CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Fry v Superior Court 12/19/13

CCP section 170.6; Proper Form and Service

On March 18, 2013, the clerk of the Los Angeles Superior Court notified plaintiffs that their case had been assigned to Judge Joanne O'Donnell in Department 86. On April 3rd, plaintiffs' counsel faxed an affidavit of prejudice concerning O'Donnell to the court's "central fax filing office." The affidavit, on Los Angeles Superior Court Form LACIV 015, is entitled "Affidavit of Prejudice Peremptory Challenge to Judicial Officer (Code Civ. Proc. Section 170.6). The affidavit identified the parties and case number, identified Judge O'Donnell as the bench officer being challenged, and set forth her department number. No separate motion accompanied the affidavit and no plea for relief was made other than was implied by the title of Form LACIV 015.

Faxed along with the form was a Judicial Counsel form facsimile cover sheet (MC-005). Counsel provided no processing instructions although the form provided a reference to allow inclusion of such instructions. The clerk's office marked the prejudice affidavit as received on April 3, 2013, the day it was transmitted, but took no further action. Upon subsequent inquiry, counsel learned the document had been lost.

The document was not forwarded to either Judge O'Donnell or the presiding judge. Counsel thereafter applied ex parte to Judge O'Donnell for a *nunc pro tunc* order deeming the affidavit to have been filed as of April 3, 2013. The trial court denied the application and the 170.6 challenge, stating in a minute order that the code requires the motion shall be made to the assigned judge or to the presiding judge. Lacking evidence the document had been timely filed in either her courtroom or in the Presiding Judge's courtroom, the court stated it

was compelled to deny the application and the motion.

Plaintiffs filed for a writ of prohibition or mandate, complaining the court had no authority to find the fax filing was insufficient for a 170.6 challenge. The Second District Court of Appeal invited a response from the Superior Court due to the impact any ruling would have on the court's case management system. The court filed a return, to which plaintiffs/petitioners then replied. Plaintiffs contend the trial court erred by ruling a peremptory challenge submitted by fax filing to the clerk's office fails to satisfy the requirements of 170.6. The Superior Court counters that (1) the peremptory challenge was improper because the affidavit was accompanied by a written or oral motion, (2) improper because it was not directed to Judge O'Donnell or the presiding judge, and (3) filing at the central filing window by fax was improper.

The DCA began its opinion by reviewing the history of 170.6, which represented the culmination of many years' effort by the organized bar of the State to obtain legislation which would permit the challenge of a judge for prejudice without an adjudication of disqualification. (*Johnson v Superior Court* (1958) 50 Cal.2d 693) Pursuant to statute, a party or its lawyer may peremptorily challenge a judge by making "an oral or written motion without prior notice supported by affidavit" to the effect that the judge is prejudiced against the party or its attorney so that the party believes it cannot have a fair and impartial trial before that judge. (170.6 (a)(2)) In a civil case, involving a judge for all purposes, the motion shall be made within 15 days after notice of the all purpose assignment.

Section 170.6 guarantees to litigants an extraordinary right to disqualify a judge. The right is automatic in the sense that a good faith belief in prejudice is alone sufficient, proof of facts showing actual prejudice not being required. The object of this section is to provide the party and attorney with a substitution of judge to safeguard the right to a fair trial or hearing. This section is intended to ensure confidence in the judiciary and avoid the suspicion which might arise from the belief of a litigant that the judge is biased where such belief is difficult, if not impossible, to prove. The section is liberally construed and the trend is to grant relief unless absolutely forbidden by statute. (*People v Superior Court (Maloy)* (2001) 91 Cal.App.4th 391) Courts must refrain from any tactic or

maneuver that has the practical effect of diminishing the important right to exercise the challenge. (*Hemingway v Superior Court* (2004) 122 Cal.App.4th 1148)

In *Johnson v Superior Court*, the California Supreme Court observed that prejudice, being a state of mind, is very difficult to prove, and, when a judge asserts that he is unbiased, courts are naturally reluctant to determine that he is prejudiced. By permitting a party to avoid the difficult or impossible task of persuading a court that his or her belief in judicial prejudice is justified, section 170.6 alleviated suspicion of unfairness while promoting the integrity and fairness of the judiciary. (*Johnson*, at p. 697)

Here, plaintiffs/petitioners filed only LACIV 015, and the Superior Court argues that the form does not constitute a 170.6 motion because it contains no language seeking relief. The Justices disagreed, and found the LA County form adequately addresses the requirements of the statute. Section 170.6 also requires that the challenge be made to the assigned judge or the presiding judge. The Fax Filing Cover Sheet contains a section for special handling instructions, for completion of any local rule requirements. Plaintiffs filed the proper form with the clerk's office but provided no processing instructions, as they failed to indicate to whom the challenge should be directed.

Despite the liberal view of minor procedural irregularities allowed by the statute, the DCA held that filing a 170.6 challenge at the clerk's window without processing instructions risks delay and invites mischief. Because the statute provides the document may be transmitted to one of two judges, it is incumbent on the moving party to specify which is intended. The clerk has no way to know to whom the challenge is to be transmitted, nor how important the decision is, and should not be forced to guess the filer's intent or make further contact with the party or counsel to obtain clarification.

The Justices concluded that where a form provides a means of supplying processing instructions, a party is expected to supply them when needed. If it does not, it must bear the risk of delay, including the risk that a statutory time limitation will run. Because the peremptory challenge here was directed to no one, it was not "made to" either Judge O'Donnell or the presiding judge, and denial of the challenge was correct.

As to the last point raised by the Superior Court, the Justices find that a party may file by fax directly to any court that, by local rule, has provided for direct fax filing. (Cal. Rules of Court, rule 2.304(a)) They do not read the provision in section 170.6 that a peremptory challenge be "made to" the assigned or presiding judge as requiring that the challenge be handed to the judge personally. Rather, the challenge is properly filed with the court clerk. In sum, when a court accepts documents by facsimile transmission at a central filing office, as in Los Angeles Superior Court, a motion thus submitted satisfies the requirement that it be made to the judge

The petition for writ of mandate is denied. Each side is to bear its own costs.

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