California
Civil Litigation REPORTER
Volume 26 / Number 2 April 2004

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HIGHLIGHTS

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Civil Litigation Reporter (ISSN 0199-0802), Volume 26, Number 1 (April 2004). Published six times a year in February, April, June, August, October, and December by Continuing Education of the Bar—California, University of California. Mailing address: CEB Civil Litigation Reporter, Department Civ LR, 300 Frank H. Ogawa Plaza, Suite 410, Oakland, CA 94612–2001.

Periodicals Postage Paid at Oakland, California, and additional mailing offices. POSTMASTER: Send address changes to Customer Service, 300 Frank H. Ogawa Plaza, Suite 410, Oakland, CA 94612–2001.

SUBSCRIPTION: $209 annually, plus $7.95 for shipping and handling. Back issues, beginning July 1979, are $35 each. Storage binders are $12.50 plus tax each. For more information, call toll-free 1–800–232–3444, or mail your order to CEB, 300 Frank H. Ogawa Plaza, Suite 410, Oakland, CA 94612–2001.

This Reporter may be cited as 26 CEB Civ Litigation Rep ___ (Apr. 2004); the short citation is 26 CEB Civ LR ___ (Apr. 2004).

FEATURED ARTICLES

Back to the Well: Can New Trial Judges Reverse a Ruling Made by Their Predecessors?

James C. Martin and Benjamin G. Shatz

Posing the Question

It is not uncommon for a case to be handled by several different trial judges. This can happen for a variety of reasons, most frequently when a party successfully moves to disqualify a judge. Although there is ample appellate precedent dealing with the review of motions to disqualify, less attention has been paid to the effect that a change in judges might have on rulings previously made in the trial court. In particular, when a new judge takes over a case after a prior judge is disqualified or recused, to what extent can the new judge revisit decisions made by the old one?

The problem is that the jurisprudential principles that generally lend finality to interim trial court rulings do not apply when there is a change of judges, but no appellate review. In these circumstances, collateral estoppel does not attach to a prior trial court ruling because of lack of finality. *Sandoval v Superior Court* (1983) 140 CA3d 932, 190 CR 29. And the law of the case doctrine does not apply to rulings by trial courts either; it applies only to determinations made by appellate courts. *Providence v Valley Clerks Trust Fund* (1984) 163 CA3d 249, 209 CR2d 276.

California Courts Divide on the Answer

Historically, California courts have provided diverse answers to the question of when one trial judge may revisit the decision of another when collateral estoppel or law of the case do not apply. One line of authority, typified by *Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 285 CR 659, takes an expansive view of a subsequent judge's authority. These cases generally hold that orders rendered by a disqualified judge are voidable if the issue is properly raised again by an interested party.

Urias

In *Urias,* the judge granted summary judgment and entered judgment for the defendant in a wrongful termination case. Shortly after entry of judgment, however, the plaintiff sought to void the summary judgment and disqualify the judge on the ground that the judge's former law firm had a close and long-standing relationship with the defendant. Because the judge never responded to the statement of disqualification—inaction that the law construes as a consent to disqualification—the second judge assigned to the matter granted the request for disqualification under CCP §170.3(c)(4).

With regard to the entry of summary judgment by the disqualified judge, the *Urias* court relied on a line of cases from 1920–1984 and found that a judgment or order rendered by a disqualified judge is void whenever brought into question. See, *e.g., Cadenasso v Bank of Italy* (1932) 214 C 562, 567, 6 P2d 944 (void judgment rendered by judge who held stock in defendant bank); *T.P.B., Jr. v Superior Court* (1977) 66 CA3d 881, 136 CR 311 (any act of disqualified judge is voidable).

Armstrong

However, in contrast to *Urias* and the cases it relied on, another line of authority takes a narrower view of the revisitation issue. These cases generally hold that the power of one trial judge to vacate another judge's orders is "limited" and should only be exercised as prescribed by statute. *Church of Scientology v Armstrong* (1991) 232 CA3d 1060, 283 CR 917 (citing cases from 1939–1990).

In *Armstrong,* after entry of judgment and at the litigants' request, the judge sealed the record in the case. Two years later, after the judge had retired, a third party sought to intervene to obtain access to the record for his own litigation. The judge who had replaced his retired predecessor sua sponte vacated the order sealing the record. On appeal, the *Armstrong* court ruled that this was error and that the second judge exceeded his authority in vacating the earlier order. *Armstrong,* like *Urias,* relied on a long line of authority. See, *e.g., Wyoming Pac. Oil Co. v Preston* (1958) 50 C2d 736, 740, 329 P2d 489 (judge's ruling that defendant was evading service of process was "prior binding adjudication" that prevented second judge from dismissing action for failure to serve process and could not be vacated without showing of cause); *Greene v State Farm Fire & Cas. Co.* (1990) 224 CA3d 1583, 1589, 274 CR 736 (second judge had no authority to "rethink" and effectively vacate first judge's order extending deadline to bring case to trial); *Fallon v Superior Court* (1939) 33 CA2d 48, 52, 90 P2d 858 (successor judge could not vacate order of predecessor judge except as allowed by statute).

