



# THE STATE BAR OF CALIFORNIA

– COMMITTEE ON ADMINISTRATION OF JUSTICE

180 Howard Street  
San Francisco, CA 94105-1639  
Telephone: (415) 538-2306  
Fax: (415) 538-2515

---

## ***TIME LIMITATION FOR MAKING A PEREMPTORY CHALLENGE TO A JUDGE IN DIRECT CALENDAR, FAST TRACK CASES***

### **LEGISLATIVE PROPOSAL (CAJ-2010-12)**

TO: Saul Bercovitch, Legislative Counsel  
State Bar Office of Governmental Affairs

FROM: Reuben A. Ginsburg, Chair  
Committee on Administration of Justice

DATE: July 27, 2009

RE: Time Limitation for Making a Peremptory Challenge to a Judge in Direct  
Calendar, Fast Track Cases  
- A proposal to repeal Section 68616(i) of the Government Code

### **COMMITTEE ACTION AND CONTACT**

Date of Approval by Committee: June 17, 2009  
Approval vote: Unanimous

<b>Committee Contact:</b>
Reuben A. Ginsburg California Court of Appeal 300 S. Spring St., Ste. 200 Los Angeles, CA 90013 Phone: (213) 830-7273 Fax: (213) 897-2430 E-mail: <a href="mailto:reuben.ginsburg@jud.ca.gov">reuben.ginsburg@jud.ca.gov</a>

### **SUMMARY OF PROPOSAL**

This proposal would clarify the time for a party to challenge a judge in certain fast track cases by filing a motion supported by an affidavit of prejudice under Code of Civil Procedure Section 170.6. Code of Civil Procedure Section 170.6(a)(2) establishes the date by which the motion must be filed. Government Code Section 68616(i), however, establishes an exception to

those timing requirements for judges in direct calendar courts in fast track cases. This proposal would repeal Government Code Section 68168(i) so as to eliminate the uncertainty caused by that provision and the cases interpreting it and make the clearer timing requirements of Code of Civil Procedure Section 170.6(a)(2) applicable in all fast track cases.

## **ISSUES AND PURPOSE**

Code of Civil Procedure Section 170.6 establishes a procedure to challenge a judge for cause based on prejudice, by filing a motion supported by an affidavit. It includes a provision governing the time to file the motion in a case that has been assigned to a judge for all purposes. Government Code Section 68616(i) expressly supersedes that timing provision for fast track cases.<sup>1</sup>

Code of Civil Procedure Section 170.6(a)(2) states that in a case that has been assigned to a judge for all purposes, the motion must be filed within 10 days after notice of the all-purpose assignment or, if the party has not yet appeared in the action, within 10 days after the appearance.<sup>2</sup>

Code of Civil Procedure Section 170.6(a)(2) states further that the motion can be made after a reversal on appeal if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. In those circumstances, the motion must be filed within 60 days after notice of the assignment.<sup>3</sup>

Government Code Section 68616(i) simply states that in a “direct calendar” court, a challenge under Code of Civil Procedure Section 170.6 must be made within 15 days after the party’s first appearance.<sup>4</sup> Government Code Section 68616(i) states, in full:

“Notwithstanding Section 170.6 of the Code of Civil Procedure, in direct calendar courts, challenges pursuant to that section shall be exercised within 15 days of the party’s first

---

<sup>1</sup> The Trial Court Delay Reduction Act, commonly known as fast track, is Government Code section 68600 et seq.

<sup>2</sup> “If directed to the trial of a cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance.” (Code Civ. Proc., § 170.6(a)(2).)

<sup>3</sup> “A motion under this paragraph may be made 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. . . . 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., § 170.6(a)(2).)

<sup>4</sup> A direct calendar court is a court to which a case has been assigned for all purposes, including trial. (*Zilog v. Superior Court* (2001) 86 Cal.App.4th 1309, 1319.)

appearance. Master calendar courts shall be governed solely by Section 170.6 of the Code of Civil Procedure.”<sup>5</sup>

Government Code Section 68616(i) does not expressly contemplate either the subsequent assignment of a case to a new direct calendar judge or the assignment of a direct calendar judge after a reversal on appeal. Section 68616(i) provides no express exception to the stated 15-day limit. A literal construction of the statute presumably would preclude both a challenge to a direct calendar judge who was assigned to the case more than 15 days after a party’s first appearance in the case and a challenge to a judge assigned to conduct a new trial after a reversal on appeal.<sup>6</sup>

