

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

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WHAT'S NEXT FOR ABTL?



Justice Brian S. Currey

In September 2021, the California Civility Task Force released its initial report, “Beyond the Oath: Recommendations for Improving Civility.” The report sets forth four concrete, realistic, achievable, and powerful proposals to improve civility in California’s legal profession, and has already stimulated renewed interest in taming incivility in the

state. The Task Force is comprised of a diverse group of more than 40 distinguished lawyers and judges, including members from each ABTL chapter. I am honored to serve as Chair. This article summarizes the report, explains ABTL’s key role in the

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NEW JUDGE, NEW RULINGS?



Judge David J. Cowan

The judge assigned to hear a case often changes during protracted litigation. The first judge might retire or be reassigned to a different court division, or the first judge might be assigned to hear only pretrial matters before another judge takes over for trial. While one party might try to revisit old issues before fresh eyes, the other side might believe it should not have to go through the expense of relitigating issues on which it already prevailed. This article discusses how parties can assess whether their case presents that rare instance where a prior judge’s ruling might be amenable to further review by a successor judge overseeing the same action.



Eric S. Boorstin

A judge may always reconsider his or her own interim rulings.

The California Supreme Court has confirmed that a trial judge has the power to reconsider his or her own rulings regardless of whether the statutory requirements for a reconsideration motion have been met, and regardless of how the trial judge comes to understand that a prior ruling was mistaken. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105–1108 (*Le Francois*)). A party is not precluded from making a “suggestion” that the trial court sua sponte reconsider a prior ruling even in the absence of new facts or new law. (*Id.* at p. 1108.) The odds may be slim and the trial court need not rule on this suggestion because it is not a *motion*. But if the court is seriously considering reversing itself, the court should inform the parties, solicit briefing, and hold a hearing. (*Ibid.*)

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Although *Le Francois* examined an action that had been transferred to a new judge, the Court expressly declined to opine on the circumstances under which one judge may revisit a ruling of another judge because the parties did not raise the issue. (*Le Francois*, *supra*, 35 Cal.4th at p. 1097, fn. 2.)

California authorities limit a second judge’s ability to reconsider a first judge’s rulings, but recognize some circumstances permitting reconsideration.

One of the leading authorities to discuss the issue left open by *Le Francois* is *In re Marriage of Oliverez* (2015) 238 Cal. App.4th 1242 (*Oliverez*). *Oliverez* collected authorities holding that, generally, one trial judge may not reconsider or overrule an interlocutory ruling of another trial judge. (*Id.* at p. 1248.) The court noted at least three “narrow exceptions to this general rule”: (1) where the judge who made the initial ruling is “unavailable”; (2) “when the facts have changed or when the judge has considered further evidence and law”; and (3) if the first ruling was based on “inadvertence, mistake, or fraud.” (*Id.* at pp. 1248–1249.) “Mere disagreement” with the prior judge’s ruling is not enough to overturn it. (*Id.* at p. 1249.)

Applying the above principles, *Oliverez* overturned a second trial judge’s order who had reconsidered the first judge’s order declining to enforce a marital settlement agreement. (238 Cal. App.4th at p. 1249.) Notably, the Court of Appeal did not discuss which of the two trial judges perceived the merits correctly because that wasn’t necessary to conclude that the second trial judge had overstepped his authority when he disagreed with the first trial judge’s order.

In addition to the circumstances permitting reconsideration identified in *Oliverez*, certain statutes or rules may also permit reconsideration of particular matters. (See *People v. Konow* (2004) 32 Cal.4th 995, 1019 [interpreting Code of Civil Procedure section 657 to allow a second judge to reconsider first judge’s ruling in connection with a new trial motion]; Cal. Rules of Court, rule 3.300(h)(1)(D) and Super. Ct. L.A. County Local Rules, rule 3.3(f)(3) [allowing second judge to find cases related after another judge has made an order not to deem cases related].)

Some policy considerations favor limited authority for a second judge to reconsider a first judge’s ruling.

There is a material difference between a judge reconsidering his or her own order and a judge reconsidering a colleague’s order. A judge revisiting her own order can more efficiently and reliably determine whether reconsideration is warranted

because she knows what was in her own mind when she made the original decision. But it is much less clear whether the first judge would agree with a second judge that circumstances warrant reconsideration. A person’s recognizing his or her *own* mistake is an occurrence inherently limited to rare and especially compelling circumstances. But a person’s belief that someone *else* made a mistake can be difficult to distinguish from a mere disagreement on a judgment call.

The limitations on a second judge’s reconsideration power serve to promote judicial economy and restrict forum shopping. The aim is to dissuade parties from seeking relief from “ ‘another and another judge until finally they found one who would grant what they are seeking’ ” because “ ‘[s]uch a procedure would instantly breed lack of confidence in the integrity of the courts.’ ” (*In re Alberto* (2002) 102 Cal.App.4th 421, 427 (*Alberto*).) In most circumstances, parties should be able to rely on the judicial resolution of contested issues remaining fixed throughout trial court proceedings.

