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APPELLATE LAW

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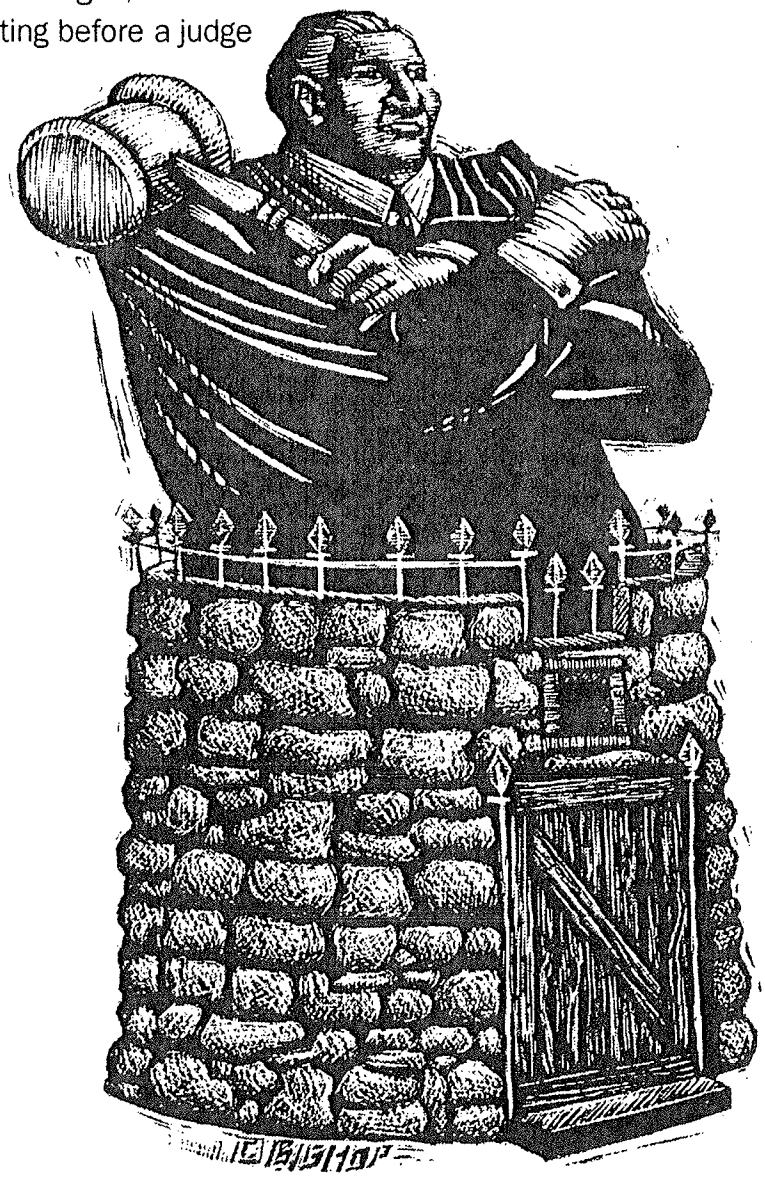
# ILLUSORY FORTRESS

Regardless of previous peremptory challenges, a party should be able to avoid litigating before a judge whose decision was overturned.



Imagine a prevailing appellant, flushed with victory, returning to the trial court to see justice done on the second go-round. The glow of victory fades, however, when the appellant discovers that the case has been assigned to the same judge just reversed on appeal.

Until recently, if a litigant had already used the one peremptory challenge allowed by statute, there was no further recourse in this uncomfortable situation. But two years ago, the Legislature provided some relief by enacting an "appellate remand" exception to the ordinary one-per-case limit on peremptory challenges.

The scope of that exception now has been fleshed out in several opinions, most recently in *Stubblefield Construction Co. v. Superior Court (City of San Bernardino)*, 81 Cal.App.4th 762 (2000). *Stubblefield* confirms the breadth of the remand exception, even when fast-track rules would seem to preclude such a challenge.

The Legislature first enacted a statute allowing litigants to peremptorily challenge a judge in 1937. Under that statute, litigants could disqualify any trial court judge simply by filing a motion. Perhaps understandably, the statute received a hostile judicial reception, with the intermediate appellate courts declaring it unconstitutional because it granted the unfettered power to remove a judge otherwise qualified to hear a case. *Daigh v. Shaffer*, 23 Cal.App.2d 449 (1937).

The California Supreme Court agreed, finding the statute to be an "unwarranted and unlawful interference with the constitutional and orderly processes of the courts." *Austin v. Lambert*, 11 Cal.2d 73 (1938).

Twenty years later, the Legislature passed another peremptory-challenge statute, Code of Civil Procedure Section 170.6. This statute passed constitutional muster because it included the requirement of a sworn affidavit supporting an assertion of prejudice. *Johnson v. Superior Court*, 50 Cal.2d 693 (1958); see also *Solberg v. Superior Court*, 19 Cal.3d 182 (1977) (detailed reaffirmation of Section 170.6's constitutionality).

To limit the potential for unending peremptory challenges, however, the Legislature expressly restricted each litigant to only one such challenge per case. Section 170.6(3) ("no party or attorney shall be permitted to make more than one such motion in any one action").

In 1985, the Legislature amended Section 170.6 to expressly allow a peremptory challenge when the same trial judge is assigned to a case after reversal on appeal. This amendment was meant to address the concern that a judge who had been reversed might harbor a bias against the party who successfully appealed the judge's erroneous ruling. *Steps Investments v. Superior Court*, 233 Cal.App.3d 572 (1991); *Stubblefield* (noting such a reaction "is possible, and very human").

