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# A CC-Pain: Abuse of C.C.P. § 170.6 Peremptory Challenges

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## A CC-Pain: Abuse of C.C.P. § 170.6 Peremptory Challenges

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The ability to disqualify a judge from presiding over your case is an extraordinary right. In California, there is more than one way to exercise that right, but the most controversial is [C.C.P. § 170.6](#). Added to the California Code of Civil Procedure in 1957, the legislative intent behind § 170.6 was to enhance public confidence in the judicial system by giving attorneys the power to disqualify a judge for prejudice absent any factual averments. Although the statute has served its intended purpose, its shortcomings have also allowed some attorneys to abuse it with impunity.

Under the statute, the only requirement for disqualification is for an attorney to have a [good faith belief](#) that the judge assigned to his or her case is prejudiced against the attorney, the attorney's firm, or the attorney's client. The thinking at the time of enactment was that if an attorney ever faced a situation where he or she believed the assigned judge would not give the attorney a fair chance at trial, he or she could disqualify the judge without having to provide specific accusations. The absence of accusations allows disqualification to occur without offending the judge being challenged. It also avoids any hearing where the judge's dirty laundry could potentially be aired. All the moving party must do for the challenge to be granted is to timely submit, in good faith, a statement or an affidavit that asserts the judge is prejudiced.

The statute's reliance on an attorney's good faith belief about a judge's prejudice and its potential for abuse have raised alarm bells in the past. The constitutionality of § 170.6 was challenged and upheld in [Johnson v. Superior Court](#) and [Solberg v. Superior Court](#). The California Supreme Court reasoned in both cases that because of the inherent difficulty of proving prejudice, an attorney's good faith accusations, even absent factual averments, were permissible. It also recognized that the importance of avoiding even the suspicion of judicial partiality was paramount. The Court further asserted that the allegations of abuse of the statute were no reason to find it unconstitutional, and moreover, the risk of abuse was minimized by the safeguard mechanism requiring attorneys to "show good faith by declaring under oath that the judge is prejudiced."

Though I'm sure everyone can agree that the judiciary should do its utmost to preserve its reputation of impartiality, I don't think that the § 170.6 safeguard does nearly enough to prevent abuse. The lack of an evidentiary burden makes it easy for attorneys to assert the challenge, but it also makes it just as easy for them to abuse it. If an attorney isn't prepared for trial, wants to delay trial for strategic purposes, or wants to judge shop, § 170.6 can be used without question as long as it is asserted in a timely fashion. The rule's reliance on the good faith of attorneys makes it an effective tool in any litigator's arsenal, but it comes at the cost of allowing rampant and unchecked exploitation.

One can certainly argue that § 170.6 does have a sufficient deterrent mechanism because misusing it requires attorneys to perjure themselves. This view, however, fails to consider that because § 170.6 requires no factual averments, an attorney who perjures himself or herself to disqualify a judge has essentially zero chance of getting caught. If attorneys don't face any real threat of disciplinary action for abusing § 170.6, the temptation to misuse it may far outweigh the guilt or shame he or she may feel for committing perjury.

The most serious side effect of the statute has inevitably been that judges who are completely qualified to preside over their cases, and who are not biased, are benched at the whim of the litigants in front of them. This was the exact reason § 170.6's predecessor, C.C.P. § 170.5, was found unconstitutional.

Section 170.5 was enacted in 1937 for much the same reasons as § 170.6. However, it differed from § 170.6 because it did not require the filing of an affidavit, and in criminal cases could only be asserted by the defense. In 1938, the statute was [found to be unconstitutional](#) because it

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permitted private citizens to unilaterally interfere with the power of the judicial branch to appoint qualified judges to preside over cases. The California Supreme Court stated, “to put in the hands of a litigant uncontrolled power to dislodge without reason or for an undisclosed reason, an admittedly qualified judge from the trial of a case in which forsooth the only real objection to him might be that he would be fair and impartial in the trial of the case would be to characterize the statute not as a regulation but as a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department.”

So how is § 170.6 any different? It isn't really different at all, apart from the requirement of an affidavit. In fact, many attorneys and judges will readily admit that the most frequent reasons for using § 170.6 are indeed prohibited by the statute. One court went so far as to state, “it is universally understood that the challenge is used mostly for purposes unrelated to bias or prejudice of the judge.” This evidence of universal acceptance of off-label use of the statute perfectly illustrates the ineffectiveness of the abuse deterrent mechanism.

What then can be done to preserve for litigants the right to disqualify a judge whom they truly believe is biased, while at the same time sufficiently deter abuse of the statute? We simply need to start keeping score.

The recording of every challenge and the review of challenges by an enforcement body would do much more to deter abuse than the current reliance on good faith. Just like Santa's naughty or nice list, when you know somebody is keeping score you are much less likely to break the rules.

First, there needs to be a database that records peremptory challenges. Currently there is no way to analyze the use of the statute, making it essentially impossible to find instances of abuse outside of anecdotal evidence. Having a database that records which attorney or law firm brings the challenge, and which judge is disqualified, is essential to begin reigning in abuse. Each court in California could easily submit the name of the attorney, law firm, and challenged judge to a centralized database. This would put little burden on the courts and help them greatly with backlogs caused by challenges.

Second, there needs to be a third-party monitoring body. This entity could analyze the database for patterns of abuse and investigate suspicious challenges. The California Bar could carry out this task, which would be in accord with its role in ensuring attorneys meet their professional obligations. When an attorney or law firm is found to have a suspicious assortment of challenges to multiple judges, an analyst could flag the attorney or law firm and further investigate to determine if § 170.6 has been abused.

As the legal profession adapts to the new technologies of the twenty-first century, it should not hesitate to use these new tools to help correct the imperfections of the past. C.C.P. § 170.6 is one of many rules that could use database analytics to cure its shortcomings, and doing so would be a step in the right direction.

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C.C.P. § 170.6, California, California Code of Civil Procedure, judicial disqualification, peremptory challenge

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