation to hear difficult cases.

☛ JUDICIAL TIP: In an emergency, *e.g.,* a request for a temporary restraining order, a judge who would otherwise request recusal should temporarily serve until a replacement judge can be found, while stating on the record the possible basis for recusal. Commentary to Cal Rules of Ct, Code of Judicial Ethics, Canon 3E.

b. [§2.7] Judge's Duty To Be Impartial

Judges have a duty to make their decisions free from any bias or prejudice. Cal Rules of Ct, Standards of J Admin 10.20; Cal Rules of Ct, Code of Judicial Ethics, Canon 3B(5). Because of this obligation, judges must disqualify themselves in proceedings in which their disqualification is required by law (see CCP §170.1(a); discussion in §§2.11–2.19) or in which their impartiality might reasonably be questioned (CCP §170.1(a)(6)(A)(iii); see Commentary to Cal Rules of Ct, Code of Judicial Ethics, Canon 3E; discussion in §§2.15–2.17).

☛ JUDICIAL TIP: The "headline" test is a good exercise for the judge to apply when deciding whether to initiate recusal, especially when dealing with the appearance of impropriety. The judge should consider the headline a newspaper might use to announce that the judge was remaining on the case in spite of, for example, the judge's relationship to or interest in a party, or other possible basis for disqualification.

c. [§2.8] Judge's Duty To Disclose Information Potentially Relevant to Disqualification

A judge must disclose on the record information the judge believes the parties or their attorneys might consider relevant to the question of

disqualification, even if the judge believes there is no actual basis for disqualification. Cal Rules of Ct, Code of Judicial Ethics, Canon 3E(2); Cal Rules of Ct 2.817 [temporary judge]. The parties should have an opportunity to weigh this information when considering whether to challenge the judge. Many judges invite the parties to comment on the disclosed information. See Rothman, *Handbook* §7.02. Even if the parties decide to waive disqualification, disclosure helps to ensure that they are fully informed when they do so. Disclosure might be appropriate, for example, if:

- The judge and an attorney in the proceeding are active members of the same service organization or regularly play golf together. See Rothman, *Handbook* §7.51.
- An attorney contributed to the judge's election campaign. See Rothman, *Handbook* §7.56.
- The judge was once treated by the physician who is a party to the proceedings. See Rothman, *Handbook* §7.54.
- The judge's spouse and one of the parties have the same occupation and the subject matter of the action arises from that occupation. See *Geldermann, Inc. v Bruner* (1991) 229 CA3d 662, 280 CR 264 (judge's wife was realtor; action involved disputed real estate commission).

In order to make an informed decision about recusal, judges must review their financial interests and family relationships as they may relate to the cases before them. CCP §170.1(a)(3)(C).

Because in some instances membership in certain organizations may have the potential to give an appearance of partiality even though membership itself may not be barred by the judicial canons, a judge should consider disqualification under the general standards of Canon 3E(1). If the judge believes no basis for disqualification exists, he or she should nevertheless disclose the membership if the parties or their lawyers might consider the information relevant to the question of disqualification. Commentary to Cal Rules of Ct, Code of Judicial Ethics, Canon 3E.

d. [§2.9] Disciplinary Action for Failure To Recuse

A judge's failure to initiate recusal when grounds for disqualification clearly exist may be grounds for disciplinary action. See *In re Youngblood* (1983) 33 C3d 788, 191 CR 171 (judge engaged in litigation against corporation that was party in case assigned to judge); Rothman, *Handbook* §7.36. However, a judge's failure to initiate recusal, even when recusal is mandatory, is not a criminal violation of Govt C §1222 (willful failure to perform duty required by law of public official) or a criminal offense of

any kind. *Boags v Municipal Court* (1987) 197 CA3d 65, 69–71, 242 CR 681.

e. [§2.10] Who May Be Challenged

Any trial court judge, commissioner, or referee may be challenged. CCP §170.5(a); *Autoland, Inc. v Superior Court* (1988) 205 CA3d 857, 859, 252 CR 662 (discovery referee). Juvenile court referees (Welf & I C §247.5), arbitrators appointed by the court under judicial arbitration (CCP §1141.18(d); Cal Rules of Ct 3.816), temporary judges (Cal Rules of Ct 2.818(a), 2.819, 2.831(e)), and neutral arbitrators in contractual arbitration proceedings (CCP §1281.91; *Azteca Constr., Inc. v ADR Consulting, Ins.* (2004) 121 CA4th 1156, 1167, 18 CR3d 142 (disqualification for failure to comply with disclosure requirements) may also be challenged for cause.

2. Grounds for Disqualification

a. [§2.11] Personal Knowledge

Judges who have personal knowledge of disputed evidentiary facts in proceedings assigned to them must recuse themselves. CCP §170.1(a)(1)(A). A judge is deemed to have "personal knowledge" if the judge knows that the judge, his or her spouse, or a relative within the third degree of kinship to either of them or the spouse of such a person is likely to be a material witness in the proceeding. CCP §170.1(a)(1)(B). The civil law system is used to calculate the degree of relationship. CCP §170.5(d). It includes direct descendants within three generations (*e.g.,* the judge's great-grandchildren) and relatives through a common ancestor measuring three generations back to the ancestor and down to the relative (*e.g.,* the judge's nephews and nieces, but not cousins). See *People v Williams* (1997) 16 C4th 635, 652–653, 66 CR2d 573 (judge's daughter's husband's nephew does not qualify as "a person within the third degree of relationship" to judge). An example of disqualification for personal knowledge is found in *People v Avol* (1987) 192 CA3d Supp 1, 6, 238 CR 45 (judge's ex parte inspection of property violated defendant's right to controvert evidence, but did not violate due process right or require reversal given overwhelming evidence and complete lack of showing of prejudice that might have required recusal).

Litigants may waive this type of disqualification except when the judge is a material witness in the proceeding. CCP §170.3(b); Cal Rules of Ct 2.818(c)(2)(C) [temporary judge].

b. [§2.12] Former Counsel

A judge is disqualified if the judge served as a lawyer in the proceeding, represented one of the parties in another action that involved the same issues, or gave advice to one of the parties on any matter

involved in the present proceeding. CCP §170.1(a)(2)(A). A judge is deemed to have served as a lawyer in the proceeding if, within the past two years:

- A party or an officer, director, or trustee of a party was a client of the judge or of the judge's former law firm (CCP §170.1(a)(2)(B)(i)); or
- A lawyer in the proceeding was associated in private practice (see CCP §170.5(e)) with the judge (CCP §170.1(a)(2)(B)(ii)).

The judge is also disqualified if he or she was an attorney with a public agency that is a participant in the proceeding and personally advised or represented the agency regarding issues present in the proceeding. CCP §170.1(a)(2)(C).

When the judge has served as an attorney in the matter in controversy, the disqualification may not be waived. CCP §170.3(b)(2)(B); Cal Rules of Ct 2.818(c)(2)(B) [temporary judge].

A judge has a duty to disclose that the judge's former firm has represented one of the parties. *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 425, 285 CR 659. Although this fact may be common knowledge in the community, it is the judge's responsibility to disclose this fact and not counsel's responsibility to uncover and reveal it. 234 CA3d at 425.

There are additional limitations that disqualify an attorney from serving as a temporary judge in certain circumstances, unless the presiding judge waives the disqualification for good cause (Cal Rules of Ct 2.818(b)):

- If the attorney is appearing on the same day in the same courthouse as an attorney or party in any case (Cal Rules of Ct 2.818(b)(1));
- If the attorney is a party at that time in any court proceeding in the same court (Cal Rules of Ct 2.818(b)(2)); or
- If, in a family law or unlawful detainer case, only one side is represented by an attorney or is an attorney while the other side is self-represented (Cal Rules of Ct 2.818(b)(3)).

c. [§2.13] Financial Interest

In general. A judge who has a financial interest in the proceedings or in a party to the proceedings is disqualified. CCP §170.1(a)(3)(A). The judge is disqualified if the financial interest is held by the judge, the judge's spouse, or a minor child who is living in the judge's household, or if it is held by the judge or the judge's spouse in a fiduciary capacity, *i.e.,* as an executor, trustee, guardian, or administrator. CCP §§170.1(a)(3)(B), 170.5(g). A judge must make reasonable efforts to keep current and

informed about all such financial interests so that he or she may make knowledgeable decisions regarding recusal. CCP §170.1(a)(3)(C).

Financial interest. A "financial interest" includes (1) ownership of more than a one percent legal or equitable interest in a party, (2) a legal or equitable interest in a party that has a fair market value of more than $1500, or (3) a relationship as a director, adviser, or other active participant in the affairs of a party. CCP §170.5(b). "Financial interest" does not include (1) ownership in a mutual or common investment fund that holds securities unless the judge participates in managing the fund, (2) holding an office in an educational, religious, charitable, fraternal, or civic organization that holds securities, or (3) an interest as a policyholder of a mutual insurance company or as a depositor in a mutual savings association, or a similar proprietary interest, unless the outcome of the proceeding could substantially affect the value of that interest. CCP §170.5(b).

A judge may have a duty to disqualify himself or herself from hearing a case, based on ownership of bonds. Ownership of a corporate bond issued by a party is grounds for disqualification if the bond has a fair market value of more than $1500. Ownership of a government bond is considered grounds for disqualification only if the outcome of the proceeding could substantially affect the value of the judge's bond. Ownership in a mutual or common investment fund that holds bonds is not a disqualifying financial interest. Cal Rules of Ct, Code of Judicial Ethics, Canon 3E(3).

Exception to financial interest rule. The only exception to the financial interest rule occurs when there is no other judge or court to hear and resolve the case, *i.e.,* when every judge in California has a financial interest in the outcome. *Olson v Cory* (1980) 27 C3d 532, 537, 178 CR 568 (action to determine constitutionality of legislation limiting judicial salaries).

d. [§2.14] Family Connection to Party or Counsel

A judge is disqualified if the judge, the judge's spouse, or a person within the third degree of relationship to either of them (or the spouse of such a person) is a party or an officer, director, or trustee of a party. CCP §170.1(a)(4). On persons within the third degree of relationship, see §2.11. A judge who fails to initiate recusal and acts in a proceeding involving a family member is subject to admonition. See Rothman, *Handbook* §7.46.

A judge is also disqualified if the judge or his or her spouse is a child, sibling, spouse, former spouse, or parent of one of the lawyers in the case or is associated in private practice with a lawyer in the case. CCP §170.1(a)(5). See also CJA Ethics Opinion 45; Rothman, *Handbook* §7.45 (relative's employment in nonattorney position by law firm involved in proceeding *probably* does not disqualify judge).

e. [§2.15] Interests of Justice, Bias, and Appearance of Bias

In general. A judge is disqualified if

- The judge believes that recusal would serve the interests of justice (CCP §170.1(a)(6)(A)(i)),
- The judge has substantial doubt that he or she could be impartial (CCP §170.1(a)(6)(A)(ii)), or
- A person who was aware of the facts might reasonably entertain a doubt about the judge's impartiality (CCP §170.1(a)(6)(A)(iii)); Commentary to Cal Rules of Ct, Code of Judicial Ethics, Canon 3E. See *Housing Auth. of Monterey County v Jones* (2005) 130 CA4th 1029, 1041–1942, 30 CR3d 676 (judge who decided pretrial motions against defendant in limited civil case was disqualified under CCP §170.1(a)(6)(A)(iii) from sitting on appellate division panel that heard defendant's appeal); *DCH Health Servs. Corp. v Waite* (2002) 95 CA4th 829, 833, 115 CR2d 847 (recusal may be required on basis of mere appearance of impropriety); *Gai v City of Selma* (1998) 68 CA4th 213, 230–233, 79 CR2d 910 (this provision does not apply to administrative hearing officers).

Examples. The most common examples of disqualifying bias are a judge's personal bias against a party, which may not be waived (CCP §170.3(b)(2)(A)), and bias toward a lawyer in the proceeding (CCP §170.1(a)(6)(B)). See *In re Buckley* (1973) 10 C3d 237, 256, 110 CR 121 (judge must be so personally embroiled with lawyer that judge's capacity for impartiality is destroyed). Bias toward a witness is also grounds for disqualification. *In re Henry C.* (1984) 161 CA3d 646, 653, 207 CR 751.

☛ JUDICIAL TIP: Some judges maintain a list of affiliations that may raise the issue of disqualification, and circulate this list to members of their staff who review files, such as clerks and research attorneys. In this way, staff may help judges to be alert to possible conflicts.

Objective standard. Judges should use an *objective* standard in deciding whether a person aware of the facts might entertain doubts concerning the judge's impartiality. *Briggs v Superior Court* (2001) 87 CA4th 312, 319, 104 CR2d 445; *Flier v Superior Court* (1994) 23 CA4th 165, 170, 28 CR2d 383; see *Roitz v Coldwell Banker Residential Brokerage Co.* (1998) 62 CA4th 716, 723, 73 CR2d 85 (standard for arbitrator). In deciding the question of recusal, judges should ask themselves if a reasonable person would entertain such doubts looking at the circumstances at the present time. *United Farm Workers of Am. v Superior Court* (1985) 170 CA3d 97, 104, 216 CR 4. See *Ceriale v AMCO Ins. Co.*

(1996) 48 CA4th 500, 506, 55 CR2d 685 (relationship between arbitrator and attorney for party, although indirect, could raise doubts about arbitrator's impartiality).

No actual bias required. Actual bias need not be present. *Roitz v Coldwell Banker Residential Brokerage Co., supra,* 62 CA4th at 723. If an average person could entertain doubt about the judge's impartiality, disqualification is mandated. *Catchpole v Brannon* (1995) 36 CA4th 237, 246, 42 CR2d 440. An appellate court will not speculate about whether the bias was actual or merely apparent; reversal is required in such a case, with remand of the matter to a different judge for a new hearing on all issues. CCP §170.1(c); *In re Wagner* (2005) 127 CA4th 138, 147–149, 25 CR3d 201; *Roitz v Coldwell Banker Residential Brokerage Co., supra,* 62 CA4th at 723; *Catchpole v Brannon, supra,* 36 CA4th at 247; discussion in §§2.20–2.21.

(1) [§2.16] No Bias Found

In general. Potential bias and prejudice must be clearly established. *Roitz v Coldwell Banker Residential Brokerage Co.* (1998) 62 CA4th 716, 724, 73 CR2d 85. Bias or prejudice consists of a judge's mental attitude or disposition for or against a party to the litigation. 62 CA4th at 724. Remote or tenuous connections between the judge and a party are not sufficient to disqualify the judge.

Examples. Some of the situations in which bias or partiality has *not* been found are when:

- The judge had participated in pretrial proceedings in which she heard various statements about a prosecution witness, was informed that the defendant had pleaded guilty and had been sentenced for related noncapital charges, and heard from defense counsel about defendant's current plea. *People v Scott* (1997) 15 C4th 1188, 1205–1207, 65 CR2d 240. See §2.22.
- In a pretrial proceeding, the trial judge was outraged because trial counsel failed to notify the trial court that counsel had requested a temporary stay of proceedings at the brink of jury selection, where the judge's comments were outside the presence of any jurors, made clear that his irritation was with counsel and not defendant, and unequivocally stated that defendant would receive a fair trial. *People v Guerra* (2006) 37 C4th 1067, 1111, 40 CR3d 118.
- The judge made a single racially insensitive remark when addressing the defendant. *Flier v Superior Court* (1994) 23 CA4th 165, 171, 28 CR2d 383 (remark may give rise to public reproval by Commission on Judicial Performance).