While this post-remand provision made good sense, it did not expressly resolve the troubling predicament of a litigant who had already used a Section 170.6 challenge and then later obtained a reversal on appeal.

For instance, in *Matthews v. Superior Court*, 36 Cal.App.4th 592 (1995), the plaintiff peremptorily challenged the first judge assigned to the case. A second judge later granted summary judgment for the defendants but was reversed on appeal. When the case returned before this judge after remand, the plaintiff attempted a second peremptory challenge. The second trial judge denied the challenge and the Court of Appeal affirmed that ruling.

The *Matthews* court reasoned that although the 1985 amendment to Section 170.6 expressly allowed

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for a peremptory challenge against a judge reversed on appeal, that provision was no exception to the one-challenge-per-action limitation. Because the remanded case was simply a continuation of the same action, no second challenge was permitted.

This unsettling state of affairs persisted for three years after the *Mattheus* decision until the Legislature acted to cure the problem.

In 1998, the Legislature amended Section 170.6 to create an "appellate remand" exception to the "one peremptory challenge per action" rule. Under the amended statute, if a judge reversed on appeal is reassigned to the matter after remand, then the party who successfully pursued the appeal may peremptorily challenge that judge within 60 days of notice of that judge's assignment. That challenge is available, moreover, even if the party already has used its peremptory challenge. Section 170.6(2).

Although the plain terms of the appellate-remand exception would seem to require no clarification, fast-track cases presented a variation that required further statutory construction. That is the backdrop for *Stubblefield*.

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In Stubblefield Construction's lawsuit against the city of San Bernardino, Stubblefield exercised its peremptory challenge under Section 170.6. The second judge assigned granted summary judgment for the city. Stubblefield appealed and the Court of Appeal reversed in part, remanding the case for further proceedings. After remand, the parties learned that the case had been assigned to the same judge who had granted summary judgment. Forty-two days later, Stubblefield filed a second peremptory challenge under Section 170.6(2). When the city objected to the motion, the trial court refused to disqualify itself. Stubblefield sought writ relief.

In response to the writ, the city raised two creative, but ultimately unsuccessful, arguments against Stubblefield's second peremptory challenge. First, the city argued that the wording of the remand exception precluded Stubblefield from taking advantage of that rule and that Stubblefield was limited to the one-challenge-per-case rule.

The city focused on the language providing that a second peremptory challenge is allowed only "following reversal on appeal of a trial court's decision ... if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter." Section 170.6(2). Previous precedent had already clarified that the word "trial" in the term "new trial" was to be broadly construed to mean any situation where the court was to perform any nonministerial act. *Stegs* (remand as to one issue only, rather than for an entire new trial).

So here, the city focused on the word "new," arguing that since the original proceeding was terminated by summary judgment, there technically never had been a trial, and, thus, the remand would not result in a "new trial" but only the "first trial."

The Court of Appeal rejected this narrow construction as "meritless." The purpose for allowing a second peremptory challenge in a remand situation — i.e., the possibility that "a judge may react with a certain pique to the negative treatment of his or her decisions by an appellate court" — applies as equally to the reversal of a summary judgment ruling as to the reversal of a judgment after a bench or jury trial.

Also, the phrase "new trial," as used in various statutes, is not limited to proceedings after a bench or jury trial — indeed, an aggrieved party may move for a "new trial" after the granting of a summary judgment motion. *Scott v. Farrar*, 139 Cal.App.3d 462 (1983). This construction of the term "new trial" harmonizes with the broad definition appearing in Code of Civil Procedure Section 656 ("a re-examination of an issue of fact in the same court") and that applied in another Section 170.6(2) case, *Hendershot v. Superior Court*, 20 Cal.App.4th 860 (1993).

Second, the city argued that Stubblefield's post-remand Section 170.6 motion was untimely because under a Trial Court Delay Reduction Act (commonly known as "fast track") provision, a peremptory challenge in a directly calendared matter must be brought with 15 days of a party's first appearance. Government Code Section 68616(i). Obviously, a strictly literal reading of Section 68616(i) would negate Section 170.6(2)'s provision that allows a challenge after remand.

Thus, the city did not espouse such a Draconian position that would destroy the appellate-remand exception entirely. Instead, the city argued that Stubblefield should have filed its second peremptory challenge within 15 days of notice of the reassignment to the same judge who had granted the summary-judgment motion.

The Court of Appeal acknowledged that the city's second argument had "substantial appeal." However, the language of the Government Code shows that the 15-day limit was not drafted with the possibility of a judicial assignment after a remand in mind.

As a result, rather than create a rule that the 15 days restarts after reassignment to the same judge after remand, the Court of Appeal concluded that "Government Code section 68616, subdivision (i) has no application to the situation which arises after remand." Instead, the 60-day provision built into Section 170.6(2), expressly drafted with remand in mind, would control. Therefore, because Stubblefield filed its post-remand challenge within the controlling 60-day limit, its challenge was timely.

*Stubblefield* should put to rest any quibbling about the appellate-remand exception. Litigants should feel confident that Section 170.6 means what it says and that regardless of any prior peremptory challenge, they will have 60 days after an appellate-court remand to challenge a judge whose decision was reversed. This appellate-remand exception further extends to appeals and writs. *Overton v. Superior Court*, 22 Cal.App.4th 112 (1994) ("appeal" as used in Section 170.6 includes "writ proceedings").

Counsel must, however, make sure to comply with the statutory time limit. If it files the challenge within the 60-day period, a party should be able to avoid having to litigate before a judge whose decision was overturned.