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**IN THE SUPREME COURT
STATE OF ARIZONA**

PETITION TO AMEND RULE 77,
ARIZONA RULES OF CIVIL
PROCEDURE

Supreme Court No. R- _____

**Petition to Amend Rule 77,
Arizona Rules of Civil Procedure**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar of Arizona respectfully petitions this Court to amend Rule 77 of the Arizona Rules of Civil Procedure.¹ The proposed amendment seeks to address a conflict between Rules 42(f) and 77(d), both of which relate to the right to a peremptory change of judge, and the latter of which is found in the Rules relating to compulsory arbitration. The State Bar proposes to eliminate Rule 77(d) in its entirety. A version of proposed amended Rule 77 (“Proposed Rule 77”) identifying the proposed deletion is attached to this petition at Appendix A.

DISCUSSION

I. THE CONFLICT BETWEEN RULES 42(f) AND 77(d).

Rule 42(f)(1) permits parties to an action to a change of judge as a matter of right and generally governs when, and under what circumstances, a party to an action may exercise such right. The right to a peremptory change of judge,

¹ The terms “Rule” or “Rules” throughout this petition refer to the Arizona Rules of Civil Procedure.

1 however, is not without limitations. Under Rule 42(f)(1)(D), a waiver of the right
2 occurs when:

- 3 • “the party agrees to the assignment [of the judge],”
Rule 42(f)(1)(D)(i);
- 4 • “the judge rules on any contested issue,”
5 Rule 42(f)(1)(D)(ii)(aa);
- 6 • “the judge grants or denies a motion to dispose of one or more
7 claims or defenses in the action,” Rule 42(f)(1)(D)(ii)(bb);
- 8 • “the judge holds a scheduled conference or contested hearing,”
9 Rule 42(f)(1)(D)(ii)(cc); and
- “trial commences.” Rule 42(f)(1)(D)(ii)(dd).

10 Rule 77(d) provides that “[u]pon filing a notice of appeal [from an arbitration
11 award], all rights to change of judge are renewed and no event prior thereto shall
12 constitute a waiver.” A conflict between Rules 42(f) and 77(d) developed after the
13 compulsory arbitration rules – Rules 72 to 77 – were amended in 2007 as part of an
14 effort “to clarify, reorganize, and improve the rules to avoid unnecessary delay and
15 expense in arbitrated matters.” Ariz. R. Civ. P. 72, State Bar Committee Note,
16 2007 Amendments.

17 The amended arbitration rules contemplate that the trial court will rule on
18 certain types of motions, despite a case being subject to compulsory arbitration.
19 *See* Rule 74(c)(1) (precluding the arbitrator from ruling on motions to continue on
20 the inactive calendar, to extend Rule 38.1 deadlines, to consolidate cases, to
21 dismiss, to withdraw as attorney of record, and for summary judgment). The
22 amended arbitration rules also permit the taking of an interlocutory appeal to the
23 trial court from certain discovery rulings made by an arbitrator. *See* Rule 74(c)(4).
24 In cases that are not subject to compulsory arbitration, the trial court’s ruling on
25 many of these types of motions would result in a waiver of the right to a
26 peremptory change of judge under Rule 42(f)(1)(D). Rule 77(d), however,

1 ostensibly gives litigants whose cases are subject to compulsory arbitration an
2 additional right to a peremptory change of judge that litigants in non-arbitration
3 cases do not also enjoy.

4 Consider, for example, a situation in which the trial court in a compulsory
5 arbitration case has ruled on a contested matter prior to the arbitrator issuing an
6 arbitration award. Despite the trial court having ruled on a contested matter, which
7 would ordinarily result in the waiver of the right to a peremptory change of judge,
8 Rule 77(d) appears to resurrect the right once a notice of appeal from an arbitration
9 award is filed.

10 This situation raises some serious issues of equity and parity. In other words,
11 a party who is dissatisfied with a trial court's ruling in a compulsory arbitration
12 case has the opportunity to obtain a new judge simply because the party fulfilled an
13 obligation to participate in arbitration; a party in a non-arbitration case would not
14 have such a luxury. In addition, the monetary value of the case – one of the litmus
15 tests for ascertaining whether a case is subject to compulsory arbitration, *see* Rule
16 72(b)(2) – could dictate whether a party is entitled to a “free look” at the assigned
17 trial judge, a circumstance that the waiver provisions of Rule 42(f) are designed to
18 prevent. *See Taliaferro v. Taliaferro*, 186 Ariz. 221, 222, 921 P.2d 21, 22 (1996)
19 (“The purpose of the waiver rule is to prevent parties from testing the waters and
20 then filing a notice.”).