- The judge expressed frustration with an attorney's conduct. *Roitz v Coldwell Banker Residential Brokerage Co., supra,* 62 CA4th at 724–725; *People v Brown* (1993) 6 C4th 322, 337, 24 CR2d 710.
- The judge made prior erroneous legal rulings on various objections and motions. *Garcia v Estate of Norton* (1986) 183 CA3d 413, 423, 228 CR 108.
- The judge expressed an opinion in chambers that the defendant should settle. 183 CA3d at 423 (statement was made according to judge's usual practice of attempting to settle personal injury cases). But see *Pacific & Southwest Annual Conference of United Methodist Church v Superior Court* (1978) 82 CA3d 72, 88, 147 CR 44 (bias found when judge wrote letter to parties expressing belief that plaintiff would prevail and urging them to settle).
- The judge expressed an opinion about a party that he had formed during a prior judicial hearing. *Jack Farenbaugh & Son v Belmont Constr., Inc.* (1987) 194 CA3d 1023, 1031, 240 CR 78.
- The judge gave an opinion about a witness's credibility based on the witness's testimony and evidence presented at trial. *People v Martinez* (1978) 82 CA3d 1, 19–21, 147 CR 208.
- One of the parties was a well-known attorney in the county. *Marriage of Fenton* (1982) 134 CA3d 451, 457, 184 CR 597 (there is no requirement as matter of law that all judges in county be disqualified and new judge be appointed by Chairperson of Judicial Council).
- The judge's spouse did volunteer work for a party for a few days a number of years earlier. *United Farm Workers of Am. v Superior Court* (1985) 170 CA3d 97, 106, 216 CR 4 (judge had not remembered wife's connection until many weeks of trial had elapsed and other party failed to show any evidence of partiality during trial).
- The judge had graduated from a university that is a party. *McCartney v Superior Court* (1990) 223 CA3d 1334, 1340, 273 CR 250 (graduation was over 30 years earlier). See also *Leland Stanford Junior Univ. v Superior Court* (1985) 173 CA3d 403, 408, 219 CR 40 (as matter of law, average person would find judge's involvement with alumni activities many years earlier to be sufficiently remote from issue of college's land management policies).
- The judge should not have disqualified himself under CCP §170.1(a)(6) based on rumors that the challenging party believed the judge was prejudiced against the challenger's interests—an

accusation the judge believed to be untrue. *Briggs v Superior Court* (2001) 87 CA4th 312, 319, 104 CR2d 445. On these facts alone, a reasonable person would not have reasonably entertained a doubt about the judge's impartiality. 87 CA4th at 319 (facts also did not show that interests of justice required disqualification).

- The judge in a capital murder prosecution was not required to recuse himself from hearing the defendant's automatic modification motion for having said to the jury at the conclusion of the trial that the judge believed the jury's decision was correct. *People v Farnam* (2002) 28 C4th 107, 193, 121 CR2d 106. The judge's comment did not imply that further examination of the verdict was unnecessary or that he had prejudged the merits of modification; rather, it was made to express the judge's gratitude to the jurors for their service in a lengthy trial. 28 C4th at 193–194.

See *In re Morelli* (1970) 11 CA3d 819, 844–845 n17, 91 CR 72, for summaries of other cases in which bias was not shown. See also §2.22, discussing factors that are not grounds for recusal under CCP §170.2.

Finding of contempt. Although the fact that a judge has found an attorney or party in contempt may indicate that the judge is personally embroiled in the case and needs to consider recusal (see *In re Buckley* (1973) 10 C3d 237, 255, 110 CR 121), the prior finding of contempt of a party does not necessarily require transfer to another judge (*McCann v Municipal Court* (1990) 221 CA3d 527, 544, 270 CR 640).

(2) [§2.17] Bias Found

Examples. Situations in which bias was found include when:

- The judge interrupted and yelled loudly and angrily at counsel and a litigant, and told a joke that suggested bias. *Dodds v Commission on Judicial Performance* (1995) 12 C4th 163, 176–177, 48 CR2d 106 (prejudicial conduct).
- The judge accepted gifts and favors from attorneys appearing in the judge's court. *Adams v Commission on Judicial Performance* (1995) 10 C4th 866, 904, 42 CR2d 606 (this required disqualification with respect to matters involving these attorneys or their firms).
- The judge had been the assigned calendar deputy district attorney when the defendant in a criminal case entered a plea to two priors under Pen C §667 and had actually conducted the preliminary examination. *Sincavage v Superior Court* (1996) 42 CA4th 224, 230–231, 49 CR2d 615 (impartiality during trial on current offenses was irrelevant; reasonable person would entertain doubt that judge would be impartial in ruling on matters involving the

priors; judge was disqualified based on participation in prior proceedings). However, the fact that the judge conducted the preliminary hearing in a criminal case, or participated in other pretrial proceedings, does not automatically disqualify the judge from acting as the trial judge. *People v Scott* (1997) 15 C4th 1188, 1205–1207, 65 CR2d 240; *People v DeJesus* (1995) 38 CA4th 1, 14–17, 44 CR2d 796.

- A retired judge who was selected as a neutral third arbitrator had previously served as an arbitrator selected by one of the parties. *Kaiser Found. Hosp., Inc. v Superior Court* (1993) 19 CA4th 513, 516–517, 23 CR2d 431. See CCP §170.1(a)(8) (disqualification for service as dispute resolution neutral), discussed in §2.19.
- The judge stated that he considered sexual harassment cases a misuse of the judicial system and found that the plaintiff lacked credibility, based on stereotypical attitudes and misconceptions. *Catchpole v Brannon* (1995) 36 CA4th 237, 262, 42 CR2d 440 (this constituted gender bias).
- The judge referred to one of the parties—a woman in her forties—as a "lovely girl." *Marriage of Iverson* (1992) 11 CA4th 1495, 1499, 15 CR2d 70 (revealed gender bias).
- The judge's derogatory remarks about attorneys during the trial indicated bias and created an appearance of unfairness requiring reversal of the judgment in a malicious prosecution action against the attorney. *Hall v Harker* (1999) 69 CA4th 836, 843, 82 CR2d 44.
- The judge had written a letter to all counsel expressing the judge's opinion of the case, which showed that he had prejudged the issues. *Pacific & Southwest Annual Conference of United Methodist Church v Superior Court* (1978) 82 CA3d 72, 84, 147 CR 44 (preconceived opinion as to liability).
- The judge indicated his belief that a party's witness lacked credibility even before the witness took the stand. *In re Henry C.* (1984) 161 CA3d 646, 653, 207 CR 751; but see *People v Martinez* (1978) 82 CA3d 1, 19–21, 147 CR 208 (judge was not disqualified for giving opinion about witness's credibility based on witness's testimony and evidence presented at trial).

See also *In re Morelli* (1970) 11 CA3d 819, 844 n17, 91 CR 72, for a collection of sufficient showings of bias.

Implied bias. Under CCP §170.1(a)(6), bias may be implied from a connection between a party and a judge that is not a statutory ground for disqualification under CCP §170.1. For example, CJA Ethics Opinion 19

states that a judge may not hear any case involving a co-employee of a former associate who had recently performed legal services for the judge.

☛ JUDICIAL TIP: A judge should be careful not to make unnecessary comments or statements about a case or the litigants if there are unresolved issues, evidence is still to be received, or there is a possibility of a retrial or an appeal. Even after these issues are resolved, a judge should avoid unnecessary comments about a case.

Double jeopardy. In a criminal or juvenile delinquency case, when a judge disqualifies himself or herself under CCP §170.1(a)(6), thus compelling a mistrial of the case, double jeopardy does not bar a retrial of the defendant. *In re Carlos V.* (1997) 57 CA4th 522, 525–528, 67 CR2d 155.

f. [§2.18] Physical Impairment

A physical impairment that would hinder the judge from perceiving evidence or conducting a proceeding is a basis for disqualification. CCP §170.1(a)(7). This ground for disqualification may be waived by failure to move for disqualification on learning of the judge's physical impairment. See *People v Pratt* (1962) 205 CA2d 838, 845, 23 CR 469.

g. [§2.19] Service as Dispute Resolution Neutral

A judge may be disqualified if he or she has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral. A judge may also be disqualified if he or she is participating in, or within the last two years has participated in, discussions regarding such prospective employment or service as a dispute resolution neutral, or has been engaged in such employment or service. CCP §170.1(a)(8)(A).

In either case, for the judge to be disqualified, one of the following must apply: (1) the arrangement is, or the prior employment or discussion was, with a party to the proceeding; (2) the matter before the judge includes issues relating to the enforcement of either an agreement to submit a dispute to an alternative dispute resolution process or an award or other final decision by a dispute resolution neutral; (3) the judge directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with which the judge has the arrangement, has previously been employed or served, or is discussing or has discussed employment or service; or (4) the judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with which

the judge has the arrangement, with which the judge has previously been employed or served, or with which the judge is discussing or has discussed employment or service. CCP §170.1(a)(8)(A).

For purposes of this ground for disqualification, the term "party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts giving rise to the issues subject to the proceeding. CCP §170.1(a)(8)(B)(ii). The term "dispute resolution neutral" means an arbitrator, mediator, temporary judge, referee, special master, neutral evaluator, settlement officer, or settlement facilitator. CCP §170.1(a)(8)(B)(iii).

The term "participating in discussions" or "has participated in discussion" means that the judge solicited or otherwise indicated an interest in accepting or negotiating possible employment or service as an alternative dispute resolution neutral. It also means that a judge responded to an unsolicited statement regarding, or an offer of, such employment or service by expressing an interest in that employment or service, making any inquiry regarding the employment or service, or encouraging the person making the statement or offer to provide additional information about possible employment or service. CCP §170.1(a)(8)(B)(i). But a negative response (declining the offer or declining to discuss) to an unsolicited statement regarding, questions about, or an offer of, prospective employment or other compensated service as a dispute resolution neutral would not be considered participating in discussions. CCP §170.1(a)(8)(B)(i).

For an example of when disqualification is required under CCP §170(a)(8)(A)(ii), see *Rossco Holdings, Inc. v Bank of America* (2007) 149 CA4th 1353, 1358, 58 CR3d 141, in which the judge properly disqualified himself in an action involving arbitration because he had engaged in discussions for prospective employment as a dispute resolution neutral within the previous two years, and those discussions were considerably more substantial than the simple rejections of solicitations that are allowed by CCP §170.1(a)(8)(B)(i).

h. [§2.20] Appellate Review of Own Proceedings

A judge who has tried a case is disqualified from participating in the appellate review of that case. CCP §170.1(b).

i. [§2.21] Retrial After Appellate Reversal

In general. A judge who originally tries a case is not automatically disqualified from retrying the case after there has been an appellate reversal. *People v DeJesus* (1995) 38 CA4th 1, 16, 44 CR2d 796. However, at the request of a party or on its own motion, when granting a retrial, an appellate court must consider whether in the interest of justice it

should direct that a different judge hear the retrial. CCP §170.1(c). Code of Civil Procedure §170.1(c) should be used sparingly, however, and only when the interest of justice requires it. *Livingston v Marie Callenders, Inc.* (1999) 72 CA4th 830, 840, 85 CR2d 528; *People v Superior Court* (Dorsey) (1996) 50 CA4th 1216, 1230, 58 CR2d 165.

Examples in civil cases. The fact that the judge made erroneous rulings is not, by itself, sufficient justification for removing the judge from further proceedings in the case. *Blakemore v Superior Court* (2005) 129 CA4th 36, 59–60, 27 CR3d 877. See *Hernandez v Superior Court* (2003) 112 CA4th 285, 4 CR3d 883 (denying petitioners' request for assignment of new judge because they were "forced" to file three petitions to overturn discovery orders, when one petition was summarily denied, two other petitions were partially granted and denied, and judge's orders did not suggest bias or disregard of law, but only frustration and desire to manage complex case). However, when the judge has exhibited numerous instances of bias toward a party in the case, such that the average person might justifiably doubt whether the judge could be impartial, there is ample justification for disqualifying the judge. *Catchpole v Brannon* (1995) 36 CA4th 237, 262, 42 CR2d 440.

Examples in criminal cases. Disqualification may be necessary when the sentence of the original judge was so disproportionate as to indicate bias or when the judge seemingly ignored the rules of the determinate sentencing scheme. *People v Gulbrandsen* (1989) 209 CA3d 1547, 1562, 258 CR 75. It should not be used for a mere sentencing error, nor should it be presumed that reversal on appeal because of a sentencing error would cause the sentencing judge to seek revenge in resentencing. 209 CA3d at 1562. See *In re Wagner* (2005) 127 CA4th 138, 147–149, 25 CR3d 201 (judge's personal embroilment in case and her summary revocation of defendant's probation that "was motivated by anger" warranted transfer of case to different judge); *People v Superior Court* (Dorsey)*, supra,* 50 CA4th at 1230–1231 (neither judge's release of defendant on his own recognizance immediately after conviction nor judge's sentencing errors required disqualification under CCP §170.1(c)); *Ng v Superior Court* (1997) 52 CA4th 1010, 1024, 16 CR2d 49 (disapproved on other grounds in 24 C4th 1057, 1069 n6) (trial judge's derogatory and unfounded statements concerning defense counsel, together with his unusual and inappropriate desire to keep the case, cast doubt on judge's ability to be impartial).

Peremptory challenge of judge. When a case must be partially retried after reversal on appeal, the original trial judge may be disqualified under CCP §170.6 from retrying the case. *Stegs Inv. v Superior Court* (1991) 233 CA3d 572, 284 CR 495. See CCP §170.6(a)(2) (challenge must be made within 60 days after notice of assignment). See also *People v Crew* (1991) 1 CA4th 1591, 1608 n13, 2 CR2d 755 (although court denied

prosecution's request that further proceedings be heard by different judge, it suggested that trial judge might consider disqualifying himself under CCP §170.1(a)(6)(A)(i)—recusal to further interests of justice). If a hearing after remand involves a contested issue in which trial court discretion or fact determination is involved, the hearing may be treated as a "new trial" for the purpose of disqualification even if it is not a complete trial. *Hendershot v Superior Court* (1993) 20 CA4th 860, 864–865, 24 CR2d 645. See §2.58.

Retrial after writ. The disqualification rules governing retrial after appeal apply also to retrial after writ. *Overton v Superior Court* (1994) 22 CA4th 112, 115, 27 CR2d 274.

3. [§2.22] What Does Not Constitute Grounds for Disqualification

It is not a ground for disqualification that a judge

- Is or is not a member of a racial, ethnic, religious, sexual, or other comparable group and the case involves the rights of that group. CCP §170.2(a). See *Savage v Trammel Crow Co.* (1990) 223 CA3d 1562, 1581, 273 CR 302 (Catholic judge was not disqualified from presiding over case involving distribution of religious literature in shopping centers). See also *People v Superior Court* (Mudge) (1997) 54 CA4th 407, 410, 62 CR2d 721 (appellate justices were not required to disqualify themselves from determining an appeal because of their membership in the California Judges' Association which had filed an amicus curiae brief in the matter).
- Has, in any capacity, expressed a view on a legal or factual issue involved in the case except as provided in CCP §170.1(a)(2) (judge served as lawyer for party), §170.1(b) (judge may not participate in appellate review of decision), or §170.1(c) (judge *may* be precluded from retrying case after reversal on appeal). CCP §170.2(b). See discussion in §2.21. The fact that a judge has participated in settlement discussions with the parties is not a proper ground for disqualification by virtue of CCP §170.2(b). *Roth v Parker* (1997) 57 CA4th 542, 549, 67 CR2d 250. However, many judges will only discuss settlement in cases assigned to them for trial when the parties have waived any right to disqualify the judge based on the settlement discussions. For a written form of waiver of disqualification, see §2.80.

  The fact that a judge has participated in a pretrial proceeding such as a preliminary hearing in a criminal case does not automatically disqualify the judge from conducting the trial. *People v Scott* (1997) 15 C4th 1188, 1205–1207, 65 CR2d 240;

People v DeJesus (1995) 38 CA4th 1, 14–17, 44 CR2d 796. But see *Sincavage v Superior Court* (1996) 42 CA4th 224, 230–231, 49 CR2d 615 (judge who had been assigned calendar deputy district attorney when defendant entered plea to two priors and who had conducted preliminary examination was disqualified as trial judge because reasonable person would entertain doubt that he or she would be impartial in ruling on matters involving the priors).

- Has participated in the drafting of laws or in the effort to pass or defeat laws involved in the proceeding, unless the judge believes that the involvement was so well known as to raise a reasonable doubt about the judge's impartiality. CCP §170.2(c).

4. [§2.23] Procedure for Recusal

On determining that a ground for disqualification exists, the judge must initiate recusal by notifying the presiding judge. CCP §170.3(a)(1). A disqualified judge who is the presiding judge or the sole judge of the court must notify the person with authority to assign another judge, *i.e.,* the Chairperson of the Judicial Council. CCP §§170.3(a)(2), 170.8. In practice, this usually means informing the Assignments Unit of the Administrative Office of the Courts.

In certain circumstances, the disqualified judge may ask the parties if they wish to waive the disqualification (see CCP §170.3(b)) and, if so, may proceed with the case after obtaining a valid waiver. See §2.24. A judge who does not discover the basis for the disqualification until after making one or more rulings in the proceeding, but before judicial action has been completed, must recuse himself or herself. CCP §170.3(b)(4). In the absence of good cause, the rulings made up to that time should not be set aside by the replacement judge. CCP §170.3(b)(4). See *Sincavage v Superior Court* (1996) 42 CA4th 224, 231, 49 CR2d 615 (no requirement that conviction in criminal case be set aside when grounds for disqualification were discovered at postconviction hearing).

5. [§2.24] Waiver of Grounds for Disqualification

As an alternative to recusal, a judge may disclose (on the record) the interest or relationship that might give rise to a disqualification and ask the parties and their attorneys if they waive the disqualification. CCP §170.3(b)(1). The waiver must be in writing, must recite the basis for the disqualification, and is effective only when signed by all the parties and their attorneys and filed in the record. CCP §170.3(b)(2). The judge may not seek to induce a waiver, nor seek to discover which attorneys or parties favored or opposed a waiver. CCP §170.3(b)(3).

