

1 Honorable Barbara Rodriguez Mundell
2 Presiding Judge
3 Superior Court of Arizona, Maricopa County
4 125 W. Washington St.
5 Phoenix, AZ 85003
6 (602) 506-6130

7 IN THE SUPREME COURT OF THE STATE OF ARIZONA

8 In the Matter of:

9 ARIZONA RULES OF CRIMINAL
10 PROCEDURE, RULE 10.2

11 } Supreme Court No. R-09-0037

12 } COMMENT OF THE SUPERIOR
13 } COURT OF ARIZONA, MARICOPA
14 } COUNTY TO PETITION TO
15 } AMEND RULE 10.2 OF THE
16 } ARIZONA RULES OF CRIMINAL
17 } PROCEDURE

18 The Presiding Judge of the Superior Court in Maricopa County files the
19 following comment pursuant to Rule 28, Arizona Rules of the Supreme Court,
20 regarding the petition to amend Rule 10.2 of the Arizona Rules of Criminal
21 Procedure. The Superior Court opposes the proposed amendment of Rule 10.2.
22 Instead, the Superior Court requests the Supreme Court eliminate Rule 10.2 for
23 criminal proceedings only, or in the alternative, amend Rule 10.2 to apply in the
24 same fashion in both capital and non-capital proceedings.

25 Peremptory challenges to judges in criminal proceedings are unnecessary.
26 If a judge is biased, a party may move for a change of judge for cause pursuant
27 to Rule 10.1 of the Arizona Rules of Criminal Procedure. The protection
28 afforded under Rule 10.1 affords litigants a fair and unbiased judge. Federal
courts and many states have no provision authorizing a change of judge unless
cause has been demonstrated. The 1976 version of the ABA Standards of
Judicial Administration, Standards Relating to Trial Courts provided:

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1 A party should be permitted a peremptory challenge of the judge to
2 whom a matter has been assigned, subject to the following
3 restrictions: (1) a party may have only one such challenge in a case;
4 (2) the challenge must be asserted immediately upon the matter's
5 having been assigned to the judge against whom the challenge is
6 made and before he has made any decision regarding it; and (3) the
party must be ready to proceed in the matter without delay upon its
reassignment to another judge.

7 ABA Standards of Judicial Administration, Standards Relating to Trial Courts §
8 2.32(b) (1976). This provision has been omitted from the current version of the
9 standards.

10 Peremptory challenges create additional opportunities for delay and
11 disruption of case management. The practice is ripe for abuse by both parties, and
12 it allows parties to remove a judge for any reason, including the judge's
13 substantive views which could jeopardize judicial independence. Notably,
14 peremptory challenge procedures have been proposed for the federal courts, but
15 have never been adopted. Moreover, a majority of states have no provision for a
16 peremptory challenge to a judge.¹ A majority of states require a showing of cause
17 before a judge is removed from a criminal case.

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19 ¹ Currently, about a third of the states have a provision for a change of judge without demonstrating
20 cause in a criminal case. *See, e.g.*, Alaska R.Crim.P. 25(d) (parties are "entitled as a matter of right to
21 one change of judge"); Idaho Crim.R. 25(a) (in felony cases other than drug or mental health court, each
22 party has right to one disqualification without cause); Mont.Code Ann. § 3-1-804 ("Each adverse party is
23 entitled to one substitution of a district judge," including criminal actions); N.M.Stat.Ann. § 38-3-9 (a
24 party to a criminal action "shall have the right to exercise a peremptory challenge to the district judge
25 before whom the action or proceeding is to be tried and heard."); N.D.Cent.Code § 29-15-21 ("any party
26 to a . . . criminal action . . . may obtain a change of the judge before whom the trial or any proceeding
27 with respect thereto is to be heard" by filing a written demand); Or.Rev.Stat. § 14.250-70 (a party to any
28 action may file a "motion supported by affidavit that such party or attorney believes that such party or
attorney cannot have a fair and impartial trial or hearing before such judge, and that it is made in good
faith and not for the purpose of delay. No specific grounds for the belief need be alleged. Such motion
shall be allowed unless the judge moved against, or the presiding judge for the judicial district,
challenges the good faith of the affiant and sets forth the basis of such challenge."); Wis.Stat.Ann. §
971.20 ("In any criminal action, the defendant has a right to only one substitution of a judge);
Wy.R.Crim.P. 21.1 ("A judge may be peremptorily disqualified from acting in a case in which a felony
is charged by the filing of a motion so requesting. A party may exercise the peremptory disqualification
only one time and against only one judge.").