The limitations also reinforce the structure of the California court system and preserve the appellate courts’ function. “For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court.” (*Alberto, supra*, 102 Cal.App.4th at p. 427.) A superior court is a single court and one member “ ‘cannot sit in review on the actions of another member of that same court.’ ” (*Id.* at pp. 427–428.)

Other policy considerations favor broader authority for a second judge’s reconsideration of a first judge’s ruling.

While California courts generally prioritize the policies favoring limited authority for reconsideration by a successor judge, federal courts allow the second judge broader authority on the ground that “the power of each judge of a multi-judge court is equal and coextensive.” (*Castner v. First National Bank of Anchorage* (9th Cir. 1960) 278 F.2d 376, 380.) A second federal district court judge is “generally” expected not to overrule a predecessor judge “because of the ‘principles of comity and uniformity [which] . . . preserve the orderly functioning of the judicial process,’ ” but a second federal district court judge has the *power* to overrule a first and the only limitation is the second judge’s “ ‘proper exercise of judicial discretion.’ ” (*Fairbank v. Wunderman Cato Johnson* (9th Cir. 2000) 212 F.3d 528, 530.)

Although the structure of the California and federal court systems is not identical, the policies favoring reconsideration recognized in the federal courts also apply to California courts.

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Allowing the second judge broad discretion to reconsider may better allow him to “conscientiously carry out his judicial function in a case over which he is presiding.” (*Castner, supra*, 278 F.2d at p. 380) A judge’s role may be impaired if he “permits what he believes to be a prior erroneous ruling to control the case.” (*Ibid.*) For example, if the first judge sustains a hearsay objection to exclude key evidence at the summary judgment stage, the second judge trying the case might feel he is inappropriately making an order that is erroneous if he cannot follow his own understanding of the hearsay rule to determine whether the evidence should be admitted at trial.

An approach that broadly restricts reconsideration may be in tension with the principle that a trial court generally retains the inherent power to modify its rulings until there is a final judgment and an appeal. (See *Le Francois, supra*, 35 Cal.4th at p. 1107; Code Civ. Proc., § 916, subd. (a).) Restricting a second judge’s ability to make decisions based on a predecessor trial judge’s rulings can be seen as unduly elevating the first judge’s rulings to the status of a judgment, when those same decisions would have been modifiable interim rulings had the assigned judge remained unchanged.

Allowing the second judge some amount of discretion may also avoid “futile and expensive” proceedings. (*Castner, supra*, 278 F.2d at p. 380.) “‘Forcing the parties to proceed where there is recognized error in the case would result in an enormous waste of the court’s and the parties’ resources.’” (*Le Francois, supra*, 35 Cal.4th at p. 1107.) As Justice Frankfurter said, “‘[w]isdom too often never comes, and so one ought not to reject it merely because it comes late.’” (*People v. Riva* (2003) 112 Cal.App.4th 981, 991 (*Riva*), quoting *Henslee v. Union Planters Bank* (1949) 335 U.S. 595, 600.)

Concluding thoughts and suggestions

The conflicting policy considerations outlined above suggest that a second judge will need to view the scope of her reconsideration power through the prism of the particular circumstances of each request. *Oliveres* described those circumstances that may provide openings for a litigant to raise an old issue with the new judge as “narrow”—namely, when the first judge is unavailable; when the facts have changed; when the judge has considered further evidence and law; or when the first ruling was based on inadvertence or mistake. The second judge may be appropriately reluctant to revisit a previously determined issue and therefore adopt a restrictive view of her power to do so.

Here are some factors a litigant may consider before suggesting a new judge reconsider a prior judge’s rulings:

- Can you explain why the first judge is unavailable to reconsider his or her own ruling?
- Can you provide good reasons why the second judge both has the ability to reconsider a predecessor’s ruling and should want to do so?
- Did the first judge express concerns or uncertainty about the initial ruling? (See *Riva, supra*, 112 Cal.App.4th at p. 993 [noting first judge’s statements that she might reconsider the matter herself].)
- Are you asking for reconsideration of a legal question that might be reviewed de novo on appeal and therefore might be more likely to garner a fresh look by the second judge, rather than a discretionary ruling that would be reviewed deferentially?
- Is there sufficiently changed context (e.g., new evidence or law to consider) that might warrant reconsideration or even support an argument that the current question is different from the already-decided one?
- Can you make an argument to revisit an old ruling that is so compelling even the judge who made the initial ruling would have changed course?
- Will you lose credibility with the second judge by asking him or her to revisit long-decided issues and disagree with a colleague?

In sum, you should not expect a blank slate if the judge changes mid-case, but you need not necessarily consider old rulings set in stone as a categorical matter.

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