There can be no waiver when the basis for the disqualification is that the judge either has a personal bias or prejudice against a party (see

§§2.15–2.17) or has served as an attorney or been a material witness in the matter in controversy (see §2.12). CCP §170.3(b)(2).

For a form of waiver, see §2.80.

☛ JUDICIAL TIPS:

- Some judges make it a rule never to initiate waiver discussions in order to avoid the appearance of putting pressure on the attorneys and litigants. Others do not avoid initiating these discussions, but are careful to stop short of inducing a waiver. Others have their clerks ask counsel whether all parties have waived the disqualification.
- Some judges keep a supply of blank waiver forms to facilitate the proceedings.
- Many judges disclose facts that do not require recusal, but that they feel are important for litigants to know.

6. Disqualification for Cause by Party

a. [§2.25] Requirements for Statement of Disqualification

Any party may challenge a judge for cause by filing a written, verified statement with the clerk's office objecting to the hearing or trial before the judge and setting forth the facts constituting the basis for the disqualification. CCP §170.3(c)(1). Copies of the statement must be served on all parties or on any of their attorneys who have appeared. CCP §170.3(c)(1); see *McCartney v Superior Court* (1990) 223 CA3d 1334, 1340, 273 CR 250 (statement in reply to opposition to disqualification statement does not satisfy notice requirements of CCP §170.3). A copy must be personally served on the judge who is alleged to be disqualified, or on his or her courtroom clerk, provided that the judge is present in the courthouse or in chambers. See CCP §170.3(c)(1).

☛ JUDICIAL TIP: Judges should advise their courtroom clerks to immediately show them all statements of disqualification that they may have been served on judge's behalf under CCP §170.3(c)(1). If the clerk simply places the statement in the file, the judge may not know that a statement has been served and might then be deemed to have consented to the disqualification by failing to take action within the ten-day period specified in CCP §170.3(c)(3). See CCP §170.3(c)(4).

Generally, a statement of disqualification is not a motion, and the determination of the disqualification is outside the law and motion rules. *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 422, 285 CR 659. Many judges do not require strict compliance with the statutes. For example, although CCP §170.3(c)(1) refers to a verified statement, a declaration

under penalty of perjury may be sufficient. See *Urias v Harris Farms, Inc., supra,* 234 CA3d at 421 n4; *Hollingsworth v Superior Court* (1987) 191 CA3d 22, 25, 236 CR 193. However, a failure to provide a statement of reasons for the disqualification waives the challenge. *Roth v Parker* (1997) 57 CA4th 542, 549, 67 CR2d 250. A statement that merely contains allegations on information and belief or conclusions is insufficient, and the judge against whom the statement is filed may strike it. *Bear Creek Master Ass'n v Edwards* (2005) 130 CA4th 1470, 1474, 31 CR3d 337. If the alleged bias set forth in the statement of disqualification is merely based on dissatisfaction with the judge's rulings, the judge properly strikes the statement because it does not show legal cause for the challenge. 130 CA4th at 1474. The judge may also strike a statement that is not verified. *Bompensiero v Superior Court* (1955) 44 C2d 178, 183, 281 P2d 250.

An oral disqualification motion is insufficient, even if the challenged judge issues a written order denying it. A challenging party waives the challenge by failing to file a verified written statement that complies with CCP §170.3(c)(1). *People v Bryant* (1987) 190 CA3d 1569, 1573, 236 CR 96.

Each party may file only one statement of disqualification against a judge unless facts indicating new grounds for disqualification are discovered or arise after the statement is filed. CCP §170.4(c)(3). The challenged judge may strike a subsequent statement that does not allege facts suggesting new grounds for disqualification. CCP §170.4(c)(3).

b. [§2.26] Who Makes the Determination

A judge whose impartiality has been challenged and who refuses recusal may not rule on either the disqualification or the sufficiency in law or fact of the statement of disqualification. CCP §170.3(c)(5); *Garcia v Superior Court* (1984) 156 CA3d 670, 680, 203 CR 290. The question of disqualification must be determined by another judge who has been agreed on by all the parties who have appeared, or if they cannot agree, by a judge who was selected by the Chairperson of the Judicial Council. CCP §170.3(c)(5) (parties must reach agreement within five days of notification of answer of judge whose impartiality has been questioned). See *People v Mayfield* (1997) 14 C4th 668, 811, 60 CR2d 1 (defendant who told judge he wanted specific judge to hear disqualification motion, but who did not object when trial judge assigned matter to another judge for determination, impliedly consented to other judge, thus satisfying statutory requirement that motion be heard by judge agreed on by parties).

The judge whose disqualification for cause is sought has authority only to determine the issue of timeliness (*Hollingsworth v Superior Court* (1987) 191 CA3d 22, 27, 236 CR 193) and to strike the statement if it is

untimely or fails to disclose legal grounds for disqualification on its face. CCP §170.4(b); see §2.28.

Once it is determined that the Judicial Council must be involved, the clerk must notify the Judicial Council's executive officer. In reality, the clerk notifies the Assignments Unit of the Administrative Office of the Courts. The selection must be made as expeditiously as possible. The party who sought the disqualification may not challenge the new judge under CCP §170.6 (peremptory challenge) or CCP §170.3(c) (refusal of biased judge to recuse himself or herself). CCP §170.3(c)(5). Because of this, the identity of the new judge need not be disclosed beforehand to the parties. *Garcia v Superior Court, supra,* 156 CA3d at 685.

c. [§2.27] Time Limitations

The statement of disqualification must be presented at the earliest practicable opportunity after the party or attorney has discovered the facts constituting the basis for the disqualification. CCP §170.3(c)(1); *People v Scott* (1997) 15 C4th 1188, 1207, 65 CR2d 240 (defendant who knew of facts constituting ground for disqualification before trial, but who never objected to judge's presiding over trial or otherwise sought her disqualification, waived right to raise this issue on appeal); *People v Guerra* (2006) 37 C4th 1067, 1111, 40 CR3d 118 (it is too late to raise the issue for the first time on appeal when trial counsel made no effort to comply with the procedures of CCP §170.3(c)(1) and was silent after the trial judge assured that he could give defendant a fair trial despite his outrage at defendant's attorney and promise to later disqualify himself if he began compromising defendant's right to a fair trial); *Tri Counties Bank v Superior Court* (2008) 167 CA4th 1332, 1337, 84 CR3d 835 (challenge was rejected because the party delayed for over seven months; rejecting the party's contention that intervening stay of proceedings made filing impracticable, appellate court emphasized that a party may not take a wait-and-see approach and may only assert purported grounds after case has been decided against the party); *Eckert v Superior Court* (1999) 69 CA4th 262, 265, 81 CR2d 467 (motion made after judge had ruled on numerous motions in limine). Failure to file the statement promptly on discovering the ground for disqualification constitutes an implied waiver of the disqualification. *In re Steven O.* (1991) 229 CA3d 46, 55, 279 CR 868.

The statement may be timely even if filed after the judge has made one or more rulings in the case. See CCP §§170.3(b)(4), 170.4(c); *Church of Scientology v Wollersheim* (1996) 42 CA4th 628, 655–656, 49 CR2d 620, disapproved on other grounds in 29 C4th 53, 68 n5; *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 419, 285 CR 659 (statement of disqualification was timely after judge granted motion for summary judgment because litigant did not learn of grounds for disqualification

until then). See §2.33 for discussion of validity of judge's rulings after judge has been disqualified. However, even when the basis for disqualification is known early on, the statement need not be presented until the assignment is entirely certain. See *Hollingsworth v Superior Court* (1987) 191 CA3d 22, 27, 236 CR 193 (filing statement of disqualification in advance would be superfluous and might even be insolent and offensive).

Expeditious resolution of the disqualification question is essential. Permitting a party to disqualify a judge for cause should not enable that party to introduce inordinate delays into the proceedings. *Garcia v Superior Court* (1984) 156 CA3d 670, 677, 203 CR 290.

The challenged judge may strike an untimely statement. CCP §170.4(b). See §§2.26, 2.81.

d. Judge's Response to Statement of Disqualification

(1) [§2.28] Judge's Options

A judge whose impartiality has been challenged may take a number of actions. The judge may:

- Request any judge agreed on by the parties to act in his or her place, without conceding disqualification. CCP §170.3(c)(2).

☛ JUDICIAL TIP: If a statement of disqualification has been filed under CCP §170.3 and there are no actual grounds for disqualification, a judge should not circumvent the duty to hear a case (CCP §170) by consenting to the disqualification or requesting another judge to act in his or her place. Judges have a primary obligation to decide cases. See CCP §170; Rothman, *Handbook* §7.01.

- Consent to the disqualification within ten days of the filing or service of the statement, whichever is later, and notify the presiding judge or other person authorized to appoint a replacement. CCP §170.3(c)(3).
- Within ten days of the filing or service of the statement, file a verified written answer, admitting or denying the allegations and setting forth additional facts. The clerk must transmit a copy of the judge's answer to each party or attorney who has appeared. CCP §170.3(c)(3).
- Strike the statement if it was untimely filed (see §2.27) or, on its face, discloses no legal grounds for disqualification (see §2.25). CCP §170.4(b). A judge is not precluded from striking the statement as untimely by the fact that the judge has previously filed an answer to the statement under CCP §170.3(c)(3). These procedural

options are not mutually exclusive. *PBA, LLC v KPOD, Ltd.* (2003) 112 CA4th 965, 972, 5 CR3d 532. However, a judge cannot consent or answer *after* striking the statement of disqualification. 112 CA4th at 973.

If no action is taken within the applicable time limits, the judge is deemed to have consented to the disqualification. CCP §170.3(c)(4); *People v Superior Court* (Mudge) (1997) 54 CA4th 407, 411, 62 CR2d 721.

(2) [§2.29] Contesting Disqualification

To contest the disqualification, the judge must file an answer within the ten-day period prescribed in CCP §170.3(c)(3) (*i.e.,* within ten days of the filing or service of the statement), denying the allegations contained in the statement. *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 421, 285 CR 659. Although the statute refers to an "answer" by the challenged judge, a judge's written declaration under penalty of perjury satisfies the statutory requirement. *People v Mayfield* (1997) 14 C4th 668, 811, 60 CR2d 1.

(3) [§2.30] Proceeding With Trial or Hearing

If the statement of disqualification was filed after the commencement of the trial or hearing, the judge whose impartiality is at issue may order the trial or hearing to proceed. CCP §170.4(c)(1). The disqualification question must be referred for adjudication to another judge, and if the original judge is found to be disqualified, all orders and rulings made after the statement of disqualification was filed must be vacated. CCP §170.4(c)(1).

Generally, the commencement of trial or hearing is defined as the start of voir dire, the swearing of the first witness, or the submission of a motion for decision. See CCP §170.4(c)(1). Because these events are stated in the alternative, the first event to occur commences the trial. *Eckert v Superior Court* (1999) 69 CA4th 262, 266, 81 CR2d 467. For example, in a case in which a party moved to disqualify the trial judge for cause after the judge had ruled on 20 motions in limine, but before the commencement of voir dire, the judge properly refused to stay the proceedings until a second judge ruled on the party's motion, and properly proceeded with the trial. 69 CA4th at 266. Under the statutory language, the trial "commenced" when the parties submitted motions in limine for the trial judge's decision. 69 CA4th at 266. The appellate court rejected the contention that a jury trial does not "commence" within the meaning of CCP §170.4(c)(1) until voir dire has started. 69 CA4th at 265–266.

In a one-judge court or when the case has been assigned to a single judge for disposition and the proceeding has been set 30 or more days in

advance to a known judge, the trial or hearing is deemed to have commenced ten days before the date scheduled for trial or hearing as to any grounds for disqualification known before that time. CCP §170.4(c)(2).

☛ JUDICIAL TIP: Because a disqualified judge's orders and rulings must be vacated, some judges tend to avoid making orders or rulings if a challenge for cause that could reasonably be considered meritorious is filed before the hearing or trial has begun. They make orders or rulings only if the pending challenge is clearly specious. Few judges let the filing of a challenge deter them if the challenge is filed after the start of the hearing or trial. Once they conclude that the alleged grounds are unfounded or the challenge is untimely, most judges order the hearing or trial to go forward and do not allow the challenge to interrupt or delay the proceedings.

(4) [§2.31] Striking Statement of Disqualification

In addition to striking a statement of disqualification if it was untimely filed or if, on its face, it disclosed no legal grounds for disqualification (see CCP §170.4(b)), the judge whose impartiality is being challenged may also strike repetitive statements of disqualification that do not allege facts suggesting new grounds. CCP §170.4(c)(3).

The ability to strike the statement of disqualification is a narrow exception to the rule of CCP §170.3(c)(5) (no judge may pass on his or her own disqualification). *PBA, LLC v KPOD, Ltd.* (2003) 112 CA4th 965, 972, 5 CR3d 532. Moreover, the fact that the judge has previously filed an answer to the statement under CCP §170.3(c)(3) does not preclude the judge from striking the statement. These procedural options are not mutually exclusive. 112 CA4th at 972. The only restraint on a judge's authority to strike a statement of disqualification is that a judge must do so within the ten-day time limit specified in CCP §170.3(c)(3), *i.e.,* within ten days of the filing or service of the statement. 112 CA4th at 972–973. A judge cannot, however, consent to or answer the statement *after* striking the statement. 112 CA4th at 973.

A judge who does not strike the statement of disqualification within this ten-day time limit is deemed disqualified. *Lewis v Superior Court* (1988) 198 CA3d 1101, 1104, 244 CR 328. Once a judge strikes a statement of disqualification, the aggrieved party may seek a writ immediately without waiting for the ten-day period to elapse. *Hollingsworth v Superior Court* (1987) 191 CA3d 22, 26, 236 CR 193.

7. [§2.32] Decision Regarding Disqualification

Procedure for ruling. The judge who is selected to rule on the disqualification issue (see §2.23) may rule solely on the basis of information in the file, *i.e.*, the statement of disqualification, the answer, and written arguments, if requested. CCP §170.3(c)(6). The pleadings and other records in the case file may also be helpful.

The judge has the discretion to set the matter for hearing as soon as practicable. CCP §170.3(c)(6); *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 422, 285 CR 659. At the hearing the judge may hear the arguments of the parties and the judge whose disqualification is sought. If a hearing is held, the judge whose disqualification is sought may request representation by the county counsel. *Estate of Di Grazia* (1993) 13 CA4th 681, 685, 16 CR2d 621 (disapproved on other grounds in 24 C4th 1057, 1069 n6). Evidence may be presented at the hearing if good cause is shown. CCP §170.3(c)(6); *Garcia v Superior Court* (1984) 156 CA3d 670, 680, 203 CR 290.

The party seeking to challenge the judge has the burden of proof to establish that a ground for disqualification exists. *Betz v Pankow* (1993) 16 CA4th 919, 926, 20 CR2d 834. See §§2.11–2.21 for a discussion of grounds.

☛ JUDICIAL TIPS:

- Many judges recommend that the determination be made without a hearing unless further information is needed or the issues are very complex. If no hearing is held, the judge making the determination should permit the filing of supplemental affidavits.
- Judges also recommend that if the disqualification motion can be denied both on technical grounds and on the merits, the judge making the determination should deny it on both grounds to prevent any future misinterpretation of the charges.
- If there is a finding of disqualification, a note stating which judge was disqualified and by whom, along with the date and the basis for the challenge, should be prominently affixed to the file by the clerk so that the disqualified judge is not inadvertently assigned the case again.

For a form of decision that may be used, see §2.81.

Reassignment. If disqualification is warranted, the presiding judge or person having authority to appoint a replacement should be notified. CCP §170.3(c)(6). The presiding judge is authorized to reassign cases as required by convenience or necessity. Cal Rules of Ct 10.603(c)(1)(D). If there is no qualified judge who can hear the action or proceeding, the clerk must notify the Chairperson of the Judicial Council. Usually this means

that the clerk should notify the Assignments Unit of the Administrative Office of the Courts. After the Judicial Council assigns a judge, that judge must hear the action or proceeding at the scheduled time, or if there is no scheduled time or good cause appears for changing the time, the assigned judge must set a time for the hearing. CCP §170.8.

☛ JUDICIAL TIP: After recusal or a determination of disqualification for cause, the disqualified judge may not choose his or her own successor. Even when a rural court has a reciprocal agreement with another court to supply judges when necessary, the disqualified judge must still go through the AOC Assignments Unit to obtain a reassignment of the case.