To further complicate matters, the judicial disqualification statute (formerly CCP §170) was renumbered and amended in 1984 to include a provision that a judge replacing a disqualified judge "shall not" set aside prior rulings without "good cause." CCP §170.3(b)(4) (formerly

§170.3(b)(3) before 1990 amendment). No cases have interpreted this "good cause" language. See *Sincavage v Superior Court* (1996) 42 CA4th 224, 49 CR2d 615 (implicit finding of lack of good cause when defendant's conviction in jury trial presided over by later-disqualified judge could stand, but new judge had to preside at further proceedings).

Guidance from *PBA, LLC v KPOD, Ltd.*

A recent court of appeal opinion provides some helpful guidance for practitioners on the question of the authority of a succeeding trial judge to reexamine the rulings of his or her predecessor. *PBA, LLC v KPOD, Ltd.* (2003) 112 CA4th 965, 5 CR3d 532, involved the multimillion dollar purchase, operation, and sale of a hotel by three joint venturers, PBA, KRAD, and KPOD. Shortly after the hotel's purchase, disputes arose between the companies about the management of their hotel, ultimately leading to the hotel's $12 million sale by partition and numerous complaints and cross-complaints among the companies and their principals. Litigation began in early 1997 and continued for the next several years involving at least five different judges.

At Trial, Disqualification Requests Denied and KPOD Principal a Vexatious Litigant

During the course of litigation, KPOD's principal sought to disqualify one particular judge five times, beginning with a declaration alleging bias and prejudice under CCP §170.3. The judge had four options in responding to the declaration: (1) request a transfer of the case to another judge agreed on by the parties; (2) consent to disqualification and have the presiding judge appoint a replacement; (3) file a written verified answer admitting or denying the allegations; or (4) strike the declaration as procedurally defective. CCP §§170.3(c)(2)–(3), 170.4(b). Failure to exercise one of these options is deemed a consent to disqualification. CCP §170.3(c)(4).

The judge responded to the disqualification declaration by filing and serving a verified answer, but later that same day, determined that the declaration was untimely and failed to meet the statutory requirements. The judge thus struck the declaration. Four days later, KPOD's principal filed another declaration, which also was stricken. At this point, PBA moved to declare KPOD's principal a vexatious litigant. The judge granted this unopposed motion based on the documents supporting the motion and the judge's own observations.

The following year, KPOD's principal filed two more declarations of bias that were denied by two different judges. Finally, KPOD's principal filed a fifth declaration of bias and prejudice. This time the judge apparently mooted the declaration by recusing himself in the "interests of justice" under §170.1(a)(6).

New Trial Judge: Vexatious Litigant Order Reversed

The matter was transferred to yet another judge and KPOD filed a motion before the new judge to set aside all orders made by the recused judge. This motion was denied. KPOD's principal then brought a motion to vacate the order declaring him to be a vexatious litigant. PBA opposed the motion. This time the new judge granted the motion, reversing the prior judge.

On appeal, KPOD's principal sought review of his five unsuccessful disqualification attempts. PBA also appealed, arguing that the successor judge "acted as a de facto court of appeal" in overturning decisions made by the prior judge—in particular, the order declaring KPOD's principal to be a vexatious litigant.

Appellate Court: No Review of Disqualification Orders

Consistent with CCP §170.3, governing recusals and disqualification proceedings, the *PBA* court concluded it could not review the disqualification orders. Section 170.3(d) provides that "determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days."CCP §170.3(d). Case law interpreting this language confirms its plain meaning: The exclusive means for review of a judicial disqualification order is by writ. See, *e.g., Curle v Superior Court* (2001) 24 C4th 1057, 103 CR2d 751 ("the exclusive means for review of a disqualification order is by a petition for writ of mandate"); *People v Williams* (1997) 16 C4th 635, 652, 66 CR2d 573 (same); *People v Hull* (1991) 1 C4th 266, 275, 2 CR2d 526 (writ review requirement applies both to challenges for cause under CCP §170.1 and peremptory challenges under CCP §170.6).