Rather than construe Government Code Section 68616(i) literally, appellate courts have strained to construe the statute so as to allow challenges that would be untimely under a more literal construction of the statute. In so doing, however, the courts have created inconsistent rules for measuring the time to file a challenge. Four different cases are discussed in detail below. Under their inconsistent rules, the 15-day period under Government Code Section 68616(i) to file a challenge to a direct calendar judge in certain circumstances not expressly contemplated by the statute begins to run either (1) on the date of the assignment; (2) on the date of receipt of notice of the assignment; or (3) on the date of service of notice of the assignment (plus five days for service by mail). In contrast, a fourth case suggests that Government Code Section 68616(i) is inapplicable if the judge was assigned after the date the complaint was filed, and that Code of Civil Procedure Section 170.6(a)(2) governs in those circumstances, so that any challenge must be filed within 10 days after the notice of assignment or, if the moving party has not appeared as of that date, within 10 days after the party’s appearance. Repealing the statute would eliminate the uncertainties created by both the statute and the cases construing it and would restore the more definite timing provisions of Code of Civil Procedure Section 170.6(a)(2).

### **1. *Fight for the Rams v. Superior Court* (1996) 41 Cal.App.4th 953**

*Fight for the Rams* involved a plaintiff’s challenge to a judge who was assigned as a direct calendar judge in the case more than 15 days after the action was commenced. *Fight for the Rams* stated that if a direct calendar judge is assigned more than 15 days after the filing of the complaint, a party’s “first appearance” in a direct calendar court, within the meaning of

---

<sup>5</sup> The reason for extending the applicable time period from 10 days (under Code Civ. Proc., § 170.6(a)(2)) to 15 days (under Gov. Code, § 68616(i)) is not readily apparent. *La Seigneurie U.S. Holdings, Inc. v. Superior Court* (1994) 29 Cal.App.4th 1500, 1504, stated: “While it is somewhat puzzling that the Legislature has provided fast track litigants filing peremptory challenges five more days than section 170.6 authorizes, that decision cannot be characterized as absurd. It may be that the drafters of Government Code section 68616, subdivision (i), merely recognized that fast track litigants are, at the onset of a case, immediately thrust into an expedited program, and that a defendant, brought into an action against his will, must be afforded a fair opportunity to reflect and consider on the issue of a challenge to the assigned judge.” (See also *Zilog, supra*, 86 Cal.App.4th at pp. 1319-1320; *Stubblefield Construction Co. v. Superior Court* (2000) 81 Cal.App.4th 762, 769.)

<sup>6</sup> Government Code Section 68616(i) applies only to fast track cases. Certain types of cases are exempt from the fast track rules. Government Code Section 68608(a) states, “Juvenile, probate, and domestic relations cases shall not be assigned to a delay reduction program, and cases which have been assigned to a judge or judges for all purposes based on subject matter need not be assigned to the program.”

Government Code Section 68616(i), occurs at the time of the assignment.<sup>7</sup> (*Fight for the Rams, supra*, at p. 958.) *Fight for the Rams* stated that this rule applies to a challenge by the plaintiff or by any defendant who has appeared in the action. Implicitly acknowledging the weakness of this statutory construction, *Fight for the Rams* encouraged the Legislature to “consider changing [the statute] to eliminate this loophole.” (*Id.* at p. 956.) Thus, the rule from *Fight for the Rams* is that if a direct calendar judge is assigned more than 15 days after the filing of the complaint, any challenge to the judge by a party that has appeared in the action must be filed within 15 days after the assignment.

### **2. *Cybermedia, Inc. v. Superior Court* (1999) 72 Cal.App.4th 910**

*Cybermedia* involved the defendants’ challenge to a judge who was assigned as a direct calendar judge in the case more than 15 days after their appearance in the action. *Cybermedia* did not adopt the statutory construction of “first appearance” from *Fight for the Rams, supra*, 41 Cal.App.4th 953, but instead “[h]armoniz[ed]” (*Cybermedia, supra*, at p. 913) Code of Civil Procedure Section 170.6 and Government Code Section 68616(i) in another manner.

*Cybermedia* acknowledged that, unlike Code of Civil Procedure Section 170.6, Government Code Section 68616(i) does not “specif[y] a time limitation in the situation where, as here, there is a change in the individual calendar judge assigned to the case after the party’s first appearance.” (*Cybermedia, supra*, 72 Cal.App.4th at p. 913.) *Cybermedia* stated that if there is a change in the direct calendar judge after a party’s first appearance in the case, a party must file a challenge “within 15 days of receiving notice” of the new assignment. (*Ibid.*) Under the facts of the case, the effective notice was given and received on the same date. *Cybermedia* held that a general mailing by the court’s public information office describing several judicial assignments was not adequate notice because it was addressed to the attorney’s law firm rather than to the individual attorney assigned to the case and did not reference the case name or full case number. (*Id.* at p. 914.) Absent an adequate written notice of the assignment, the attorney first received notice of the assignment at a demurrer hearing. (*Id.* at p. 912.) *Cybermedia* held that a challenge filed three days after the hearing was timely. (*Id.* at p. 914.) Thus, the rule from *Cybermedia* is that if there is a change in the direct calendar judge, any challenge must be filed within 15 days after the party receives notice of the new assignment.