Sanctions. If the judge hearing the challenge for cause concludes that it was frivolous or made for the purpose of delay, that judge may sanction the challenging party under CCP §128.5 (in a case filed before January 1, 1995) for the costs of the judge's reasonable expenses, including attorneys' fees, incurred as a result of the challenge. *Estate of Di Grazia, supra,* 13 CA4th at 685. In a case filed on or after January 1, 1995, sanctions may be imposed if the judge hearing the challenge concludes it was presented for an improper purpose, such as to harass or cause unnecessary delay. See CCP §128.7(b)(1). An attorney who files a false affidavit of disqualification may be cited for direct contempt. *Fine v Superior Court* (2002) 97 CA4th 651, 665–674, 119 CR2d 376.

8. [§2.33] Permissible Actions by Disqualified Judge

A disqualified judge is permitted only to

(1) Take any action or issue any order required to maintain the court's jurisdiction pending assignment of a replacement judge. CCP §170.4(a)(1).

(2) Request another judge who has been agreed on by the parties to act in his or her place. CCP §§170.4(a)(2), 170.3(c)(2).

(3) Hear and rule on purely default matters. CCP §170.4(a)(3).

(4) Issue a possession order pending judgment in eminent domain proceedings. CCP §170.4(a)(4).

(5) Set proceedings for trial or hearing. CCP §170.4(a)(5).

(6) Hold settlement conferences. CCP §170.4(a)(6). See *Adams v Commission on Judicial Performance* (1995) 10 C4th 866, 904–905, 42 CR2d 606 (judge was not required to disclose that he had received gifts and favors from attorney appearing before him at settlement conference).

Otherwise, a disqualified judge has no power to act after the disqualification. CCP §170.4(d). Except as noted above, once a statement of disqualification has been filed, the judge may take no further action in the proceedings until the disqualification issue has been determined. CCP §170.4(d). A judge who has disqualified himself or herself because of bias

against a criminal defendant may not remain in the case to sentence a codefendant. *People v Bridges* (1982) 132 CA3d 234, 238, 183 CR 118 (decided under former CCP §170). See *Geldermann, Inc. v Bruner* (1991) 229 CA3d 662, 280 CR 264 (after completion of court trial and issuance of tentative decision, trial judge who voluntarily disqualifies himself is precluded from continuing to act in case).

If the grounds for disqualification were not discovered until after the trial or hearing commenced, the judge may order the trial or hearing to proceed. CCP §170.4(c)(1). See §2.28 for a discussion of what constitutes commencement of a trial or hearing. But once it is determined that the judge is disqualified, all orders and rulings made by the judge after the filing of the statement of disqualification must be vacated. CCP §170.4(c)(1).

9. [§2.34] Review of Order Granting or Denying Disqualification

Writ review. A judge's order granting or denying disqualification is not appealable unless there is a constitutional due process claim that the judge making the order was not impartial. *People v Mayfield* (1997) 14 C4th 668, 811, 60 CR2d 1. The order may only be reviewed by a writ of mandate, and the writ petition must be filed within ten days after service of written notice of the court's order regarding disqualification. CCP §170.3(d); *Curle v Superior Court* (2001) 24 C4th 1057, 1059, 103 CR2d 751; *PBA, LLC v KPOD, Ltd.* (2003) 112 CA4th 965, 970–971, 5 CR3d 532 (litigants who challenge denial of disqualification motion are limited to writ review).

This rule, which denies a right of appeal and requires that any writ petition must be filed within ten days of service of written notice of the court's order, has a twofold purpose: (1) it seeks to eliminate the waste of time and money that would result from continuing the proceeding subject to its being voided by an appellate ruling that the disqualification decision was erroneous; and (2) it also promotes fundamental fairness by denying the party seeking disqualification a second "bite at the apple" if the party loses on the merits but succeeds on appeal from the disqualification order. *Bear Creek Master Ass'n v Edwards* (2005) 130 CA4th 1470, 1474, 31 CR3d 337; *PBA, LLC v KPOD, Ltd., supra,* 112 CA4th at 971.

Who may seek review. Review may be sought by the parties to the proceedings. CCP §170.3(d). But the judge does not have standing to seek review if disqualification is ordered. *Curle v Superior Court, supra*, 24 C4th at 1071.

Waiver of review. In general, when a judge discloses a possible basis for disqualification for cause and the parties agree that the judge may hear the case, they may not later raise the issue of disqualification on appeal. *People v Williams* (1997) 16 C4th 635, 651–652, 66 CR2d 573 (when

judge disclosed that his daughter's husband's nephew may have been present at crime scene and defendant expressly agreed that judge could hear case, defendant was barred from raising issue of disqualification on appeal). See *People v Avol* (1987) 192 CA3d Supp 1, 6, 238 CR 45 (party who fails to seek disqualification for cause forfeits opportunity to appeal on basis that there were grounds for disqualification); *People v Klaess* (1982) 129 CA3d 820, 824, 181 CR 355 (litigant may not raise issue of disqualification of trial judge for bias for first time on appeal). However, even if the parties are willing to do so, they cannot waive the following grounds for disqualification if: (1) the judge either has a personal bias or prejudice against a party or has served as an attorney in the case, or (2) the judge has been a material witness in the matter in controversy. CCP §170.3(b)(2). See *Catchpole v Brannon* (1995) 36 CA4th 237, 244–245, 42 CR2d 440 (plaintiff was not required to raise issue of judge's gender bias in trial court in order to preserve issue for appeal).

Standard of review. An appellate court may overturn a judge's ruling on a recusal motion only for abuse of discretion. *People v Alvarez* (1996) 14 C4th 155, 237, 58 CR2d 385; *Hemingway v Superior Court* (2004) 122 CA4th 1148, 1153, 19 CR3d 363.

10. [§2.35] Effect of Disqualification for Cause on Rulings by Judge

The acts of a judge subject to disqualification are void or, according to some authorities, voidable. *Giometti v Etienne* (1934) 219 C 687, 688–689 (void); *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 424, 285 CR 659 (voidable); *Betz v Pankow* (1993) 16 CA4th 931, 939–940, 20 CR2d 841 (voidable); *Rossco Holdings Inc. v Bank of America* (2007) 149 CA4th 1353, 58 CR3d 141 (void); *Christie v City of El Centro* (2006) 135 CA4th 767, 37 CR3d 718 (void); see also §2.75 for discussion of effect of rulings by judge who was subject of a peremptory challenge.

11. [§2.36] When Due Process Requires Disqualification

The due process clause of the federal Constitution (US Const amend XIV) can require judicial disqualification in a case in which a complainant has forfeited any right to disqualify the judge under the state disqualification statute. Although a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Rather, based on an objective assessment of the circumstances in the particular case, the probability of actual bias must exist on the part of the judge that is too high to be constitutionally tolerable. Only the most extreme facts justify judicial disqualification under the due process clause. *Caperton v A.T. Massey Coal Co., Inc.* (2009) __ US ___, 129 S Ct 2252, 173 L Ed 2d 1208

(Supreme Court found that due process was violated by a state high court justice's refusal to recuse himself from a case involving a $50 million damage award against a company whose chairman had contributed $3 million to the justice's election campaign, and the justice had cast the deciding vote that overturned the award). See also *People v Freeman* (2010) 47 C4th 993, 103 CR3d 723 (trial judge's acceptance of case after he had once recused himself was not a due process violation because it did not show required high probability of actual bias or present exceptional facts).

B. Peremptory Challenge

1. [§2.37] General Background

No trial judge, commissioner, or referee may try any civil or criminal case or hear any matter involving a contested issue of law or fact if it is established that the judicial officer is prejudiced against a party or attorney or the interest of a party or attorney. CCP §170.6(a)(1); see §2.39. A party or attorney may establish this prejudice by oral or written motion without notice. The motion must be supported by a declaration under penalty of perjury, an affidavit, or an oral statement under oath, stating that the judicial officer to whom the case is assigned is prejudiced against the party or attorney who therefore cannot receive a fair trial or hearing. CCP §170.6(a)(2); see §§2.40–2.41.

The right to exercise a peremptory challenge against a judge is a creature of statute; it did not exist in the common law predating the enactment of CCP §170.6. *Home Ins. Co. v Superior Court* (2005) 34 C4th 1025, 1031, 22 CR3d 885. This right is an extraordinary right that should be liberally construed to promote justice. *Nissan Motor Corp. v Superior Court* (1992) 6 CA4th 150, 154, 7 CR2d 801. See *Hemingway v Superior Court* (2004) 122 CA4th 1148, 1158, 19 CR3d 363 (courts must refrain from any tactic or maneuver that has practical effect of diminishing this important right). The statute allowing a peremptory challenge must be liberally construed in favor of allowing a challenge, and a challenge should be denied only if the statute absolutely forbids it. *Stephens v Superior Court* (2002) 96 CA4th 54, 61–62, 116 CR2d 616.

If the challenge is timely and properly made, the assignment of a replacement judge follows "without any further act or proof." CCP §170.6(a)(3). A party may obtain the disqualification of a judge for prejudice under CCP §170.6 based solely on a sworn statement, without being required to establish prejudice as a matter of fact to the judge's satisfaction; the judge must accept the disqualification without further inquiry. *The Home Ins. Co. v Superior Court, supra,* 34 C4th at 1032. There is no hearing or ruling on the merits of the challenge. *Barrett v Superior Court* (1999) 77 CA4th 1, 4–5, 91 CR2d 116.

The judge must make an *instant* determination as to the validity of a properly made challenge; if properly made, the disqualification takes effect instantaneously and requires the court to transfer the case immediately for reassignment. *Hemingway v Superior Court, supra,* 122 CA4th at 1157. See *Davcon, Inc. v Roberts & Morgan* (2003) 110 CA4th 1355, 1359–1362, 2 CR3d 782 (60-day time limit for ruling on motion for new trial or motion for judgment notwithstanding the verdict is not extended when party files peremptory challenge against judge who heard motion, because disqualification takes effect instantaneously).

The disqualification is automatic in the sense that a good faith belief in prejudice is in itself sufficient to disqualify the judge. CCP §170.6(a)(3); *McCartney v Commission on Judicial Qualifications* (1974) 12 C3d 512, 531, 116 CR 260. Good faith is presumed from the act of challenging the judge under oath. *Solberg v Superior Court* (1977) 19 C3d 182, 200, 137 CR 460. Although CCP §170.6(a)(2) requires the party or attorney to show "good faith" by declaring under oath that the judge is prejudiced, it does not follow that a showing of bad faith invalidates the disqualification motion. *School Dist. of Okaloosa County v Superior Court* (1997) 58 CA4th 1126, 1136–1137, 68 CR2d 612 (timely disqualification motion must be granted without regard to disruption it may cause to orderly administration of case).

In *Solberg v Superior Court, supra,* the Supreme Court upheld the constitutionality of CCP §170.6 by stating that the legislature's method in trying to maintain the appearance as well as the fact of impartiality in the judicial system was a reasonable one. 19 C3d at 192. To preserve public confidence in the impartiality of the courts, a good faith statement of belief alone justifies disqualification. 19 C3d at 193. Although disqualification motions have been brought as a means of "judge-shopping," to cause delay, or for other improper tactical advantages, the safeguards built into the statutes tend to minimize abuses, *e.g.,* permitting only one peremptory challenge per case per side and requiring that the challenge be brought at the earliest opportunity. 19 C3d at 196. The Trial Court Delay Reduction Act (Govt C §§68600–68620) also prohibits removing a proceeding from a delay reduction program because of a CCP §170.6 challenge. Govt C §68607.5.

The *Solberg* court denied a request to read into the statute the requirement that the party seeking the disqualification state specific facts and circumstances underlying the prejudice. The court noted that this proposal would require placing the details on the public record, thereby causing humiliation to the judge and disputing the truth of the allegations in court. 19 C3d at 199. See *Superior Court v County of Mendocino* (1996) 13 C4th 45, 56–57, 51 CR2d 837 (reaffirming holding of *Solberg*).

However, inherent in the right to disqualify a judge is adherence to statutory procedures necessary to benefit all litigants. *People v Superior*

Court (Williams) (1992) 8 CA4th 688, 698, 10 CR2d 873; see §§2.41–2.73. Even if the time limitations and other requirements are met, the challenge may still be denied when it is used to disqualify a judge solely on the basis of race. 8 CA4th at 699, 709. In such an event, the party who is opposing the challenge must establish a prima facie case. This party must first show that the other party exercised the challenge to remove a judge who is a member of a cognizable racial group, and then must show facts that raise an inference that the party making the challenge did so because of race. 8 CA4th at 708.

Judges have developed certain techniques for discouraging improper use of CCP §170.6 challenges:

- *Ignoring attorneys' intimations that a challenge will be made.* Some attorneys try to influence the assignment of cases by letting it be known that they will challenge a particular judge, hoping to preserve their challenge for later use.
- *Avoiding predictable patterns in assigning cases from the master calendar.* If case assignments follow a pattern, attorneys may anticipate which judge they would draw if they were to exercise their CCP §170.6 challenge.
- *Holding the hearing or trial as soon as possible.* A request for a continuance because of a CCP §170.6 challenge should be denied unless good cause is shown. CCP §170.6(a)(4).

2. [§2.38] Judge's Duty When Challenged

Once a challenge has been filed, the judge must withdraw from the case unless the challenge is defective. After a challenge has been made, a judge has no jurisdiction to hold further proceedings except to inquire into the timeliness of the challenge (see §§2.42–2.50) and the technical sufficiency (see §§2.40–2.41). CCP §170.4(d); *McCartney v Commission on Judicial Qualifications* (1974) 12 C3d 512, 531, 116 CR 260 (immediate disqualification is mandatory); see *Spruance v Commission on Judicial Qualifications* (1975) 13 C3d 778, 797, 119 CR 841 (judge may not cross-examine attorney making challenge). It is prejudicial misconduct for a judge, after a valid peremptory challenge has been made, to continue to decide any contested issue. *Wenger v Commission on Judicial Performance* (1981) 29 C3d 615, 643, 175 CR 420, disapproved on other grounds in 11 C4th 294. However, judges may rule on motions that were heard before the challenge was made. See *Stevens v Superior Court* (1988) 198 CA3d 932, 939, 244 CR 94 (judge who received timely peremptory challenge may decide pending issue). A judge who is the subject of a peremptory challenge in a case in which there is a cross-complaint may not sever the case by reassigning part of it and keeping the other part.

Sunkyong Trading (H.K.) Ltd. v Superior Court (1992) 9 CA4th 282, 286–287, 11 CR2d 504.

A judge should accept a challenge with equanimity. Improper reactions to peremptory challenges have been the subject of judicial discipline, as in the following cases:

Wenger v Commission on Judicial Performance (1981) 29 C3d 615, 643, 175 CR 420	Continuing to decide contested issues in a case in which a peremptory challenge had been filed was prejudicial misconduct.
Gubler v Commission on Judicial Performance (1984) 37 C3d 27, 54, 207 CR 171	After disqualification, attempting to influence commissioner on how to decide case.
McCartney v Commission on Judicial Qualifications (1974) 12 C3d 512, 525, 529, 116 CR 260	Arguing against the filing of a CCP §170.6 affidavit and threatening to take case to the people; judge also engaged in angry and excited dialogues with deputy public defenders who made "blanket" challenges.
Spruance v Commission on Judicial Qualifications (1975) 13 C3d 778, 786, 119 CR 841	Improperly cross-examining attorney who had sought to disqualify judge.
In re Rasmussen (1987) 43 C3d 536, 538, 236 CR 152	Discouraging the use of peremptory challenge by inappropriate remarks.
Furey v Commission on Judicial Performance (1987) 43 C3d 1297, 1308, 240 CR 859	After disqualification, writing note to new judge recommending sentence.

☛ JUDICIAL TIP: A judge should not take a peremptory challenge personally and seek a motive behind it. He or she should accept the challenge without rancor.

Judges have a limited duty to assist attorneys and parties appearing in pro per in meeting the statutory requirements for making a challenge. See *People v Whitfield* (1986) 183 CA3d 299, 305, 228 CR 82. Generally, a judge should not keep silent when an attorney or party in pro per makes a defective challenge and an explanation of the requirements could easily cure the defect. See *People v St. Andrew* (1980) 101 CA3d 450, 456, 161 CR 634 (judge should not deny motion because defendant or counsel is not under oath without first informing counsel of procedural requirements). See also *McCauley v Superior Court* (1961) 190 CA2d 562, 565, 12 CR 119 (substantial compliance with declaration requirement of CCP §170.6 is sufficient); *Retes v Superior Court* (1981) 122 CA3d 799, 807, 176 CR 160 (judge should permit counsel's failure to sign declaration to be remedied). The important right of disqualification should not be defeated by a failure to comply with a formality. 122 CA3d at 807. One judge's insistence on counsel's using the exact statutory language in

making an oral CCP §170.6 challenge, coupled with his refusal to permit counsel to obtain the preprinted form for making the challenge and his failure to advise counsel of the way in which the motion was insufficient, constituted prejudicial conduct. *Kloepfer v Commission on Judicial Performance* (1989) 49 C3d 826, 851, 264 CR 100.