Restricting appellate oversight of judicial disqualification orders to writ review makes good sense for at least two reasons. First, this limitation prevents the waste of resources that would occur if a proceeding were tried on the merits only to be voided by an appellate ruling that the judge should have been disqualified. Second, allowing review of a disqualification order after a final judgment would provide the party seeking disqualification the proverbial "second bite at the apple"—*i.e.,* if the party lost on the merits, that loss could be attacked collaterally by appealing a disqualification ruling. *Gai v City of Selma* (1998) 68 CA4th 213, 230, 79 CR2d 910 (outlining "twofold" purpose of limiting appellate review to writ petition).

Trial Court Can't Revisit Vexatious Litigant Order Without New Facts, Circumstances, or Law

The statutes governing declarations of vexatiousness contain no provision for reversing such determinations. CCP §§391–391.7. This troubled the *PBA* court, which noted that, as a matter of "fundamental fairness," this brand of vexatiousness must be "erasable" under "appropriate circumstances." 112 CA4th at 976. Likening a declaration of vexatiousness to an injunction, the court reasoned that such declarations could be reversed to serve the "ends of justice" or on a showing of a "material change in the facts." 112 CA4th at 976; see CCP §533 (governing modification or dissolution of an injunction).

This still left open the questions of whether a successor trial judge could reverse a prior judge's order, and if so, under what standard of review. The statutory scheme governing judicial recusal and disqualification provides that a judge replacing a disqualified judge "shall not" set aside the prior judge's rulings without "good cause." CCP §170.3(b)(4). Without citing this statute, the *PBA* court effectively applied it by reasoning that such a reversal would "at least" require a change in facts or circumstances. 112 CA4th at 976. From there, the court concluded that the successor judge abused his discretion in reversing his predecessor because KPOD's principal failed to provide any new facts showing that the order declaring him a vexatious litigant was incorrect.

The Lessons of PBA

Two important lessons emerge from *PBA*. First, when it comes to judicial disqualification orders, appellate review requires a timely writ petition. The controlling statute and case law make clear that such orders will not be reviewable by appeal.

Second, after recusal, it is possible for a litigant to have a successor judge reexamine the orders of his or her predecessor. However, to change a prior order, a party must make a strong showing of "good cause" by establishing that the original order was legally incorrect in the first instance or that there are new material facts or circumstances warranting a different result.

This "good cause" standard is analogous to the "newly discovered facts or law" threshold for granting motions for reconsideration. The *PBA* court, for example, emphasized that there was no procedural method for dissolving the vexatious litigant order entered by the original judge, other than a timely motion for reconsideration. The court specifically referred to the standard set out in CCP §1008, *i.e.,* that reconsideration is granted only "upon a change of facts, circumstances or law." In *PBA,* the successor judge abused his discretion by vacating the original vexatious litigant finding because the litigant had "completely failed" to establish that the determination was either incorrect in the first place, "or no longer required in light of new facts." Thus, there was "no material change" justifying reversal of the previous prefiling order.

The Continued Vitality of *Urias* in Light of *PBA* and *Armstrong*

It may be possible to harmonize the holdings in *PBA* and *Armstrong,* which take a restrictive view of revisiting an existing order, with *Urias'* holding that such orders are voidable if the issue is properly raised. One important distinction among these cases is that, in *PBA,* the judge who entered the vexatious litigant order, although the target of several disqualification attempts, recused himself, and in *Armstrong* the judge who entered the record-sealing order retired. In contrast, in *Urias,* the judge whose summary judgment ruling was challenged had been disqualified. Once the *Urias* court determined that the statement of disqualification was legally sufficient, it concluded that "[b]ecause the summary judgment was entered by a disqualified judge, the judgment was voidable upon plaintiff's objection."*Urias v Harris Farms, Inc.* (1991) 234 CA3d 415, 426, 285 CR 659.

Thus, when a prior order has been rendered by a judge who has not been disqualified, the courts likely will require a strong showing of good cause—*i.e.,* something akin to a CCP §1008 showing—for a successor judge to change it. See *McPherson v City of Manhattan Beach* (2000) 78 CA4th 1252, 93 CR2d 725 (reconsideration requires new or different circumstances, facts, or law that could not originally be presented); *Hollister v Benzl* (1999) 71 CA4th 582, 83 CR2d 903 (newly produced documents justified reconsideration). But when the prior judge has been disqualified, courts may apply a more relaxed standard, linked to the reasons for the disqualification, in considering whether a prior order should be altered or overruled.

When Are Written Discovery Requests Truly Burdensome and Oppressive?

John A. Burke

Introduction

We see it all the time. Opposing counsel objects to our perfectly crafted interrogatories or document requests on the grounds that they are "burdensome and oppressive" and, on that basis, refuses to answer the interrogatories or produce the documents. Our subsequent attempts to meet and confer with our adversary prove fruitless and we must decide whether to file a motion to compel. But what will