1 Capital and non-capital cases should be treated the same. No reason exists
2 to have different timeframes or requirements. None of the states which allow for
3 a peremptory challenge to a judge have different requirements for capital cases.
4 Therefore, should Rule 10.2 not be eliminated, the Superior Court requests Rule
5 10.2 be amended as follows:

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7 **Rule 10.2. Change of judge upon request**

8 **a. Entitlement.** ~~In any death penalty case, any party shall be entitled to request~~
9 ~~a change of judge as a matter of right no later than ten (10) days after the state~~
10 ~~files a notice of intention to seek the death penalty.~~ In any criminal case other
11 than a death penalty case, each side is entitled as a matter of right to a change
12 of judge. Each ~~non-death penalty~~ case, whether single or consolidated, shall be
13 treated as having only two sides; except that, whenever two or more parties on
14 a side have adverse or hostile interests, the presiding judge or that judge's
15 designee may allow additional changes of judge as a matter of right.
16 Notwithstanding the foregoing provision, the right to a change of judge shall be
17 inapplicable to Rule 32 petitions for post-conviction relief or remands for
18 resentencing.

19 **b. Procedure.** A party may exercise his or her right to a change of judge by
20 filing a pleading entitled "Notice of Change of Judge" signed by counsel, if any,
21 stating the name of the judge to be changed. The notice shall also include an
22 avowal that the request is made in good faith and not:

- 23 1. For the purpose of delay;
- 24 2. To obtain a severance;
- 25 3. To interfere with the reasonable case management practices of a judge;
- 26 4. To remove a judge for reasons of race, gender or religious affiliation;
- 27 5. For the purpose of using the rule against a particular judge in a blanket
28 fashion by a prosecuting agency, defender group or law firm (*State v. City Court
of Tucson*, 150 Ariz. 99, 722 P.2d 267 (1986));
6. To obtain a more convenient geographical location; or
7. To obtain advantage or avoid disadvantage in connection with a plea bargain
or at sentencing, except as permitted under Rule 17.4(g).

The avowal shall be made in the attorney's capacity as an officer of the court.

26 **c. Time for Filing.** A notice of change of judge ~~in a non-death penalty case~~ shall
27 be filed within ten days after any of the following:

- 28 (1) Arraignment, if the case is assigned to a judge and the parties are given
actual notice of such assignment at or prior to the arraignment;

1 (2) Filing of the mandate from an Appellate Court with the clerk of the Superior
Court;

2 (3) In all other cases, actual notice to the requesting party of the assignment of
3 the case to a judge.

4 Notwithstanding the foregoing provision, if a new judge is assigned to a ~~non-~~
5 ~~death penalty~~ case fewer than ten (10) days before trial (inclusive of the date of
6 assignment), a notice of change of judge shall be filed, with appropriate actual
notice to the other party or parties, by 5:00 p.m. on the next business day
following actual receipt of notice of the assignment, or by the start of trial,
whichever occurs sooner.

7 **d.** At the time of the filing of a notice of change of judge, the parties shall inform
8 the court in writing if they have agreed upon a judge or judges who are available
and are willing to have the action assigned to that judge. An agreement of all
9 parties upon such judge may be honored and, if so, shall preclude further
10 changes of judge as a matter of right unless the agreed-upon judge becomes
immediately unavailable. If no judge has been agreed upon, then the presiding judge shall
immediately reassign the action.

11 If a judge to whom the action has been assigned by agreement later becomes
12 unavailable because of a change of calendar assignment, death, illness, or other
13 legal incapacity, the parties shall be restored to their rights under this rule as
they existed immediately before the assignment of the action to such judge.

14 The foregoing changes enable all criminal cases, whether capital or non-capital,
15 to be handled in the same manner and provide all defendants the same rights.

16 Respectfully submitted this 20th day of May, 2010.

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Honorable Barbara Rodriguez Mundell
20 Presiding Judge
Superior Court of Arizona, Maricopa County

21 Original and six (6) copies delivered this
22 20th day of May, 2010 to:

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24 Clerk of the Arizona Supreme Court
1501 W. Washington, Suite 402
25 Phoenix, AZ 85007
26
27
28

1 Copy hand-delivered this
2 20th day of May, 2010 to:

3 David K. Byers, Director
4 Administrative Office of the Courts
5 1501 W. Washington
6 Phoenix, AZ 85007-3231
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