However, in *People v St. Andrew, supra,* 101 CA3d at 456, the court of appeal noted that the oath requirement of CCP §170.6 is not a hollow formality and that the denial of the disqualification per se was not erroneous. See also *People v Jones* (1991) 53 C3d 1115, 1129, 282 CR 465 (court correctly did not disqualify itself after defendant declared that he was going to "pass a Writ of Prejudice" against the judge; defendant's counsel never followed up with a written affidavit as he said he would do).

☛ JUDICIAL TIP: If there is a valid peremptory challenge, a note stating who made the challenge and the date the challenge was made should be prominently affixed to the file. Any judge who is assigned the case in the future is then aware that a prior challenge has been made and will know not to assign the disqualified judge to hear any matters in the case again. This also allows the court to keep track of the number of challenges that have been exercised.

3. [§2.39] Who May Be Challenged

Under CCP §170.6(a)(1), any superior court judge, commissioner, or referee is subject to a peremptory challenge. This includes court-appointed discovery referees even though they only submit recommended rulings to appointing courts, rather than making rulings. *Autoland, Inc. v Superior Court* (1988) 205 CA3d 857, 859, 252 CR 662. Similarly, the provisions of CCP §§170–170.6 apply to juvenile court referees (Welf & I C §247.5), temporary judges (Cal Rules of Ct 2.831(e)), and court-appointed arbitrators in judicial arbitration proceedings (Cal Rules of Ct 3.816; *Kaiser Found. Hosp., Inc. v Superior Court* (1993) 19 CA4th 513, 516, 23 CR2d 431). In contractual arbitration proceedings, parties have the right to disqualify one court-appointed arbitrator without cause in any single arbitration. CCP §1281.91(b)(2). See *Azteca Constr., Inc. v ADR Consultng, Inc.* (2004) 121 CA4th 1156, 1169–1170, 18 CR3d 142 (party's demand for disqualification of proposed neutral arbitrator has same practical effect as timely peremptory challenge to superior court judge under CCP §170.6—disqualification is automatic, disqualified arbitrator loses jurisdiction over case, and any subsequent orders made by arbitrator are void).

A judge serving in the appellate division of the superior court is not subject to a peremptory challenge. CCP §170.7. But see *Housing Auth. of Monterey County v Jones* (2005) 130 CA4th 1029, 1041–1042, 30 CR3d

676 (judge who decided pretrial motions against defendant in limited civil case was disqualified under CCP §170.1(a)(6)(A)(iii) from sitting on appellate division panel that heard defendant's appeal). Similarly, a trial judge who is appointed by the appellate court as its referee is not subject to a peremptory challenge. *People v Gonzalez* (1990) 51 C3d 1179, 1247 n44, 275 CR 729. If a party files a motion, which the judge denies, and the party subsequently files a renewed motion, the party may file a peremptory challenge to the judge who is assigned to hear the renewed motion. If the motion is not a renewed motion, but instead is a motion for reconsideration, then CCP §1008(a) requires the original judge to hear the motion, and no peremptory challenge may be exercised. *Deauville Restaurant, Inc. v Superior Court* (2001) 90 CA4th 843, 847–852, 108 CR2d 863 (this provision overrides party's right to exercise peremptory challenge to prevent judge from hearing reconsideration motion).

4. [§2.40] Standing To Make Peremptory Challenge

Parties. Any party or attorney may make a peremptory challenge against an assigned judge under CCP §170.6. CCP §170.6(a)(2). A party to a coordination proceeding may make a peremptory challenge. See Cal Rules of Ct 3.516; *Citicorp North Am., Inc. v Superior Court* (1989) 213 CA3d 563, 570, 261 CR 668. An intervenor may also make a peremptory challenge, even if the parties agree to try the case before the challenged judge. See *Hospital Council of N. Cal. v Superior Court* (1973) 30 CA3d 331, 339, 106 CR 247. A party may make the challenge at a special appearance. 30 CA3d at 339.

Nonparties. Although nonparties do not have the right to make peremptory challenges under CCP §170.6, a nonparty who is cited for contempt may file a challenge against the judge who hears the contempt proceeding. *Avelar v Superior Court* (1992) 7 CA4th 1270, 1279 n5, 9 CR2d 536. See *Sears, Roebuck & Co. v National Union Fire Ins. Co.* (2005) 131 CA4th 1342, 1349 n4, 32 CR3d 717 (nonparty witness charged with contempt for failure to comply with discovery requests should have right to challenge judge, but should not have right if he or she merely seeks relief from discovery procedures or objects to party's request for monetary sanctions against nonparty for discovery abuse). A police department may not challenge the judge in a case in which the defendant has sought disclosure of a police officer's records, because it is not a party to the criminal action. *Avelar v Superior Court, supra,* 7 CA4th at 1279 (motion for disclosure of police records under Evid C §1043 is not special proceeding within meaning of CCP §170.6).

5. [§2.41] Requirements for Peremptory Challenge

A peremptory challenge may be made without notice and may be either in oral or written form. An oral motion must be accompanied by a statement under oath that the judicial officer to whom the case is assigned is prejudiced against the party or attorney and that the party or attorney cannot receive a fair trial or hearing. CCP §170.6(a)(2). A written motion must be supported by a declaration under penalty of perjury or an affidavit, also stating that the judicial officer to whom the case is assigned is prejudiced and the party or attorney cannot receive a fair trial or hearing. CCP §170.6(a)(2).

The form of affidavit is set out in CCP §170.6(a)(5). Code of Civil Procedure §170.6(a)(6) provides that an oral statement under oath and a declaration under penalty of perjury must include substantially the same contents as the affidavit set out in CCP §170.6(a)(5).

Although CCP §170.6 refers to an oral or written motion, no document labeled "motion" need be filed as long as there is an express request for relief. *Louisiana-Pacific Corp. v Philo Lumber Co.* (1985) 163 CA3d 1212, 1223, 210 CR 368. However, the request for relief must be explicit. See *People v Jones* (1991) 53 C3d 1115, 1129, 282 CR 465 (defendant's statement that he was going to "pass a Writ of Prejudice" against judge was not by itself valid oral motion under CCP §170.6 because it was not accompanied by oral statement under oath that judge was prejudiced).

For a discussion of the judge's obligation to explain the requirements of CCP §170.6(a)(5) and (6), see §2.38.

6. Time Limits for Peremptory Challenge

a. [§2.42] Time Limits Generally; Chart

The time limits for filing a peremptory challenge are set forth in CCP §170.6(a)(2), as interpreted by the California Supreme Court in *People v Superior Court* (Lavi) (1993) 4 C4th 1164, 17 CR2d 815. In *Lavi*, the supreme court stated that, as a general rule, a challenge of a judge is permitted under CCP §170.6 any time before a trial or hearing begins. 4 C4th at 1171. The court recognized, however, that CCP §170.6(a)(2) contains three express exceptions to this general rule: (1) the master calendar rule (see §2.43); (2) the all-purpose assignment rule (see §2.44); and (3) the 10-day/5-day rule (see §2.45). To determine whether a peremptory challenge is timely, the judge must decide whether the general rule or any of the three exceptions applies. 4 C4th at 1172–1173.

A peremptory challenge can only be filed or accepted at certain times; CCP §170.6(a)(2) expressly limits a peremptory challenge to those times when either a trial or a hearing involving a contested issue of law or fact is pending on the court's calendar. In juvenile delinquency proceed-

ings, "trial" means the jurisdiction hearing at which the minor is exposed to a finding of truth of the allegations contained in the petition, which may not be the first jurisdictional hearing if the minor denies the allegations and the matter is thereafter set for a contested jurisdiction hearing. *In re Abdul Y.* (1982) 130 CA3d 847, 856–857, 182 CR 146 [jurisdictional hearing may be bifurcated into phases involving the functional equivalent of the pretrial stage in adult criminal proceedings and the adjudicatory phase]. The only exception indicated in the statute is the all-purpose assignment rule, which permits a peremptory challenge to an all-purpose assignment judge who is expected to preside at trial even though the trial date has not been set. *Grant v Superior Court* (2001) 90 CA4th 518, 525, 108 CR2d 825. The statute does not permit a peremptory challenge to be filed or accepted absent a pending trial, a pending hearing involving a contested issue of fact or law, or an all- purpose assignment. 90 CA4th at 526–527. Therefore, a peremptory challenge cannot be used to disqualify a judge from presiding over a case management conference or a settlement conference, because these conferences do not involve a determination of contested issues of fact or law. 90 CA4th at 526, 528 (judge properly denied plaintiff's peremptory challenge to disqualify judge from presiding at case management conference).

Under CCP §170.6(a)(2), in no instance may a judge entertain a challenge that is made after:

- The first juror's name is drawn,
- Plaintiff's counsel makes an opening statement in a nonjury trial,
- The first witness is sworn or any evidence is given in a nonjury trial in which there is no opening statement, or
- The trial has otherwise begun.

A challenge that is directed to a judge who is presiding over a hearing, rather than a trial, must be made no later than the commencement of the hearing. CCP §170.6(a)(2); see *Valenta v Regents of Univ. of Cal.* (1991) 231 CA3d 1465, 1467 n1, 282 CR 812 (challenge under CCP §170.6 is untimely when filed after judge has issued order but before hearing on motion for reconsideration of that order is scheduled). This general rule does not, however, preclude a party from making a challenge to a judge who has presided over, or acted in connection with, a pretrial conference or other hearing, as long as the judge did not determine a contested issue of fact relating to the merits of the case. CCP §170.6(a)(2). On what constitutes such a determination, see §§2.63–2.73.

A judge has no authority to waive the statutory deadline for making a peremptory challenge. See *Briggs v Superior Court* (2001) 87 CA4th 312, 318, 104 CR2d 445. Any superior court policy or practice that is in conflict with the statutory time provisions is void. *Motion Picture &*

Television Fund Hosp. v Superior Court (2001) 88 CA4th 488, 492, 105 CR2d 872.

The following chart sets forth the statutory deadlines for making a peremptory challenge depending on the type of assignment. In all other cases, the time limits and procedures for making a peremptory challenge, as specified in CCP §170.6(a)(2), must be followed as closely as possible. CCP §170.6(a)(2).

Chart: Deadlines for Peremptory Challenge

How Judge Assigned	Deadline	Who Hears Challenge
Assignment to judge for all purposes	Within 10 days after notice of assignment or, if party has not appeared, within 10 days after party appears	Challenged judge or presiding judge
Assignment by master calendar judge	Not later than time case is assigned for trial	Judge supervising master calendar
Assignment to judge other than judge assigned to hear the case for all purposes at least 10 days before trial	At least 5 days before hearing or trial (10-day/5-day rule)	Challenged judge (or perhaps presiding judge)
One-judge court	Before expiration of 30 days from first appearance of party who is making motion (or whose attorney is making motion)	Judge of one-judge court
Former trial judge assigned to conduct retrial after appeal	Within 60 days after notice of assignment	Challenged judge
Assignment to specific judge under local delay reduction rules	Within 15 days after challenging party's first appearance	Challenged judge
Coordinated action	Within 20 days after service of order making assignment	Challenged judge
Consolidated action	Within 10 days after notice of consolidation order	Challenged judge
Judicial arbitration	Within 5 days after appointment of arbitrator	Challenged arbitrator
All other assignments	Any time before trial or hearing	Challenged judge

b. [§2.43] Master Calendar Assignment

In courts that operate under a master calendar system, any peremptory challenge to the assigned judge must be made to the judge supervising the master calendar no later than the time the case is assigned for trial. CCP §170.6(a)(2). This deadline applies only when a trial-ready

case is assigned to a trial-ready courtroom. *People v Superior Court* (Lavi) (1993) 4 C4th 1164, 1175–1177, 17 CR2d 815; *Grant v Superior Court* (2001) 90 CA4th 518, 524, 108 CR2d 825. A courtroom is "ready" if it is idle at the time of assignment or is reasonably expected to become available within a short time (*e.g.,* in the afternoon if the assignment is made in the morning, or on the following morning if the assignment is made in the afternoon). *People v Superior Court* (Lavi), *supra,* 4 C4th at 1177 n8. The master calendar rule does not apply to a case that is merely assigned to a court for the setting of a trial date sometime in the future. In such a case, either the all purpose assignment rule (see §2.44) or the 10-day/5-day rule (see §2.45) applies. 4 C4th at 1176–1177; *Depper v Superior Court* (1999) 74 CA4th 15, 18–20, 87 CR2d 563.

The master calendar rule presupposes that the parties' attorneys are personally before the master calendar judge when the assignment is made; the challenge must be made immediately after the assignment to permit the master calendar judge to assign the case to another judge without delay and to assign the challenged judge to another case. *Stevens v Superior Court* (1997) 52 CA4th 55, 59–60, 60 CR2d 397. When the assignment is made by a telephone call from a court clerk, a challenge filed on the next court day is timely. 52 CA4th at 60–61.

Any peremptory challenge in a case that is subject to a master calendar court's delay reduction rules is governed solely by the time limits of CCP §170.6. Govt C §68616(i). A challenge in such a case is timely if it is made at the challenging party's first opportunity to make an informed decision, even if it was not made when the case was assigned for trial. *People v V.C. Van Pool Bail Bonds* (1988) 200 CA3d 1018, 1024, 248 CR 5 (when master calendar clerk misinformed parties about name of judge to whom case had been assigned for trial, peremptory challenge made immediately on discovery of assigned judge's true identity was timely). When a judge in a case assigned to a court's delay reduction program is challenged peremptorily under CCP §170.6, the case is reassigned to another judge in the program; it is not removed from the program. See Govt C §68607.5.

An otherwise timely peremptory challenge is rendered untimely if it is made to the judge to whom the case was assigned rather than to the master calendar judge as required by CCP §170.6(a)(2). *People v Wilks* (1978) 21 C3d 460, 466, 146 CR 364.

c. [§2.44] Assignment to Judge for All Purposes

If the case is assigned to a judge for all purposes, any peremptory challenge must be made to the assigned judge or the presiding judge within ten days after notice of the assignment or, if the party has not appeared, within ten days after appearance. CCP §170.6(a)(2). The time limit is extended by five days when notice of the assignment is served by

mail under CCP §1013(a). *California Business Council v Superior Court* (1997) 52 CA4th 1100, 1102, 62 CR2d 7.

In juvenile delinquency proceedings, when a court invokes the all-purpose assignment rule, it must do so by way of a valid court order or valid written local rule that instantly pinpoints the assigned judge as the judge expected to process that case in its entirety. *In re Daniel V.* (2006) 139 CA4th 28, 42 CR3d 471 (informal, unwritten local juvenile court practice, was insufficient to trigger 10-day limitations period for minors' filing motion to disqualify judge, when there had not yet been any adjudication of contested issue).

When the all-purpose assignment is made before a defendant has appeared in the action, the defendant's time for making any peremptory challenge begins on the date the defendant makes a "general" appearance in the action. *Shipp v Superior Court* (1992) 5 CA4th 147, 152, 6 CR2d 685. It does not begin on the date on which the defendant makes a "special" appearance, *e.g.,* for a motion to quash service of summons. *La Seigneurie U.S. Holdings v Superior Court* (1994) 29 CA4th 1500, 1504, 35 CR2d 175.

A judge must grant a late-named defendant's peremptory challenge under CCP §170.6, even though the time within which the other defendants could have challenged the judge has long since expired and even though the case has been assigned to the judge as complex litigation. The late-appearing defendant has the right to exercise its challenge within ten days after its appearance, as long as no other defendant has exercised its right to disqualify the judge. *School Dist. of Okaloosa County v Superior Court* (1997) 58 CA4th 1126, 1130–1134, 68 CR2d 612.

The right of a late-appearing party to exercise a peremptory challenge is subject to two exceptions under CCP §170.6(a)(2): (1) the party cannot exercise a peremptory challenge after the trial begins; and (2) a peremptory challenge is precluded after the judge has decided a contested fact issue relating to the merits (and the party appears in the proceeding in which the judge made the determination or a subsequent proceeding that is a continuation of the proceeding in which the judge made the determination). *Stephens v Superior Court* (2002) 96 CA4th 54, 60–62, 116 CR2d 616. The rationale for these exceptions is that after a case has progressed to the point at which an assigned judge has presided over a trial or any other proceedings involving the determination of contested fact issues relating to the merits, avoiding possible judicial bias through peremptory challenge must yield to the policy against judge shopping, *i.e.,* removing an assigned judge from a case for reasons other than a good faith belief the judge is prejudiced. 96 CA4th at 60.

