

**Department 29
Superior Court of California
County of Sacramento
720 Ninth Street
Timothy M. Frawley, Judge
Frank Temmerman, Clerk**

CALIFORNIA ASSOCIATION OF PSYCHIATRIC TECHNICIANS v. ARNOLD SCHWARZENEGGER, et al.	Case Number: 34-2009-80000148
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Proceedings: Ruling on Peremptory Challenge (C.C.P. § 170.6)

This action, entitled *California Association of Psychiatric Technicians v. Governor Arnold Schwarzenegger, et al.* (Case No. 34-2009-80000148), was filed on January 23, 2009, in Sacramento County Superior Court. It was assigned for all purposes to the Honorable Lloyd G. Connelly in Department 33.

On January 30, 2009, this action was ordered related to Case No 34-2008-80000126, Case No. 34-2009-80000134, Case No. 34-2009-80000135, Case No. 34-2009-80000137, and Case. No 34-2009-00032732 This action and all of the related cases (except Case No 34-2009-00032732) were re-assigned for all purposes to the Honorable Patrick Marlette in Department 19

On August 31, 2009, Respondents/Defendants in this action filed a motion for transfer of actions and coordination of proceedings under Code of Civil Procedure section 403 (the "Transfer Motion") The Transfer Motion seeks, among other things, to transfer to this Court for purposes of coordination the following actions pending in other counties:

CASE v. Schwarzenegger, et al
Alameda County Superior Court Case No. RG09453982

Calif. Correctional Peace Officers Assn. v. Schwarzenegger, et al.
Alameda County Superior Court Case No RGO9441544

SEIU/Walker v. Schwarzenegger, et al
Alameda County Superior Court Case No. RGO9456750

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Union of American Physicians & Dentists v. Schwarzenegger, et al.
Alameda County Superior Court Case No. RGO9456684

CalPERS v. Schwarzenegger, et al.
San Francisco County Superior Court Case No CPF-09-509754

Respondents/Defendants scheduled the hearing on the Transfer Motion before Judge Marlette

On September 3, 2009, the California Correctional Peace Officers' Association ("CCPOA"), plaintiff/petitioner in Alameda County Case No RGO9441544, filed a peremptory challenge seeking to disqualify Judge Marlette from hearing the Transfer Motion or any other matters arising in this action.

On September 18, 2009, the Presiding Judge of this Court granted CCPOA's peremptory challenge and re-assigned this action for all purposes to the Honorable Timothy M. Frawley in Department 29.

On September 29, 2009, Adam Zapala, counsel for Union of American Physicians and Dentists ("UAPD"), plaintiff/petitioner in Alameda County Case No. RGO9456684, filed a peremptory challenge pursuant to Code of Civil Procedure § 170.6 seeking to disqualify Judge Frawley from hearing the Transfer Motion or any other matters arising in this action. The peremptory challenge is opposed by the Respondents/Defendants in this action.

For the reasons described below, the Court concludes that UAPD's peremptory challenge should be denied

A peremptory challenge may be filed by any party or attorney appearing in the action or proceeding. (*Avelar v Superior Court* (1992) 7 Cal App 4th 1270, 1274-1280.) However, each party is entitled to only one peremptory challenge. A party may not make more than "one such motion in any one action or special proceeding . . ." (Cal Civ. Proc Code § 170.6) If there is more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one challenge may be made by each "side." (Cal. Civ. Proc. Code § 170.6(a)(3)) If one of several co-parties on the same side has already disqualified a judge under CCP §170.6, any other judge who is subsequently assigned to the case is not subject to peremptory challenge by any of the other co-parties. (*Id.*)

Although UAPD is not strictly a party of record in this action, UAPD asserts a right to file a peremptory challenge by virtue of its status as a plaintiff/petitioner in one of the actions included in the pending Transfer Motion (hereinafter referred

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to as the "Included Actions") However, even if UAPD has standing to bring this challenge, it still must comply with the limitation that only one challenge is allowed "for each side."

The question presented here is whether, in light of CCPOA's prior peremptory challenge, UAPD's motion constitutes an improper attempt to file a second peremptory challenge by the same "side "

To determine what constitutes a "side" for purposes of a motion for coordination under Code of Civil Procedure section 403, the Court is guided by the California Rule of Court governing petitions for coordination under Code of Civil Procedure section 404 (See Cal Rules of Ct , Rule 3 516)

For purposes of applying § 170.6 to a "coordination proceeding" under C.C.P. § 404, California Rules of Court, Rule 3.516 provides that all plaintiffs or similar parties in the included or coordinated actions, and all defendants or similar parties in such actions, constitute a single "side " (See Cal Rules of Ct., Rule 3 516.)

The instant Transfer Motion is a motion for coordination of non-complex actions under Code of Civil Procedure § 403, and not a petition for coordination of complex actions under Code of Civil Procedure § 404. Thus, Rule 3.516 does not actually apply here. (See Cal. Rules of Ct , Rule 3.501 [defining "coordination proceeding" and "coordinated action"], *Philip Morns v. Superior Court* (1999) 71 Cal.App 4th 116 [applying § 170 6 in context of petition for coordination under C.C.P. § 404].) And there may be sound reasons why, at least in some instances, the rules adopted for coordination petitions may not provide useful guidance in the context of coordination motions. (See, e.g., *Stone v. Superior Court* (1994) 25 Cal App.4th 1144, 1146-1147 [holding that, because the statutory scheme for coordination proceedings of complex actions provides for two separate judicial assignments, parties have the right to challenge the assignment of both the coordination motion judge and the coordination trial judge, even if it is the same judge])

Nevertheless, under the circumstances of this case, the Court finds Rule 3.516 to be a useful guide for determining what constitutes a "side" for purposes of applying § 170.6 to a coordination motion under Code of Civil Procedure § 403. Thus, the Court is persuaded that all plaintiffs or similar parties, who have a common or substantially similar interest in the motion, should be treated as one "side" for purposes of applying § 170 6 in the context of a motion for coordination under C.C.P. § 403 The Court concludes that UAPD and CCPOA are on the same "side" for purposes of applying section 170.6

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UAPD's argument that the plaintiffs in the Included Actions cannot be considered to be on the same "side" unless and until the coordination motion is granted is unavailing. To accept this argument, the Court also would have to conclude that the plaintiffs in the Included Actions are not "parties" to this action and therefore do not have standing to bring a peremptory challenge unless the coordination motion is granted – a conclusion that may cast doubt upon the validity of CCPOA's previous peremptory challenge in this action.

In sum, the Court concludes that CCPOA's peremptory challenge to Judge Marlette was the first peremptory challenge by plaintiffs' side in this action. Because UAPD and CCPOA are on the same "side," and because UAPD's "side" already has exercised a peremptory challenge in this action, UAPD is prohibited from filing a second peremptory challenge. UAPD's peremptory challenge is therefore DENIED.

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