### **3. *Stubblefield Construction Co. v. Superior Court* (2000) 81 Cal.App.4th 762**

*Stubblefield* involved a plaintiff’s challenge to a judge who was reassigned as a direct calendar judge in the case on remand after the reversal of a summary judgment on appeal. The plaintiff filed a challenge to the judge more than 15 days, but fewer than 60 days, after the notice of assignment on remand. (*Id.* at p. 764.) One of the questions presented was whether the 15-day period in Government Code Section 68616(i) or the 60-day period in Code of Civil Procedure Section 170.6(a)(2) governed.

---

<sup>7</sup> *Fight for the Rams* stated that Government Code Section 68616(i) requires any challenge to be filed within 15 days after the party’s first appearance in a direct calendar court and that the party’s “first appearance” within the meaning of the statute necessarily “coincides with the direct calendar assignment.” Thus, under *Fight for the Rams*, the 15-day period apparently begins to run upon the assignment rather than upon notice of the assignment.

*Stubblefield* stated that Government Code Section 68616(i) seems to assume that the only situation where a party will seek to challenge a direct calendar judge is where the judge was assigned at the time the original complaint was filed. (*Stubblefield, supra*, 81 Cal.App.4th at p. 768.) *Stubblefield* stated that the statute makes no allowance for a challenge to a direct calendar judge who is assigned after that date or who is assigned after a reversal on appeal. (*Id.* at pp. 766, 768.) *Stubblefield* discussed the statutory construction in *Fight for the Rams, supra*, 41 Cal.App.4th 953, and *Cybermedia, supra*, 81 Cal.App.4th 910, but declined “to join in the rewriting effort.” (*Stubblefield, supra*, 81 Cal.App.4th at p. 768.) Instead, *Stubblefield* concluded that the term “appearance” as used in Government Code Section 68616(i) should be construed in accordance with its ordinary meaning, so that a plaintiff appears when the complaint is filed and a defendant appears by filing an answer, demurrer, notice of appearance, or certain other documents (see Code Civ. Proc., § 1014). (*Stubblefield, supra*, at p. 768.) *Stubblefield* held that the Legislature intended Government Code Section 68616(i) “to apply only when the assignment of an all-purpose or direct calendar judge is made simultaneously with the acceptance of the complaint for filing,” and that it would be illogical and unfair to apply the statute “to the situation which arises after remand.” (*Stubblefield, supra*, at p. 769.) Thus, the rule from *Stubblefield* is that Code of Civil Procedure Section 170.6 governs the time to file a challenge to a judge assigned to a case for all purposes after a reversal on remand (i.e., 60 days after the notice of assignment), and that Government Code Section 68616(i) is inapplicable in those circumstances. *Stubblefield* arguably also stands for the broader proposition that Code of Civil Procedure Section 170.6 governs the time to file a challenge to any judge assigned to a case for all purposes after the date the complaint was filed and that Government Code Section 68616(i) is inapplicable in those circumstances.

#### **4. *Motion Picture & Television Fund Hospital v. Superior Court* (2001) 88 Cal.App.4th 488**

*Motion Picture* involved the plaintiffs’ challenge to a judge who was assigned as a direct calendar judge in the case more than 15 days after the filing of the complaint. *Motion Picture* stated that case law had established “the clear rule that where a cause has been assigned to a judge for all purposes after the parties already have appeared in the action, a peremptory challenge to a judge must be filed within 15 days after receiving notice of a change in the individual calendar judge assigned to the case.” (*Id.* at p. 494, citing *Cybermedia, supra*, 81 Cal.App.4th at p. 913.) Despite that statement, *Motion Picture* calculated the time to file a challenge from the date the notice was served, rather than the date it was received. (*Ibid.*) *Motion Picture* stated that Code of Civil Procedure Section 1013 extends the 15-day period under Government Code Section 68616(i) by five days when the notice of assignment is served by mail, and held that the challenge was untimely because it was not filed within 20 days after service of the notice of assignment. (*Motion Picture, supra*, 88 Cal.App.4th at p. 494.) Thus, the rule from *Motion Picture* is that if a direct calendar judge is assigned after the parties have already appeared in the action, any challenge to the judge must be filed within 15 days after service of the notice of assignment, plus five days for service by mail.