An assignment to a judge for all purposes has the following characteristics:

- The assignment must, with reasonable certainty, identify the judge who will preside. It is sufficient if the assignment is made to a numbered department of the court when a particular judge is known to sit regularly in that department. See §2.46.
- That judge must be expected to preside over all remaining aspects of the case, including motions and trial. *People v Superior Court* (Lavi) (1993) 4 C4th 1164, 1178–1182, 17 CR2d 815. See *Zilog, Inc. v Superior Court* (2001) 86 CA4th 1309, 1315–1322, 104 CR2d 173 (when judge is assigned as case manager for all purposes *except* trial, time limit of Govt C §68616(i) is inapplicable; 10-day/5-day time limit of CCP §170.6(a)(2) governs); discussion in §2.45. See also *Grant v Superior Court* (2001) 90 CA4th 518, 528, 108 CR2d 825 (following *Zilog*).

A party that files a peremptory challenge beyond the time limit has the burden of establishing that the assignment was *not* an all-purpose assignment. *Shipp v Superior Court, supra,* 5 CA4th at 152, 154.

Any peremptory challenge to the judge assigned for all purposes in a case that is subject to the court's delay reduction rules must be made within 15 days of the challenging party's first general appearance, notwithstanding CCP §170.6. Govt C §68616(i); *La Seigneurie U.S. Holdings, Inc. v Superior Court, supra,* 29 CA4th at 1503–1506. This does not mean that a plaintiff must file such a challenge within 15 days of filing the complaint. *Fight for the Rams v Superior Court* (1996) 41 CA4th 953, 958, 48 CR2d 851. When a direct calendar assignment is made more than 15 days after the complaint is filed, the "first appearance" by a plaintiff or a defendant who has already responded to the complaint coincides with the direct calendar assignment. 41 CA4th at 958.

When a party has already appeared in the action, it must file its challenge within 15 days of receiving notice of the assignment or of a change in the assignment. *Cybermedia, Inc. v Superior Court* (1999) 72 CA4th 910, 913, 82 CR2d 126. See *Motion Picture & Television Fund Hosp. v Superior Court* (2001) 88 CA4th 488, 494, 105 CR2d 872 (parties have 20 days after mailing of notice of *reassignment*—10 days under CCP §170.6(a)(2), plus 5 days under Govt C §68616(i), plus 5 days under CCP §1013—to file peremptory challenge). A clerk's notice of change of assignment that was misaddressed to the defendants' attorney was insufficient notice to the defendants to trigger the 15-day time period. The defendants' challenge to the assignment, filed three days after receiving actual notice, was timely. *Cybermedia, Inc. v Superior Court, supra,* 72 CA4th at 914. When a judge in a case assigned to a court's delay reduction program is challenged peremptorily under CCP §170.6, the case is reassigned to another judge in the program; it is not removed from the program. See Govt C §68607.5.

Any challenge to an all-purpose *discovery referee* must be made within ten days of the referee's appointment, or ten days after the party first appears in the action. CCP §639(b)(A).

d. [§2.45] Assignment to Judge for Less Than All Purposes ("10-Day/5-Day Rule")

When a case is assigned to a judge for less than all purposes, *e.g.,* to hear a particular motion or to preside at trial, and the judge is known at least ten days before the date set for the hearing or trial, any peremptory challenge must be made at least five days before that date. CCP §170.6(a)(2) (the "10-day/5-day rule"); *Grant v Superior Court* (2001) 90 CA4th 518, 524–525, 108 CR2d 825; see *Zilog, Inc. v Superior Court* (2001) 86 CA4th 1309, 1315–1322, 104 CR2d 173 (this time limit applies when judge is assigned as case manager for all purposes except trial). The judge need not be known with absolute certainty; it is sufficient that there is reasonable assurance that the assigned judge is the one who will hear the matter. *People v Superior Court* (Lavi) (1993) 4 C4th 1164, 1183, 17 CR2d 815; *Depper v Superior Court* (1999) 74 CA4th 15, 20, 87 CR2d 563. If the hearing or trial date is set and then continued, a peremptory challenge is timely if made at least five days before the new date. See *People v Superior Court* (Hall) (1984) 160 CA3d 1081, 1085, 207 CR 131.

When the court appoints a discovery referee and the referee is known at least ten days before the hearing date, any peremptory challenge to the referee must be made at least five days before the hearing date. *Pedus Servs., Inc. v Superior Court* (1999) 72 CA4th 140, 146, 84 CR2d 771. But see *Grant v Superior Court* (2001) 90 CA4th 518, 526–527, 108 CR2d 825 (disagreeing with *Pedus* to extent it may be construed to allow peremptory challenge to be filed in absence of pending trial or hearing, or all-purpose assignment). See §2.42. The appointment of a discovery referee is not the functional equivalent of assigning the case to a judge for all purposes for which a peremptory challenge must be made within ten days of notice of the assignment. *Pedus Servs., Inc. v Superior Court, supra,* 72 CA4th at 142–146. See §2.44.

e. [§2.46] Assignment to Department Rather Than to Judge

A difficult issue in deciding timeliness is determining when an assignment to a particular judge has occurred. Although often an assignment to a department in which a judge regularly sits is equivalent to an assignment to that judge, there are occasions in which last-minute changes such as illness, vacation, reassignment because of speedy trial deadlines and for other reasons, and continuances require that someone other than the regularly assigned judge sit in the department. See *People v*

Superior Court (Hall) (1984) 160 CA3d 1081, 207 CR 131. If there is a last-minute change, the litigant may have wasted his or her one peremptory challenge on the wrong judge, undermining the underlying policy of CCP §170.6, *i.e.,* affording a litigant the opportunity to have a single chance to disqualify a known judge. 160 CA3d at 1085.

When there is an assignment to a department by number, the "all purpose assignment rule" applies (see §2.44) if

- A particular judge regularly presides in that department,
- The identity of the judge is either known or reasonably discoverable, and
- It is reasonably certain that this judge will hear the case.

People v Superior Court (Lavi) (1993) 4 C4th 1164, 1180 n12, 17 CR2d 815.

☛ JUDICIAL TIP: Some judges make assignments to a judge by name as well as by department number and indicate whether the assignment is for all purposes. Whatever assignment is given should be noted on the file.

An assignment made to a department by number is sufficient to invoke the "10-day/5-day rule" (see §2.45) when there is no indication that the judge who is regularly assigned to that department is likely to transfer the case elsewhere. 4 C4th at 1180 n12, 1183–1184.

f. [§2.47] Tentative Rulings

A problem may arise when a law and motion judge other than the regularly assigned judge makes a tentative ruling and is then challenged by the party who disagreed with the ruling. Aware of this potential difficulty, the court in *Kaiser Found. Hosp. v Superior Court* (1987) 190 CA3d 721, 725, 235 CR 630, held that the "10-day/5-day rule" (see §2.45) applies when motions are set in a department that has a regularly assigned law and motion judge. However, when the regularly assigned judge does not rule on the motion or when the regular assignment has been changed without notification to the parties, a party may make a CCP §170.6 challenge even after receipt of a tentative ruling. 190 CA3d at 725.

g. [§2.48] One-Judge Court

In a one-judge court, any CCP §170.6 challenge must be made within 30 days of the challenging party's first appearance in the action. CCP §170.6(a)(2); see *People v Superior Court* (Smith) (1987) 190 CA3d 427, 429, 235 CR 482 (30-day period runs from party's appearance even if party's attorney first appears after expiration of this 30-day period). One issue that has arisen in one-judge courts is whether a judge sitting on

assignment in that court is a "duly elected or appointed judge of that court" (see CCP §170.6(a)(2)) and therefore subject to the 30-day rule. Most judges believe that the 30-day rule applies only to the judge who was elected or permanently assigned to the court, and that the deadline for the challenge of a temporarily assigned judge is the same as in a multiple-judge court.

h. Coordinated and Consolidated Cases

(1) [§2.49] Coordinated Cases

Any motion or affidavit of prejudice under CCP §170.6 regarding a coordination motion judge or a coordination trial judge must be submitted in writing to that judge within 20 days after service of the order assigning that judge to the coordination proceedings. Cal Rules of Ct 3.516. Parties to coordination proceedings have an additional five days to make a peremptory challenge under CCP §1013 when the order of assignment has been served by mail. *Citicorp North Am., Inc. v Superior Court* (1989) 213 CA3d 563, 570, 261 CR 668.

All plaintiffs or similar parties to the coordination proceedings constitute one "side" for the purposes of CCP §170.6, and all defendants or similar parties constitute a side. Cal Rules of Ct 3.516. Each side may exercise one challenge. CCP §170.6(a)(3). A "side" means parties who have a common or substantially similar interest in the issues, as determined by the assigned judge. Cal Rules of Ct 3.501(18). A party to an add-on petition in a coordinated action is not entitled to a peremptory challenge if its side has already exercised a challenge. *Industrial Indem. Co. v Superior Court* (1989) 214 CA3d 259, 261, 262 CR 544. However, a plaintiff's peremptory challenge to the coordination trial judge is not precluded by the fact that another plaintiff in the coordinated actions filed a peremptory challenge *before* the actions were coordinated. *Philip Morris, Inc. v Superior Court* (1999) 71 CA4th 116, 126, 83 CR2d 671.

If the assigned coordination motion judge is later assigned as the coordination trial judge, the parties have 20 days after service of the order of the judge's assignment as the trial judge to challenge this assignment. *Stone v Superior Court* (1994) 25 CA4th 1144, 1146–1147, 31 CR2d 56. A party is entitled to challenge the assignment of a judge as the coordination trial judge even if the judge previously ruled on contested issues in the party's case before it was coordinated with other cases. *Farmers Ins. Exch. v Superior Court* (1992) 10 CA4th 1509, 1511–1512, 13 CR2d 449.

The time limit for challenging a judge in a coordinated case does not apply to a case that has merely been designated "complex litigation" under a court's local rules. *School Dist. of Okaloosa County v Superior Court* (1997) 58 CA4th 1126, 1135–1136, 68 CR2d 612.

(2) [§2.50] Consolidated Cases

When a number of cases that have been filed in one court are consolidated for all purposes, any challenge to the assigned judge must be made within ten days of notice of the consolidation order. *Nissan Motor Corp. v Superior Court* (1992) 6 CA4th 150, 154–155, 7 CR2d 801 ("all purpose assignment" rule applies). Each party in each of the consolidated actions has a right to challenge the assigned judge. 6 CA4th at 155 (each plaintiff in three consolidated actions had right to exercise challenge; plaintiffs were not considered a "side"). The challenge may be addressed to the assigned judge or the presiding judge. 6 CA4th at 155.

A party's decision not to challenge the judge in one case does not waive the party's right to challenge the judge in other cases with which the first case is later consolidated. 6 CA4th at 155–156.

i. [§2.51] Judicial Arbitrators

Any peremptory challenge to a judicial arbitrator appointed under CCP §§1141.10–1141.28 must be made within five days of the appointment. CCP §1141.18(d). The procedures set out in CCP §170.6 apply. CCP §1141.18(d).

7. [§2.52] Limitations on Number of Challenges

Each party is entitled to one peremptory challenge as its "ace in the hole." *Trail v Cornwell* (1984) 161 CA3d 477, 484, 207 CR 679. However, under no circumstances may a party or attorney make more than one peremptory challenge in any action or special proceeding. CCP §170.6(a)(3). Generally, a party who has exercised a peremptory challenge "at any stage in the proceedings" has exhausted his or her statutory remedy under CCP §170.6. *Matthews v Superior Court* (1995) 36 CA4th 592, 599, 42 CR2d 521.

For example, a party who has exercised a peremptory challenge against an arbitrator during the course of judicial arbitration proceedings may not subsequently exercise a peremptory challenge against the trial judge after filing a request for a trial de novo. *Kelley v Bredelis* (1996) 45 CA4th 1819, 1827, 53 CR2d 536. But if a judge denies a party's peremptory challenge on the basis that it was untimely, the party is not barred from filing a subsequent peremptory challenge in the proceedings. *Grant v Superior Court* (2001) 90 CA4th 518, 528–529, 108 CR2d 825; *Truck Ins. Exch. v Superior Court* (1998) 67 CA4th 142, 146–148, 78 CR2d 721.

Code of Civil Procedure §170.6(a)(2) provides another exception to the general rule. After a reversal, an appellant may exercise a peremptory challenge if the same judge is assigned to conduct the new trial in the

matter even if the appellant has previously exercised a challenge. CCP §170.6(a)(2). See §2.58.

a. What Constitutes a "Side"

(1) [§2.53] General Rule

If there is more than one plaintiff or similar party or more than one defendant or similar party, each side still has only one peremptory challenge. CCP §170.6(a)(3). If one of several coparties on the same side has already disqualified a judge under CCP §170.6, any other judge who is subsequently assigned to the case is not subject to a peremptory challenge by any of the other coparties. *Pappa v Superior Court* (1960) 54 C2d 350, 355, 353 P2d 311. This limitation is intended to strike a balance between the needs of the litigants and the operating efficiency of the courts. *Home Ins. Co. v Superior Court* (2005) 34 C4th 1025, 1032, 22 CR3d 885.

This rule applies even if the coparty that challenged the judge is later dismissed from the case. *Louisiana-Pacific Corp. v Philo Lumber Co.* (1985) 163 CA3d 1212, 1219, 210 CR 368. It also applies to a coparty who is joined after the challenge is made. *School Dist. of Okaloosa County v Superior Court* (1997) 58 CA4th 1126, 1135, 68 CR2d 612. However, a party's waiver of the right to make a peremptory challenge does not affect the right of a party added later to the same side to make such a challenge. 58 CA4th at 1135.

(2) [§2.54] Coparties With Substantially Adverse Interests

If coplaintiffs or codefendants have substantially adverse interests, there may be more than two "sides" in the case, and more than one challenge by coparties may be appropriate. *School Dist. of Okaloosa County v Superior Court* (1997) 58 CA4th 1126, 1135 n5, 68 CR2d 612. See *Home Ins. Co. v Superior Court* (2005) 34 C4th 1025, 1036–1037, 22 CR3d 885 (in insured's declaratory relief action against its primary and excess insurers, interests of insurers are not necessarily "substantially adverse").

A party seeking to exercise a subsequent peremptory challenge has the burden of establishing that its interests are substantially adverse to those of a coparty that previously exercised a peremptory challenge; substantially adverse interests will not be presumed. 34 C4th at 1034–1035. The party must provide evidence of a conflict to enable the judge to decide whether the interests of the party and the coparty are actually substantially adverse. 34 C4th at 1037.

The fact that the plaintiff belatedly names a party as a defendant does not establish that this defendant's interests are substantially adverse to earlier-named defendants. 34 C4th at 1037.

(3) [§2.55] Codefendants in a Criminal Case

In a criminal case, if there is a conflict of interest among codefendants, each defendant may be entitled to make a peremptory challenge. *Pappa v Superior Court* (1960) 54 C2d 350, 354, 353 P2d 311. The defendant seeking to make a second challenge has the burden of showing substantial adverse interests between the codefendants. 54 C2d at 354. This burden is not met by the mere fact that the defendants are represented by separate counsel (54 C2d at 355), nor by potential conflict between codefendants at *trial*, when the judge against whom the second challenge is sought is to preside at a *pretrial* hearing (*People v Escobedo* (1973) 35 CA3d 32, 40, 110 CR 550). The filing of a form declaration claiming a conflict of interest with no specific factual showing of adverse interests is insufficient. *Welch v Superior Court* (1974) 41 CA3d 50, 53, 115 CR 729.

b. [§2.56] What Constitutes Continuation of Proceedings

To prevent forum shopping, a peremptory challenge is not available in a subsequent proceeding that is deemed a continuation of an earlier action. *Jacobs v Superior Court* (1959) 53 C2d 187, 190, 1 CR 9 ("[a]lthough [section 170.6] does not expressly so provide, it follows that, since the [peremptory challenge] must be made before the trial has commenced, it cannot be entertained as to subsequent hearings which are a part or a continuation of the original proceedings").

Because each side is entitled to one peremptory challenge in any one action or special proceeding (CCP §170.6(a)(3)), problems may arise in determining what constitutes a separate action and what is merely a continuation of prior proceedings. See, *e.g., City of Hanford v Superior Court* (1989) 208 CA3d 580, 589–593, 256 CR 274 (for purposes of CCP §170.6(a)(3), defendant's cross-complaint was classified as separate action); *Andrews v Joint Clerks Port Labor Relations Comm'n* (1966) 239 CA2d 285, 296, 48 CR 646 (two separate actions were classified as one for purposes of CCP §170.6(a)(3) because objective of second action was to obtain modification of order issued in first action).