21 The wording of Rule 77(d) is substantially similar to the wording of
22 Rule 42(f)(1)(E), which restores a party's rights to a peremptory change of judge
23 after appeal. *Compare* Rule 77(d) (“Upon filing a notice of appeal [from an
24 arbitration award], all rights to change of judge are renewed and no event prior
25 thereto shall constitute a waiver.”), *with* Rule 42(f)(1)(E) (“When an action is
26 remanded by an appellate court and the opinion or order requires a new trial on one

1 or more issues, then all rights to change of judge are renewed and no event
2 connected with the first trial shall constitute a waiver.”). On a remand from the
3 court of appeals to the superior court, it makes sense to restore a previously
4 unexercised right to a notice of change of judge permitted by Rule 42(f)(1)(E).
5 *King v. Superior Court*, 108 Ariz. 492, 493, 502 P.2d 529, 530 (1972) (“In the case
6 of an appeal, reversal and a remand for a new trial, it is always possible that the trial
7 judge may subconsciously resent the lawyer or defendant who got the judgment
8 reversed. The mere possibility of such a thought in the back of a trial judge’s mind
9 means that a new judge should be found.”).² The same considerations do not apply
10 in the compulsory arbitration context. In an appeal from an arbitration award,
11 regardless of the outcome, the case would not be remanded to the arbitrator whose
12 decision was appealed. *See* Rule 77(c) (providing that an appeal from an arbitration
13 award “shall be *de novo* on law and facts”). Thus, the concerns identified by this
14 Court in *King* are not implicated in an arbitration case.

15 **II. THE STATE BAR’S PROPOSAL TO ELIMINATE THE CONFLICT.**

16 The State Bar next evaluated the best method of reconciling the conflict
17 between Rule 42(f) and Rule 77(d). The State Bar first considered modifying
18 Rule 77(d) to make clear that, if the party engages in conduct which would result in
19 a waiver under Rule 42(f)(1)(D), the right to a peremptory change of judge is not
20 renewed. The State Bar, however, determined that doing so would be duplicative
21 of what is already contained in Rule 42(f)(1)(D).

22 Rule 77(c) provides that, upon appeal from an arbitration award, “[a]ny legal
23 rulings and factual findings made by the arbitrator shall not be binding on the court
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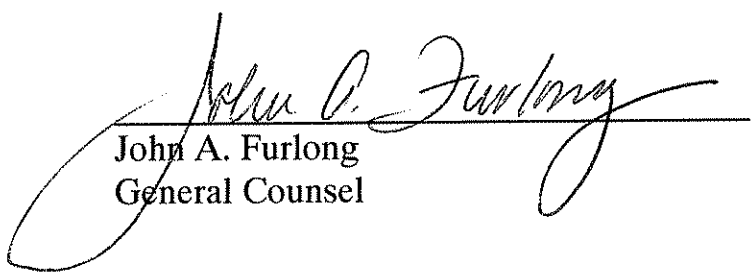
25 ² In *Brush Wellman, Inc. v. Lee*, the court of appeals held that, after a remand from
26 an appellate court for a new trial, “Rule 42(f)(1)(E) *does not* apply when the party has
already exercised a peremptory change of judge.” 196 Ariz. 344, 349, ¶ 16, 996 P.2d
1248, 1253 (App. 2000) (emphasis added).

1 or the parties” In addition, the waiver of the right to a change of judge under
2 Rule 42(f)(1)(D) relates only to the assigned judge who made the contested ruling,
3 ruled on the dispositive motion, held the scheduled hearing, etc. See
4 Rule 42(f)(1)(D) (“Such waiver is to apply only to such assigned judge.”
5 (Emphasis added)). Thus, Rule 42(f) makes clear that the actions of an arbitrator
6 would have no effect on the right to seek a peremptory change of judge if (1) an
7 appeal was taken from the arbitrator’s award and (2) the right to a peremptory
8 change of judge had not already been exercised, see Rule 42(f)(1)(A), or waived.
9 See Rule 42(f)(1)(D). In other words, attempting to revise Rule 77(d) would not
10 add anything to the Rules.

11 **CONCLUSION**

12 After reviewing the Rules and the cases discussing the policy reasons behind
13 the peremptory change of judge, the State Bar has concluded that Rule 77(d) is
14 neither needed nor justified. Rather, the State Bar believes that Rule 42(f) should
15 govern whether a party has the right to a change of judge or whether that right has
16 been waived under all circumstances, including in compulsory arbitration cases.
17 Accordingly, for the foregoing reasons, the State Bar respectfully petitions this
18 Court to amend Rule 77 of the Arizona Rules of Civil Procedure to abrogate
19 Rule 77(d) in its entirety as reflected in Appendix A to this petition.

20 RESPECTFULLY SUBMITTED THIS 5th day of January, 2011.

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Electronic copy filed with the
Clerk of the Supreme Court of
Arizona this 5th day of January, 2011

By: Kathleen A. Ludwig

APPENDIX A

1 **Rule 77. Right of Appeal**

2 **(a) Notice of Appeal.**

3 [No proposed changes].

4

5 **(b) Deposit on Appeal.**

6 [No proposed changes].

7

8 **(c) Appeals *De Novo*.**

9 [No proposed changes].

10

11 ~~**(d) Change of Judge.** Upon filing a notice of appeal, all rights to change of~~
12 ~~judge are renewed and no event prior thereto shall constitute a~~
13 ~~waiver.~~[Abrogated]

14

15 **(e) Waiver of Right to Appeal.**

16 [No proposed changes].

17

18 **(f) Costs and Fees on Appeal.**

19 [No proposed changes].

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21 **(g) Discovery and Listing of Witnesses and Exhibits.**

22 [No proposed changes].

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