## **Summary of existing case law**

The rules established by these cases are inconsistent. The 15-day period under Government Code Section 68616(i) to file a challenge to a direct calendar judge in certain circumstances not expressly contemplated by the statute begins to run either (1) on the date of the assignment, under *Fight for the Rams, supra*, 41 Cal.App.4th 953; (2) on the date of receipt of notice of the assignment, under *Cybermedia, supra*, 72 Cal.App.4th 910; or (3) on the date of service of notice of the assignment (plus five days for service by mail), under *Motion Picture, supra*, 88 Cal.App.4th 488. In contrast, *Stubblefield* suggests that Government Code Section 68616(i) is inapplicable if the judge was assigned after the date the complaint was filed, and that Code of Civil Procedure Section 170.6(a)(2) governs in those circumstances, so that any challenge must be filed within 10 days after the notice of assignment or, if the moving party has not appeared as of that date, within 10 days after the party's appearance.

## **PROPOSAL**

The most effective way to eliminate the uncertainty created by Government Code Section 68616(i) and the cases interpreting it, and to avoid the need for strained constructions of the statute, would be to repeal the provision in its entirety. Absent Government Code Section 68616(i), the time to file a challenge to a judge assigned to a case for all purposes would be governed by Code of Civil Procedure Section 170.6(a)(2) in all cases, and there would be no distinction for certain fast track cases. Unlike Government Code Section 68616(i), Code of Civil Procedure Section 170.6(a)(2) both (1) provides for the situation where there is a change in the direct calendar judge or a direct calendar judge is assigned after the parties have appeared in the action, and (2) expressly provides for the situation where the judge is assigned on remand after a reversal on appeal. Repealing Government Code Section 68616(i) would eliminate the uncertainty and inconsistency that the provision has wrought in favor of the clear and definite timing provisions of Code of Civil Procedure Section 170.6(a)(2). Accordingly, this proposal would repeal Government Code section 68616(i) in its entirety.

## **HISTORY**

CAJ is not aware of any similar legislation being introduced in the past.

## **IMPACT ON PENDING LITIGATION**

CAJ is not aware of any litigation currently pending regarding the issues addressed by this proposal.

**LIKELY SUPPORT & OPPOSITION**

<u>Support</u> CAJ anticipates that civil litigation attorneys generally will support this proposal.	<u>Why?</u> The proposal promotes clarity and eliminates uncertainty on an issue potentially affecting all civil litigators.
<u>Oppose</u> CAJ anticipates that some civil litigation attorneys may oppose this proposal.	<u>Why?</u> Some attorneys may feel that nominally reducing the number of days to file the motion from 15 to 10, in some circumstances, would unduly restrict their right to challenge a judge.

**FISCAL IMPACT**

There is no anticipated fiscal impact.

**GERMANENESS**

This proposal relates to the special knowledge, training, experience, and technical expertise of the members of CAJ. The proposal deals with civil procedure and the administration of justice in the civil courts. The subject matter of the proposal relates to improvement of the functioning of the courts, judicial efficacy and efficiency.

**TEXT OF PROPOSAL**

SECTION 1. Section 68616(i) of the Government Code is repealed.

68616. Delay reduction rules shall not require shorter time periods than as follows:

(a) Service of the complaint within 60 days after filing. Exceptions, for longer periods of time, (1) may be granted as authorized by local rule and (2) shall be granted on a showing that service could not reasonably be achieved within the time required with the exercise of due diligence consistent with the amount in controversy.

(b) Service of responsive pleadings within 30 days after service of the complaint. The parties may stipulate to an additional 15 days. Exceptions, for longer periods of time, may be granted as authorized by local rule.

(c) Time for service of notice or other paper under Sections 1005 and 1013 of the Code of Civil Procedure and time to plead after service of summons under Section 412.20 of the Code of Civil Procedure shall not be shortened except as provided in those sections.

(d) Within 30 days of service of the responsive pleadings, the parties may, by stipulation filed with the court, agree to a single continuance not to exceed 30 days.

It is the intent of the Legislature that these stipulations not detract from the efforts of the courts to comply with standards of timely disposition. To this extent, the Judicial Council shall develop statistics that distinguish between cases involving, and not involving, these stipulations.

(e) No status conference, or similar event, other than a challenge to the jurisdiction of the court, may be required to be conducted sooner than 30 days after service of the first responsive

pleadings, or no sooner than 30 days after expiration of a stipulated continuance, if any, pursuant to subdivision (d).

(f) Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure shall govern discovery, except in arbitration proceedings.

(g) No case may be referred to arbitration prior to 210 days after the filing of the complaint, exclusive of the stipulated period provided for in subdivision (d). No rule adopted pursuant to this article may contravene Sections 638 and 639 of the Code of Civil Procedure.

(h) Unnamed (DOE) defendants shall not be dismissed or severed prior to the conclusion of the introduction of evidence at trial, except upon stipulation or motion of the parties.

~~(i) Notwithstanding Section 170.6 of the Code of Civil Procedure, in direct calendar courts, challenges pursuant to that section shall be exercised within 15 days of the party's first appearance. Master calendar courts shall be governed solely by Section 170.6 of the Code of Civil Procedure.~~