Courts have interpreted the phrase "any one action" to encompass several stages of the same proceeding. In general, a party that has disqualified a judge under CCP §170.6 may not exercise another challenge under that section either during the trial or in any later proceeding that is a "continuation" of the original proceeding. *Home Ins. Co. v Superior Court* (2005) 34 C4th 1025, 1033 n4, 22 CR3d 885. A proceeding is a continuation of a prior action if it involves substantially the same issues and matters necessarily relevant to the issues in the original actions. *City of Hanford v Superior Court* (1989) 208 CA3d 580, 589, 256 CR 274. However, even if two cases involve the same parties and similar issues,

the two cases may not be a continuation if the subsequent action arises out of later events distinct from those in a first action. *Bravo v Superior Court* (2007) 149 CA4th 1489, 1494, 57 CR3d 910.

(1) [§2.57] Retrial After Mistrial

A retrial after a mistrial is not a new action for purposes of CCP §170.6. A side that made a peremptory challenge to the judge in the first trial may not challenge a new judge appointed to hear the retrial. *Pappa v Superior Court* (1960) 54 C2d 350, 353, 353 P2d 311. A retrial is a continuation of the earlier trial and, for purposes of CCP §170.6, does not place the parties in the position they would have been in had there been no trial at all. *People v Richard* (1978) 85 CA3d 292, 300, 149 CR 344.

(2) [§2.58] Retrial After Reversal on Appeal

New trial required before challenge is allowed. A peremptory challenge may be made following reversal on appeal of a judge's decision if the same judge is assigned to conduct a new trial on the matter. CCP §170.6(a)(2). Because CCP §170.6(a)(2) does not define the term "new trial," courts have referred to CCP §656 and Pen C §1179 that define a "new trial" as a *reexamination* of an issue of fact in the same court after a trial and decision by a jury, a judge, or a referee. Thus, a hearing to be conducted by the original trial judge after remand constitutes a new trial for purposes of CCP §170.6(a)(2) only if it requires a reexamination of either law or fact. See *Pandazos v Superior Court* (1997) 60 CA4th 324, 326–327, 70 CR2d 669 (CCP §170.6(a)(2) may apply whether original trial was jury trial or court trial). In allowing a challenge on remand for a new trial, however, the Supreme Court has specifically held that the legislature did not intend to eliminate all restrictions on the challenge or to counter every possible situation in which it might be speculated that a court could react negatively to a reversal on appeal. *Peracchi v Superior Court* (2003) 30 C4th 1245, 1262–1263, 135 CR2d 639.

For example, in a bifurcated action in which only liability issues are determined in the original trial, when the case is reassigned to the original trial judge following appeal solely for purposes of trying the issue of damages, a peremptory challenge of this judge is not permitted because the issue of damages was not tried in the previous proceeding. *Paterno v Superior Court* (2004) 123 CA4th 548, 552, 558–560, 20 CR3d 282. When a judge's ruling on a conflict of law issue is reversed on appeal, this judge may not be challenged peremptorily. The judge's ruling does not constitute a trial, and the reversal of that ruling does not result in a new trial, *i.e.,* in a reexamination of that matter. *State Farm Mut. Auto. Ins. Co. v Superior Court* (2004) 121 CA4th 490, 502–503, 17 CR3d 146.

Code of Civil Procedure §170.6(a)(2) applies only when one or more issues in the case are to be retried, not when a case is remanded with instructions that require the trial judge to complete a judicial task that was not performed in the proceeding from which the appeal was taken. *Geddes v Superior Court* (2005) 126 CA4th 417, 423–424, 23 CR3d 857; *Pfeiffer Venice Props. v Superior Court* (2003) 107 CA4th 761, 767, 132 CR2d 400 (remand for retrial of *single* issue is sufficient to trigger applicability of CCP §170.6(a)(2)). Even if reexamination or reconsideration of a specific issue is required on remand, if the task to be performed is ministerial in nature, a peremptory challenge under CCP §170.6(a)(2) is not permitted. *Geddes v Superior Court, supra,* 126 CA4th at 424 n4; *Pfeiffer v Venice Props. v Superior Court, supra,* 107 CA4th at 767 (if re-calculation of prejudgment interest is all that is required, then challenge is not permitted). The fact that, on remand, the judge might exercise the authority to reexamine his or her prior ruling does not give the parties the right to exercise a peremptory challenge under CCP §170.6(a)(2). *Geddes v Superior Court, supra,* 126 CA4th at 424–425 n5. See also *C.C. v Superior Court* (2008) 166 CA4th 1019, 83 CR3d 225 (remand in a juvenile dependency matter with directions to enter new order denying reunification services and to set a permanent plan selection hearing was for performance of ministerial acts; peremptory challenge not allowed).

Other applications in civil cases. Code of Civil Procedure §170.6(a)(2) has been held to apply on a reversal of a summary judgment motion on the merits, on remand for an evidentiary hearing and factual determination after a bench trial when the judgment was reversed on appeal, and on dismissal of the action at the pleading stage when the matter was remanded for a factual determination on the merits of the defendant's special motion to strike under CCP §425.16. *State Farm Mut. Auto. Ins. Co. v Superior Court, supra,* 121 CA4th at 497. See *Geddes v Superior Court, supra,* 126 CA4th at 424 (no right to file peremptory challenge when grant of summary judgment is not reversed on merits but on procedural grounds, *e.g.,* on grounds that judge failed to provide statement of reasons and supporting evidence as required by CCP §437c(g); *Pfeiffer Venice Props. v Superior Court, supra,* 107 CA4th at 767 (CCP §170.6(a)(2)) applied on remand for purposes of determining propriety of fee award on special motion to strike under CCP §425.16).

In each of these cases, the remand was from review of a decision that either addressed the merits or otherwise terminated the case. A pretrial motion that does not reach the merits of the controversy or terminate the action is not a "trial" that will trigger the application of CCP §170.6(a)(2). *Burdusis v Superior Court* (2005) 133 CA4th 88, 93–94, 34 CR3d 575 (peremptory challenge not permitted on remand following reversal of order denying class certification when remand is for sole purpose of

allowing judge to consider record in light of two decisions filed after appeal).

Challenge in criminal cases. In a criminal case, a challenge under CCP §170.6(a)(2) is not permitted when the sole task for the judge on remand is to resentence the defendant. *Peracchi v Superior Court, supra,* 30 C4th at 1249, 1257–1258. A challenge *is* permitted, however, when the judge was reversed for dismissing the action after erroneously concluding that the action was barred by the statute of limitations. *People v Superior Court* (Maloy) (2001) 91 CA4th 391, 396–399, 109 CR2d 897. A challenge is also permitted when the appellate court directs the trial court on mandate to declare a mistrial in a criminal case. *State Farm Mut. Auto. Ins. Co. v Superior Court, supra,* 121 CA4th at 497.

Time limits for challenge. Any peremptory challenge must be made within 60 days after the party or attorney has been notified of the assignment. CCP §170.6(a)(2); see *Stubblefield Constr. Co. v Superior Court* (2000) 81 CA4th 762, 766–769, 97 CR2d 121 (15-day time limit of Govt C §68616(i) does not apply when judgment is reversed and case is remanded for retrial).

Respondent's challenge. After reversal, the appellant may make a peremptory challenge even if the appellant exercised a peremptory challenge earlier in the litigation. CCP §170.6(a)(2). But a respondent may only make a peremptory challenge if it had not previously exercised a peremptory challenge in the litigation. *Pfeiffer Venice Props. v Superior Court, supra*, 107 CA4th at 764 (respondent is limited by CCP §170.6(a)(3) to one peremptory challenge for entire case).

(3) [§2.59] Dismissed Case That Has Been Refiled

A refiled criminal case is not a continuation of the previous case that was dismissed under Pen C §1382 because the prosecutor was unable to proceed to trial within the statutory time limits. *Paredes v Superior Court* (1999) 77 CA4th 24, 27, 34–37, 91 CR2d 350 (this rule applies even if refiled charges are identical to those previously dismissed). But see *Robles v Superior Court* (2003) 110 CA4th 1510, 1515, 2 CR3d 861 (when parties stipulate under Pen C §1387.2 that instead of dismissing case, court may proceed on existing accusatory pleading, there is only *one* case for purposes of CCP §170.6).

Similarly, because the dismissal of a grand jury indictment under Pen C §995(a)(1)(A) terminates the action, if the action is refiled and assigned to the same judge, a party may disqualify that judge under CCP §170.6. *Ziesmer v Superior Court* (2003) 107 CA4th 360, 364–367, 132 CR2d 130.

(4) [§2.60] Contempt Proceedings

A contempt hearing is not necessarily a separate proceeding from the series of proceedings leading up to the contempt. See *Conn v Superior Court* (1987) 196 CA3d 774, 786, 242 CR 148.

(5) [§2.61] Postplea Proceedings After Guilty Plea

Postplea proceedings in superior court following a defendant's guilty plea and certification to superior court constitute one hearing within the meaning of CCP §170.6. *People v Jarvis* (1982) 135 CA3d 154, 157, 185 CR 16.

(6) [§2.62] Competency Hearing

A criminal trial is separate and distinct from a Pen C §1368 competency hearing and therefore a defendant is entitled to separate peremptory challenges for each. *Waldon v Superior Court* (1987) 196 CA3d 809, 814, 241 CR 123.

8. [§2.63] What Constitutes Determination of Contested Fact Issues

The fact that a judge presided at or acted in connection with a pretrial conference or other hearing does not affect a party's right to peremptorily challenge the judge under CCP §170.6 unless that judge has made a determination of contested fact issues relating to the merits. CCP §170.6(a)(2). The judge must have actually resolved or determined conflicting factual contentions relating to the merits before the right to peremptorily challenge the judge is lost. *Barrett v Superior Court* (1999) 77 CA4th 1, 5, 91 CR2d 116.

Whether a ruling constitutes a determination of contested fact issues relating to the merits has been resolved by case law in a number of instances.

a. Criminal Cases

(1) [§2.64] Chart

Type of Ruling	Contested Fact Issue?	Authority
Arraignment	No	*Moreira v Superior Court* (1989) 215 CA3d 42, 265 CR 437. But see *Grant v Superior Court* (2001) 90 CA4th 518, 526–527, 108 CR2d 825 (disagreeing with *Moreira* to extent it may be construed to allow peremptory

Type of Ruling	Contested Fact Issue?	Authority
		challenge to be filed before arraignment, absent pending trial or hearing, or all-purpose assignment)
Motion to amend information	No	*People v Hunter* (1977) 71 CA3d 634, 638 n2, 139 CR 560
Pen C §995 motion	No	*Kohn v Superior Court* (1966) 239 CA2d 428, 431, 48 CR 832
In-camera review of polygraph report	No	*In re Jose S.* (1978) 78 CA3d 619, 628, 144 CR 309
Motion to suppress evidence and confession	Yes	*In re Abdul Y.* (1982) 130 CA3d 847, 857–861, 182 CR 146
Motion to produce evidence in criminal hearing (*Hitch/ Trombetta*) motion	Yes	*People v Bean* (1988) 46 C3d 919, 949, 251 CR 467
Plea bargain	No	*People v Montalvo* (1981) 117 CA3d 790, 795, 173 CR 51
Marsden motion	No	*People v Whitfield* (1986) 183 CA3d 299, 304, 228 CR 82

(2) [§2.65] Preliminary Hearing

A defendant was not precluded from filing a peremptory challenge against a judge merely because the judge had previously presided at the defendant's preliminary hearing. *Barrett v Superior Court* (1999) 77 CA4th 1, 5–7, 91 CR2d 116. At the preliminary hearing, the judge did not resolve any contested fact issues relating to the merits of the case in determining that there was sufficient cause to hold the defendant to answer for the charges in the complaint. The defendant did not move to suppress any statements or other evidence at the preliminary hearing, did not dispute the victims' injuries or other allegations in the complaint, and did not litigate any affirmative defenses. 77 CA4th at 7.

(3) [§2.66] Motion To Suppress

A peremptory challenge is untimely after the judge who has been challenged has heard a motion to suppress evidence because the motion involves a determination of contested fact issues relating to the merits. *In re Abdul Y.* (1982) 130 CA3d 847, 857–861, 182 CR 146. However, a judge who has permitted a CCP §170.6 challenge in one case must also

permit it in a second case involving the same defendant who has been assigned to the same judge even though the judge had heard evidence in a suppression motion. *Woods v Superior Court* (1987) 190 CA3d 885, 886, 235 CR 687. In *Woods*, the court held that to have granted one challenge and rejected the other would create an appearance of impropriety that could have been avoided by granting both. 190 CA3d at 887.

When a judge has granted a defendant's motion to suppress evidence and dismissed the charge, and the prosecution refiles the charge and moves to disqualify this judge under CCP §170.6, the judge may, nevertheless, rehear the defendant's suppression motion, as required by Pen C §1538(p). *People v Superior Court* (Jimenez) (2002) 28 C4th 798, 806–809, 123 CR2d 31 (prosecution may not render judge unavailable to rehear suppression motion by challenging that judge under CCP §170.6).

A peremptory challenge by the prosecutor is also untimely after the judge who has been challenged has heard the defendant's motion to exclude certain evidence from the probable cause hearing. *Briggs v Superior Court* (2001) 87 CA4th 312, 317–318, 104 CR2d 445.

(4) [§2.67] Plea Bargain

Although a judge may be challenged after participating in a plea bargain under *People v Montalvo* (1981) 117 CA3d 790, 795, 173 CR 51, a challenge is improper if, as part of the plea bargain, the defendant agrees that the challenged judge may impose sentence. *People v Reynolds* (1984) 154 CA3d 796, 806, 201 CR 826.

(5) [§2.68] *Marsden* Motion

A ruling on a *Marsden* motion is not a determination on a contested issue of fact relating to the merits of the case, but is a determination of law regarding competency of counsel. *People v Whitfield* (1986) 183 CA3d 299, 304, 228 CR 82. Even if the court decides some factual issues in ruling on the motion, those issues will generally not relate to the merits of the case. 183 CA3d at 304.

(6) [§2.69] Probation Revocation

The fact that the challenged judge had presided at a prior hearing in which the defendant's probation was revoked did not preclude the defendant from subsequently challenging the judge. The first hearing did not involve a contested fact issue, because the judge's summary revocation of probation was based only a finding that there was probable cause to support revocation and the merits of the probation revocation petition were to be determined at a later hearing. *Depper v Superior Court* (1999) 74 CA4th 15, 18–21, 87 CR2d 563.

b. Civil Cases

(1) [§2.70] Chart

Type of Ruling	Contested Fact Issue?	Authority
TRO	No	*Landmark Holding Group, Inc. v Superior Court* (1987) 193 CA3d 525, 529, 238 CR 475
Appointment of conservator	Yes	*Conservatorship of Durham* (1988) 205 CA3d 548, 553, 252 CR 414
Injunction	Yes	*Astourian v Superior Court* (1990) 226 CA3d 720, 726, 276 CR 657
Summary judgment motion	No	*Bambula v Superior Court* (1985) 174 CA3d 653, 220 CR 223
Summary adjudication involving complex questions of law	Yes	*California Fed. Sav. & Loan Ass'n v Superior Court* (1987) 189 CA3d 267, 271, 234 CR 413
Demurrer to complaint	No	*Zdonek v Superior Court* (1974) 38 CA3d 849, 113 CR 669
Motion for judgment on pleadings	No	*Hospital Council of N. Cal. v Superior Court* (1973) 30 CA3d 331, 337, 106 CR 247
Motion to quash service of summons	No	*School Dist. of Okaloosa County v Superior Court* (1997) 58 CA4th 1126, 1131–1134, 68 CR2d 612
Motion to transfer and for continuance	No	*Los Angeles County Dep't of Pub. Social Servs. v Superior Court* (1977) 69 CA3d 407, 417, 138 CR 43

(2) [§2.71] Summary Judgment

Although a summary judgment ruling usually involves only a determination of whether a triable issue of fact exists, and not a determination of a contested fact issue (*Bambula v Superior Court* (1985) 174 CA3d 653, 220 CR 223), when there are complex issues, such as contract interpretations, a resolution of a summary adjudication motion may well involve a determination of contested fact issues. *California Fed. Sav. & Loan Ass'n v Superior Court* (1987) 189 CA3d 267, 271, 234 CR 413 (CCP §170.6 challenge made after rulings in summary adjudication motions was untimely); but see *Zilog, Inc. v Superior Court* (2001) 86

CA4th 1309, 1322, 104 CR2d 173 (declining to follow *California Fed. Sav. & Loan Ass'n v Superior Court, supra,* and holding that when judge has previously ruled on summary adjudication motion, judge has only determined legal issues and is subject to later peremptory challenge); *In re Needles Cases* (2007) 148 CA4th 489, 55 CR 3d 708 (patients in coordinated personal injury action who successfully challenged a summary judgment on appeal could thereafter exercise a peremptory challenge of the judge presiding over the coordinated proceedings; such challenge was permitted by statute, notwithstanding the time limits specified in Rules of Court with regard to coordinated proceedings).

