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## **The other 3R's: reversed, remanded, reassigned**

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### **EXCEPTIONALLY APPEALING**

Have you heard about Houston federal judge Lynn N. Hughes of the Southern District of Texas? He's become infamous for making "intemperate comments on the bench," "issuing rulings with legal errors," and being "rebuked, reversed and removed" in cases appealed to the 5th U.S. Circuit Court of Appeals. See Angela Morris, "'The Most Intemperate Judge': This Federal Jurist Is Raising Eyebrows," Law.com (Feb. 3, 2021); Alison Frankel, "Houston judge Lynn Hughes is pulled off another case as 5th Circuit revives prof's discrimination claim" (Reuters, Feb. 1, 2021) (noting a 72% affirmance rate for Judge Hughes, the second-lowest in his district).

In *Miller v. Sam Houston State University*, 4:15-CV-2824, 4:15-CV-2927 (Jan. 29, 2021), the 5th Circuit reversed and reassigned the case to a new judge based on Judge Hughes "imperious" and "biased" conduct that evidenced a "prejudgment" of the plaintiff's claims. The "cumulative weight of both prejudicial comments and peremptory rulings" made clear that there was doubt about the judge's ability to fairly decide the case.

In *U.S. v. Swenson*, 894 F.3d 677 (5th Cir. 2018), the 5th Circuit reversed, remanded and reassigned a case after finding that Judge Hughes had abused his discretion. He had "excoriated" the prosecution for a mistake, and "apparently attributed her mistake to her sex," commenting that, "We didn't let girls do it in the old days." *Id.* at 681. The 5th Circuit noted that "such comments are demeaning, inappropriate, and beneath the dignity of a federal judge." *Id.* at 681 n.3.

A few years earlier, the 5th Circuit reassigned a Judge Hughes case after reversing a summary judgment ruling. *U.S. ex rel. Little v. Shell Exploration*, 602 Fed. Appx. 959 (5th Cir. 2015). This was the second time the plaintiff had to appeal a grant of summary judgment by Judge Hughes, and this time it expressly asked for reversal and a new judge. After an earlier grant of summary judgment was reversed, the defendant filed a renewed motion, which remained on the docket for nearly a year before Judge Hughes granted it. The 5th Circuit ruled that Judge Hughes essentially "disregarded" the earlier reversal and repeated his erroneous ruling, and that a new judge was needed "to preserve the appearance of justice, given the long delays, repeated errors and cursory reasoning" by the judge.

In *Little*, the 5th Circuit also noted that ordering reassignment is an "extraordinary" power that is "rarely invoked." *Id.* at 974-75. The court went on to discuss how circuits apply two different tests. Some circuits (including the 9th Circuit) apply a factorial analysis: "(1) whether the original judge would reasonably be expected upon remand to

have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Id.* at 975; see *Cal. v. Montrose Chem. Corp.*, 104 F.3d 1507, 1521 (9th Cir. 1997). Other circuits apply "a more lenient test," essentially asking whether the judge's hostility "might reasonably cause an objective observer to question" the judge's impartiality. *Id.*

The power to reassign a case on remand derives from 28 U.S.C. Section 2106, which states that federal appellate courts may "require such further proceedings to be had as may be just under the circumstances." See *Smith v. Mulvaney*, 827 F.2d 558, 562 (9th Cir. 1987) ("Remand to a different trial judge is appropriate under a demonstration of personal bias or in 'unusual circumstances.'").

The 9th Circuit's version of Judge Hughes was the late Judge Manny Real, who also gained notoriety for being reversed and reassigned. One news article counted 23 such reassignments in ten years. "Ninth Circuit Bars Judge Real From Case," MetNews at p. 1 (May 22, 2019); see also Carol Williams, "Critics want this judge benched," L.A. Times (Aug. 16, 2009) (discussing a remand and reassignment, noting it "was at least the 10th time Real has endured that rare form of appeals court reproach"); *Folex Golf Indus. v. O-Ta Precision Indus.*, 700 Fed. Appx. 738 (9th Cir. 2017) (noting that reassignment is proper in "unusual circumstances," and that reassignment was "advisable to preserve the appearance of justice" because this was the third reversal of Judge Real in the case); *Matter of Yagman*, 796 F.2d 1165, 1188 (9th Cir. 1986).

