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I want a new judge

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Back in the 1980s, Huey Lewis crooned about wanting a new drug. If Weird Al were a successful appellant's lawyer, he'd transform Huey's lament to *I Want a New Judge*: "I want a new judge, one that won't make me cry. One that won't make me lose my case; or make my client say goodbye. I want a new judge, one that won't be as bad. One that won't rule like the one before, that made me feel so sad. One that won't make me nervous, wonderin' what to do. One that makes me feel like I've got a case that's new; got a case that's new."

Last month's column explored those exceptional appeals where an appellate court reverses and reassigns to a new judge on remand. We saw how this can occur sua sponte by the appellate court or on an appellant's motion under exceptional circumstances. But it is extremely rare for the stars to align for either of those to happen. And yet successful counsel for an appellant almost always yearns for a new judge, and believes that a reversal alone should suffice for that. Of course, it does not. *People v. Keller*, 245 Cal. App. 2d 711 (1966) (reversal on appeal does not disqualify judge nor does it evidence bias or prejudice). But shouldn't there be a way? In federal court, there's not. But for California appeals, there is such a power, and like Dorothy's ability to return to Kansas from Oz, it was there all along.

Code of Civil Procedure Section 170.6 is a number that most litigators know by heart. In litigator lingo, the number becomes a verb, as in "we'll just 170-point-6 that judge." Even more slangily, this is the statute that allows a judge to be "bounced" or "papered." Although what 170.6 can do is simply stated, the actual wording is rather dense. And hidden in that statutory thicket is a gem that exceptional appellate lawyers know and treasure.

The second paragraph of subdivision (a)(2) of Section 170.6 (enacted in 1985 to address the concern that a reversed judge might harbor a grudge) asserts that a new judge may be had "following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter." Thus, in clearer terms, winning a reversal on appeal wins you a new judge (if you want one). And it doesn't matter if the judgment originated from a jury verdict or bench trial, the appellant can still get a new judge. [*Pandazos v. Superior Court*](#), 60 Cal. App. 4th 324 (1997).

And this is true even if the prevailing appellant had already invoked 170.6 to bounce a judge early in the action. Notwithstanding the usual "single challenge" rule -- that a party gets only one "magic bullet" per action or special proceeding (170.6(a)(4)) -- "the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under this section regardless of whether that party or side has previously done so."

Moreover, there's plenty of time to ponder whether to bounce the judge, because you learn about the reversal when the Court of Appeal decision issues, then there are 30 days to finality, then another couple months or so until the remittitur returns the case back to the trial court, and then: "The motion shall be made within 60 days after the party or the party's attorney has been notified of the assignment." Code Civ. Proc. Section 170.6(a)(2). And sometimes formal notice of the assignment can take a while even after the remittitur. See [Ghaffarpour v. Superior Court](#), 202 Cal. App. 4th 1463 (2012) (holding that a local rule using the remittitur as the 60-day trigger was invalid as conflicting with statutory language that notice of the assignment starts the clock).

Well, that's all just great and dandy! Is that all there is to know? Nope. It's never that easy. Where it gets tricky is that not every reversal allows for a new judge. This is because the statute applies only where the original judge is assigned to conduct a "new trial on the matter." Figuring out if a remand is for a "new trial" isn't as easy as it sounds.

What if there never was any trial in the first place? (As in the reversal of a summary judgment?) Is a remand in such cases for a "new trial" even if there never was a first trial? Yes. [Stubblefield Const. Co. v. Superior Court](#), 81 Cal. App. 4th 762 (2000) (noting that a new trial motion may properly follow a summary judgment). What if the remand is for some collateral ruling, such as a post-judgment determination of attorney fees? Is merely re-deciding a fees motion a new trial?

Case law helps color in the details. Most 170.6(a)(2) cases address either the timeliness of the motion or whether the proceedings on remand qualify as a "new trial."

For 170.6 purposes, a "new trial" includes any hearing in which the "court must revisit some factual or legal issue that was in controversy in the prior proceeding." [Paterno v. Superior Court](#), 123 Cal. App. 4th 548, 560 (2004). Thus a hearing to determine costs and fees constitutes a "new trial" within the meaning of Section 170.6(a)(2). [First Federal Bank of California v. Superior Court](#), 143 Cal. App. 4th 310, 315 (2006); [Pfeiffer Venice Properties v. Superior Court](#), 107 Cal. App. 4th 761, 767-768 (2003).

Some sort of final merits determination must be at issue. See [Akopyan v. Superior Court](#), 53 Cal. App. 5th 1094, 1101 (2020) ("where the Court of Appeal reverses and remands for redetermination of a motion that does not involve an evaluation of the merits of the underlying action, section 170.6, subdivision (a)(2), is not triggered."). Thus, for instance, reversal of a ruling on a pretrial motion for class certification does not trigger Section 170.6 because such a ruling "did not address the merits, nor did it terminate the action, [and thus] there has been no trial." [Burdusis v. Superior Court](#), 133 Cal. App. 4th at 88, 93 (2005). Similarly, reversal of a trial court's pretrial motion determining applicable law did not support a challenge under Section 170.6(a)(2), because the trial court did not yet

"'try' any of plaintiffs' causes of action; it merely decided ... which state's law will apply when the case is tried or otherwise adjudicated." *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 121 Cal. App. 4th 490, 502 (2004).

Now let's getta a little meta. Exceptional appellate lawyers already know that Section 170.3(d) says that "the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate" (due 10 days after service of written notice of entry of the order, subject to another five days for mail service). In other words, a writ petition is the exclusive means for challenging an erroneous denial of a 170.6 peremptory challenge. *People v. Hull*, 1 Cal. 4th 266, 268 (1991). So if you win a writ allowing you to bounce the judge, can you then bounce the judge? That's a trick (or silly) question, because if by winning the writ, a new judge is ordered, then there's no need to ask for one. And if the writ wins a reversal of an order disqualifying the judge, then the appellant obviously wanted to keep that judge. So this overly recursive query would never arise.

But the more interesting question is about writs in general. Is winning a reversal via writ relief (rather than an appeal) sufficient to invoke 170.6(a)(2)? One obvious sticking point is that writ relief isn't typically going to be from a judgment -- because if appellant had a judgment, an appeal could be taken, so no writ would be needed! Further, the statutory language is phrased in terms of an "appeal" and although writs resemble appeals in many ways, writs are original proceedings, not appeals. Even so, precedent exists to allow a reversal-bounce after a writ -- albeit in highly unusual cases: "new trials granted as the result of a writ proceeding are an exceedingly rare species, seen only slightly more often than the passenger pigeon." *Overton v. Superior Court*, 22 Cal. App. 4th 112 (1994). (For those rusty on their natural history, "Martha," the last passenger pigeon, died in the Cincinnati Zoo on September 1, 1914.)

A final query: Can either side invoke the reversal-bounce? Obviously, winning appellants can. After all, they are the intended beneficiaries of the statute, and the second sentence specifically refers to "the party who filed the appeal" resulting in the reversal of a final judgment. But that second sentence addresses a winning appellant's immunity from the single challenge rule. The first sentence -- the one creating the reversal-bounce power -- says nothing that limits it to the prevailing appellant. Why a respondent would ever *want* to bounce the judge who ruled favorably is a good question. But if such a respondent did want a new judge, would that work? *Pfeiffer Venice* says yes: Unsuccessful respondents may invoke the statute, provided they have not yet exercised a peremptory challenge in the litigation. Under what circumstances would a respondent really do that? Exceptionally appealing ones, to be sure.

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