(3) [§2.72] Injunctive Relief

An ex parte hearing on an application for a temporary restraining order (TRO) does not involve a contested issue of fact. *Landmark Holding Group, Inc. v Superior Court* (1987) 193 CA3d 525, 529, 238 CR 475. Because TROs are of a transitory and temporary nature and do not constitute a determination on the merits, an otherwise timely challenge is not barred by the fact that a TRO has been issued. *International Union of Operating Eng'rs v Superior Court* (1989) 207 CA3d 340, 355, 254 CR 782. See *Schraer v Berkeley Prop. Owners' Ass'n* (1989) 207 CA3d 719, 729, 255 CR 453 (ruling on application for TRO is not ruling on contested issue of fact, and judge who has issued TRO may be subject to subsequent CCP §170.6 challenge).

However, once a judge has issued an *injunction*, a CCP §170.6 challenge against that judge is not timely to prevent the judge from determining whether the original defendant violated the injunction. *Astourian v Superior Court* (1990) 226 CA3d 720, 726, 276 CR 657.

(4) [§2.73] Ruling on Other Motions

A plaintiff's peremptory challenge was not precluded by the judge's prior consideration of the defendant's demurrer, motion to strike, and motion for a protective order. For purposes of the demurrer, the judge had accepted the plaintiff's factual allegations as true. The judge deferred ruling on the motion to strike, and the protective order merely stayed discovery by the plaintiff until a hearing on the defendant's response to the amended complaint. *Fight for the Rams v Superior Court* (1996) 41 CA4th 953, 958–960, 48 CR2d 851.

A plaintiff's peremptory challenge was also not precluded by the judge's prior rulings on two ex parte applications the plaintiff had filed—one for an extension of time to serve the complaint and the other for service by publication—because neither application required a determination of a contested issue of fact relating to the merits. *Grant v Superior Court* (2001) 90 CA4th 518, 527, 108 CR2d 825.

A peremptory challenge was also not precluded by a ruling under CC §3295(c) that there was a substantial probability that the plaintiff will prevail on a claim for punitive damages, allowing the plaintiff to conduct pretrial discovery relating to potential punitive damages. *Guardado v Superior Court* (2008) 163 CA4th 91, 95, 77 CR3d 149.

9. [§2.74] Withdrawal of Challenge

Once made, a peremptory challenge may not be withdrawn. See *Stebbins v White* (1987) 190 CA3d 769, 781, 235 CR 656. All the litigants are entitled to rely on the disqualification filed by any one of them regardless of any attempt by the challenging party to retract it. *Brown v Superior Court* (1981) 124 CA3d 1059, 1062, 177 CR 756. A challenge is not nullified by a dismissal of the challenging party from the action. *Louisiana-Pacific Corp. v Philo Lumber Co.* (1985) 163 CA3d 1212, 1219, 210 CR 368.

Although a challenge may not be legally withdrawn, at least one case has held that because the actions of a disqualified judge are not void for lack of subject matter jurisdiction, if the parties proceed to trial before a judge who has previously been the subject of a valid peremptory challenge, they waive the error of having a disqualified judge preside. *Stebbins v White*, *supra*, 190 CA3d at 781. A waiver also occurs after a case is sent back for reassignment but is inadvertently reassigned to the challenged judge, if the parties acquiesce in having that judge preside at the hearing or trial. *Andrisani v Saugus Colony Ltd.* (1992) 8 CA4th 517, 526, 10 CR2d 444.

10. [§2.75] Effect of Disqualification Under CCP §170.6 on Rulings of Judge

A judge who has been disqualified under CCP §170.6 may no longer hear any proceedings in the case even when the party who sought disqualification later expresses a preference for appearing before this judge. *Brown v Superior Court* (1981) 124 CA3d 1059, 1061, 177 CR 756. Disqualification under CCP §170.6 is not limited to a particular motion or issue, but deprives a judge of jurisdiction in any further proceedings in the case that involve a contested issue of law or fact. *Geddes v Superior Court* (2005) 126 CA4th 417, 425, 23 CR3d 857. An exception to this general rule is made in the following case: when a judge has granted a defendant's motion to suppress evidence and dismissed the charge, and the prosecution refiles the charge and moves to disqualify this judge under CCP §170.6, the judge may, nevertheless, rehear the defendant's suppression motion, as required by Pen C §1538(p). *People v Superior Court* (Jimenez) (2002) 28 C4th 798, 806–809, 123 CR2d 31

(prosecution may not render judge unavailable to rehear suppression motion by challenging that judge under CCP §170.6).

Courts are divided, however, about whether rulings by a judge made after a valid peremptory challenge are void or merely voidable. Some courts have held that once a timely challenge is made, the judge loses jurisdiction to proceed and any subsequent orders made in the case are null and void. See, *e.g.*, *Solberg v Superior Court* (1977) 19 C3d 182, 190, 137 CR 460 (dicta); *Ziesmer v Superior Court* (2003) 107 CA4th 360, 363–364, 132 CR2d 130; *Zilog, Inc. v Superior Court* (2001) 86 CA4th 1309, 1323, 104 CR2d 173; *Louisiana-Pacific Corp. v Philo Lumber Co.* (1985) 163 CA3d 1212, 1219, 210 CR 368. In *Louisiana-Pacific*, the court held that because the challenge takes effect instantaneously and irrevocably, later events, such as a dismissal, do not cause a rescission of the challenge even if it operates to the disadvantage of coparties who have remained in the case after the party making the challenge has been dismissed. 163 CA3d at 1219, 1221. See also *People v Whitfield* (1986) 183 CA3d 299, 303, 228 CR 82 (after disqualification following peremptory challenge, judge immediately loses jurisdiction, and all subsequent orders and judgments are void).

The judge who is subject to a peremptory challenge under CCP §170.6 loses jurisdiction in the case. Thus, a subsequent judgment by that judge is void when the case was tried before another judge and declared a mistrial and then transferred to and tried before the original judge. *In re Jenkins* (1999) 70 CA4th 1162, 1165–1167, 83 CR2d 232. No waiver occurred because both the prosecution and defense proceeded to trial before the original judge without knowledge that a peremptory challenge had been filed against him. 70 CA4th at 1167. But see *Stevens v Superior Court* (1988) 198 CA3d 932, 939, 244 CR 94 (judge who receives timely peremptory challenge must remove himself or herself from all future matters in case, but may nevertheless decide pending issue). See also *In re Christian J.* (1984) 155 CA3d 276, 279, 202 CR 54 (parties may waive judge's error in failing to disqualify himself or herself after peremptory challenge because actions of disqualified judge are not absolutely void for lack of jurisdiction, but only voidable).

In any event, a judge who has been disqualified under CCP §170.6 may not communicate with the new judge or attempt to influence the decision of the judicial officer assigned to hear the case. *Gubler v Commission on Judicial Performance* (1984) 37 C3d 27, 52, 207 CR 171 (attempt to influence is basis for possible discipline by Commission on Judicial Performance); *Furey v Commission on Judicial Performance* (1987) 43 C3d 1297, 1308, 240 CR 859 (attempt to communicate with new judge regarding recommended sentence was prejudicial misconduct).

The newly assigned judge may review the rulings of the disqualified judge; the disqualified judge, having no authority to rule, is deemed

"unavailable." *Geddes v Superior Court, supra,* 126 CA4th at 426. Any comity concerns that ordinarily would preclude a second judge from reviewing the first judge's rulings do not prevent a newly assigned judge from making whatever rulings are necessary to resolve the case. 126 CA4th at 426.

For an in-depth discussion of whether rulings of a disqualified judge are voidable or void, see *Stebbins v White* (1987) 190 CA3d 769, 781–783, 235 CR 656.

11. [§2.76] Waiver of Disqualification

Whether an erroneous denial of a CCP §170.6 challenge may be waived depends on whether the rulings of the challenged judge are viewed as void or as voidable. If the orders of a judge who has erroneously refused or ignored a peremptory challenge are merely voidable, then the failure to recognize and honor the challenge may be waived. See, *e.g.*, *In re Christian J.* (1984) 155 CA3d 276, 202 CR 54 (when one party has sought to disqualify judge under CCP §170.6 and judge erroneously denies challenge on basis of untimeliness, *other* party may not later contend that denial of disqualification was erroneous). The fact that the other party went to trial and at all times acquiesced in the judge's exercise of jurisdiction constitutes a waiver of the right to contest that judge's qualification to preside over the case. 155 CA3d at 278 (decided under prior law under which erroneous denial of a CCP §170.6 motion could be basis for appeal). Under current law, a party who seeks review of a denial of a peremptory challenge must file a writ of mandate within ten days after service of written notice of the court's order. CCP §170.3(d); *People v Superior Court* (Jimenez) (2002) 28 C4th 798, 802, 123 CR2d 31; *Bear Creek Master Ass'n v Edwards* (2005) 130 CA4th 1470, 1474, 31 CR3d 337. See discussion in §2.79.

There is no waiver when a party challenges a judge in some cases but not others. *Nissan Motor Corp. v Superior Court* (1992) 6 CA4th 150, 155, 7 CR2d 801 (party who accepts judge in two cases involving similar issues does not waive right to challenge judge in third case). Similarly, collateral estoppel does not apply in a CCP §170.6 situation. *City of Hanford v Superior Court* (1989) 208 CA3d 580, 593, 256 CR 274. Therefore, parties seeking to disqualify a judge are not estopped from doing so because they accepted the judge in an earlier case. 208 CA3d at 593.

See §2.24 for discussion of waiver of disqualification for cause.

12. [§2.77] Continuances

No continuance should be granted because of a peremptory challenge unless required for the convenience of the court or for good cause. CCP

§170.6(a)(4). If a continuance is granted, it must only be from day-to-day or for other limited periods, and the case must be reassigned as soon as possible (see §2.78).

A continuance caused by having to reassign a judge after a disqualification under CCP §170.6 does not count in calculating the five-year period in which a case must be brought to trial under CCP §§583.310 and 583.340 (exclusion of certain time periods from the calculation of five years). See *Hartman v Santamarina* (1982) 30 C3d 762, 768, 180 CR 337. When a peremptory challenge is sought on the last day of the statutory period because there had been no advance notice of the trial judge's identity, the continuance required by that challenge constitutes good cause for delaying trial beyond the statutory period. *Bryant v Superior Court* (1986) 186 CA3d 483, 502, 230 CR 777 (prosecution challenged judge and defense objected to delay). In *Bryant,* the court held that a master calendar court should hold an additional judge in reserve against the possibility that either side will challenge the assigned judge; this practice will ensure that speedy trial rights will not be violated. 186 CA3d at 502.

When a continuance has been granted for other reasons than a CCP §170.6 challenge, the continuance may affect the timing for the challenge. For example, when a continuance is sought in good faith, it may cause the five-day period in which a peremptory challenge may be made under the 10-day/5-day rule to begin again. See *People v Richard* (1978) 85 CA3d 292, 298, 149 CR 344.

13. [§2.78] Reassignment of Cases

Once a valid peremptory challenge has been presented, the judge supervising the master calendar must assign some other judicial officer to hear the case. CCP §170.6(a)(3). The presiding judge is authorized to reassign cases as required by convenience or necessity. Cal Rules of Ct 10.603(c)(1)(D). If there is no master calendar judge, the case must be reassigned to another judicial officer in the same court and if there is no other judicial officer available, the Chairperson of the Judicial Council must assign a judicial officer to hear the case as promptly as possible. CCP §170.6(a)(3).

For both disqualification for cause and CCP §170.6 disqualification, if there is no judge qualified to hear an action or proceeding, the clerk must notify the chairperson of the Judicial Council. Once the Judicial Council assigns a judge, that judge must hear the action or proceeding at the scheduled time, or if there is no scheduled time or good cause appears for changing the time, the assigned judge must set a time for the hearing. CCP §170.8.

☛ JUDICIAL TIP: Judges should reassign cases as quickly as possible to discourage the use of challenges for delay.

14. [§2.79] Review of Ruling on Disqualification

The exclusive means for review of the granting or denying of a peremptory challenge is by writ of mandate sought within ten days after service of written notice of the court's order. CCP §170.3(d); *People v Superior Court* (Jimenez) (2002) 28 C4th 798, 802, 123 CR2d 31; *Bear Creek Master Ass'n v Edwards* (2005) 130 CA4th 1470, 1474, 31 CR3d 337. The standard of review is abuse of discretion. *Grant v Superior Court* (2001) 90 CA4th 518, 523, 108 CR2d 825. But see *Ziesmer v Superior Court* (2003) 107 CA4th 360, 363, 132 CR2d 130 (because in deciding CCP §170.6 motion, judge has no discretion, it is appropriate to review decision granting or denying challenge as an error of law; review is therefore conducted under nondeferential de novo standard).

The writ must be sought from the "appropriate court of appeal." CCP §170.3(d). When the disqualified judge is a superior court judge acting as a magistrate, another judge of the superior court has jurisdiction to determine the writ proceeding and this proceeding need not be filed in the court of appeal. *People v Superior Court* (Jimenez), *supra,* 28 C4th at 802–805.

The writ may only be sought by a party. CCP §170.3(d). The challenged judge lacks standing to file a return to the mandate petition. *Grant v Superior Court, supra,* 90 CA4th at 523 n2 (appellate court considered respondent court's response on impact of disqualification orders on court's case management system, as an amicus curiae brief filed in support of real parties in interest).

The trial court also has inherent power to reconsider and correct an erroneous ruling on a peremptory challenge. *Stephens v Superior Court* (2002) 96 CA4th 54, 64–65, 116 CR2d 616 (when CCP §170.6 motion to disqualify judge was heard by another judge, this other judge retained jurisdiction to rescind order disqualifying judge). When a judge has been disqualified, the newly assigned judge may review the rulings of the disqualified judge. *Geddes v Superior Court* (2005) 126 CA4th 417, 426, 23 CR3d 857 (disqualified judge, having no authority to rule, is deemed "unavailable"). If the newly assigned judge finds that the disqualification was erroneous, the first judge's authority to make rulings in the case is reinstated. 126 CA4th at 426.

IV. SAMPLE FORMS

A. [§2.80] Written Form: Waiver of Disqualification

[*Title of Court*]

[*Title of Case*] No.

WAIVER OF DISQUALIFICATION

The parties to this [*action/proceeding*] stipulate to a waiver of disqualification of the Hon. [*name of judge*], Judge of the Court, to sit and act in this [*action/proceeding*]. The basis for the disqualification is .

Dated: _____

_____	_____
[*Signature of party*]	[*Signature of party*]
_____	_____
[*Party's name*]	[*Party's name*]
_____	_____
[*Signature of party's attorney*]	[*Signature of party's attorney*]
_____	_____
[*Attorney's name*]	[*Attorney's name*]

Note: The waiver must state the basis for the disqualification, be signed by all parties and their attorneys, and be filed in the record. CCP §170.3(b)(2).

B. [§2.81] Script: Order Granting/Striking Disqualification

I have read and considered the statement of disqualification [*and opposing papers/additional evidence*].

Judge _____ is hereby ordered disqualified from sitting and acting in the case of _____ because [*state the substantive grounds for the disqualification under CCP §170.1*].

[*Or*]

Judge _____ is hereby ordered disqualified from sitting and acting in the case of _____ because [*he/she*] has failed to respond to the statement of disqualification and is therefore deemed to have consented to it.

[*Or*]

The statement of disqualification is ordered struck because [*state finding regarding lack of substantive grounds for the disqualification, if any, and any procedural grounds such as timeliness that would render the statement defective*].

Note: The substantive grounds for disqualification are found in CCP §170.1. A judge who has not responded to a statement of disqualification within applicable time limits is deemed to have consented to the disqualification. CCP §170.3(c)(4).

C. [§2.82] Script: Order Denying Peremptory Challenge

The peremptory challenge is denied because [*state grounds for denial, e.g., lack of timeliness or the fact that the party has already made one challenge in the case*].

Note: See CCP §§170.6(a)(2) (discussed in §§2.42–2.50) for time limits and 170.6(a)(3) (discussed in §§2.52–2.62) for limitations on number of challenges.

V. [§2.83] REFERENCES

CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS—BEFORE TRIAL, SECOND EDITION, chap 7 (Cal CJER 2008).

Rothman, *California Judicial Conduct Handbook,* chap 7 (CJA 2007).

2 Witkin, California Procedure, *Courts* §§93–160 (5th ed 2008).

California Criminal Law Procedure and Practice, chap 21 (Cal CEB 2009)

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