These federal outliers make for interesting stories, but what happens in California state courts? Code of Civil Procedure Section 43 empowers state appellate courts to "affirm, reverse, or modify any judgment or order appealed from," and to "direct a new trial or further proceedings to be had." That does not explicitly address reassignment, but Code of Civil Procedure Section 170.1(c) provides: "At the request of a party or on its own motion, an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court."

Like the federal appellate courts, California's courts recognize that the power to reassign on remand "must 'be used sparingly and only where the interests of justice require it.'" *Kent v. Superior Court*, 2 Cal. App. 4th 1392, 1395 (1992), quoting *People v. Gulbrandsen*, 209 Cal. App. 3d 1547, 1562 (1989). In *Kent*, although the writ petitioner won a reversal, the court denied reassignment, because no showing justified it. The petitioner's mere assertion that the trial judge had "already made up his mind," was not

enough. *See also Marriage of Walker*, 203 Cal. App. 4th 137, 153 (2012) (denying reassignment on remand because mere legal error "does not itself create the appearance of bias, much less establish bias").

Grounds for reassignment include (1) "where a reasonable person might doubt whether the trial judge was impartial"; (2) "where the court's rulings suggest the 'whimsical disregard' of a statutory scheme" (*Alhusainy v. Superior Court*, 143 Cal. App. 4th 385, 394 (2006), quoting *Hernandez v. Superior Court*, 112 Cal. App. 4th 285, 303 (2003)); and (3) in criminal cases, "where the sentence of the original judge indicates an animus inconsistent with judicial objectivity." *Gulbrandsen*, 209 Cal. App. 3d at 1562.

In *Alhusainy*, reassignment was appropriate because the trial court (1) did not ensure the defendant's plea was valid before sentencing, and thus "participated in facilitating the void plea and the commission of a new crime," and (2) imposed a harsh sentence that did not align with the crime. *Id.* at 394-95. In contrast, in *Gulbrandsen*, reassignment was denied where the court committed a "mere sentencing error" that did not "reflect a lack of objectivity implicating the interests of justice." *See also People v. Superior Court*, 50 Cal. App. 4th 1216, 1231 (1996) (rejecting prosecution's request for reassignment because "mere judicial error is not conclusive evidence of bias or grounds for disqualification [for cause], and this has been held particularly true in cases of sentencing error").

Reassignment is also proper where a judge exhibits actual bias. *Hernandez v. Paicius*, 109 Cal. App. 4th 452 (2003) (trial judge's remarks gave "the appearance the court held preconceived ideas based on stereotypes of undocumented aliens"); *Ng v. Superior Court*, 52 Cal. App. 4th 1010, 1024 (1997) (reassignment because judge made "derogatory and apparently unfounded statements concerning counsel" and had an "unusual and inappropriate desire to keep the case").

Case law also shows that reassignment is proper where a judge repeatedly fails to follow the law. *See People v. Pierce*, 40 Cal. App. 4th 1317, 1319-22 (1995) (reassignment where sentencing judge had been "repeatedly reversed for failing to state reasons for sentencing decisions"). And, as in some of the federal cases noted above, reassignment makes sense when a judge is repeatedly reversed in the same case -- especially for failing to follow instructions after a prior reversal. *Lloyd v. Hardesty*, A135472 (May 31, 2013) (sua sponte reassignment "in the interests of justice" after second reversal of same judge in the same case); *see also Hogan v. First Tech. Fed. Credit Union*, A151266 (Aug. 29, 2019) (requested reassignment denied; good discussion and citations).

My basic appellate course ends with a discussion of the usual 3R's (rehearing, review, remittitur) and the 3C's (certiorari, costs, closing the file). But in exceptional cases,

another 3R's emerge. In extreme cases involving the right judge -- or rather, the "wrong" judge -- it is appropriate to ask the appellate court to reverse, remand and reassign. v

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