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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

PETITION TO AMEND
RULE 42(f)(1)(D)(ii)(dd) OF THE
RULES OF CIVIL PROCEDURE FOR
THE SUPERIOR COURTS OF
ARIZONA

Supreme Court No. R-13-_____

Pursuant to Rule 28, Rules of the Supreme Court, Mike Palmer, a member of the public deeply concerned about justice,¹ petitions this Court to adopt the proposed amendment to Rule 42(f)(1)(D)(ii)(dd) of the Rules of Civil Procedure, which governs waiver of right to a change of judge as a matter of right.

The purpose of the proposed amendment is to prevent a judge from misapplying the Rule to deprive a litigant of his constitutional right to change of judge. The rule needs to be amended to explicitly state that an ex parte hearing that initiates a civil action does not constitute the commencement of trial.

¹ Per Amos 5:15 in the Bible: “Hate evil, love good. Maintain justice in the courts.”

I. Background and Purpose of the Proposed Rule Amendment

This petition arises out of a recent bizarre ruling in the contentious town of Quartzsite, Arizona.

If it's not obvious enough from its title, *Change as a Matter of Right*, the spirit of Rule 42(f)(1) is captured in the following two quotes: "Arizona is one of a minority of states that allow a party to file a notice of change of judge without cause. The purpose of the rule is to allow a party to ask for a new judge when a party may perceive a bias that does not rise to disqualification under the rules allowing a challenge for actual bias or prejudice." Supreme Court Rule 42, ER 8.4, COURT COMMENT TO 2004 AMENDMENT.

"¶ 9 Before our supreme court promulgated Rule 42(f) in 1971, Arizona courts had recognized a peremptory **right** to a change of judge, even though § 12-409 required the filing of an affidavit of bias and prejudice, and had acknowledged that the affidavit had become a fiction in cases in which such peremptory changes were sought. Rule 42(f)(1), in contrast to Rule 42(f)(2) (change of judge for cause), recognizes the peremptory **right** to a change of judge, eliminating the previously required affidavit of bias and prejudice." *Brush Wellman, Inc. v. Lee*, 996 P. 2d 1248, 1251 - Ariz: Court of Appeals, 2nd Div., Dept. A 2000.

This right to a peremptory change of judge goes all the way back to the

constitutional right to a fair trial. “The right to a fair and impartial trial before a fair and **impartial judge** is a valuable substantive right originating in the common law and recognized by statute in both criminal and civil cases.” *Marsin v. Udall*, 78 Ariz. 309, 312, 279 P. 2d 721 - Ariz: Supreme Court 1955.)

Quite simply then, in Arizona, litigants have an automatic right to a one time change of judge . . . if that right is invoked before trial. And therein lies the rub. For the purposes of this Rule, when does a “trial” begin?

Take the case of *Halfmoon v. Roth*. Last summer, outspoken Quartzsite resident Michael Roth (of public forum fame) once again found himself the victim of an attempted ex parte civil injunction against harassment. (Readers may remember Mr. Roth's Second Amendment constitutional right was unlawfully revoked two years ago, ex parte, after he exercised his First Amendment right to political speech by calling Quartzsite Councilman Joe Winslow a “turd.”² (One time.))

In *Halfmoon*, Mr. Roth and some friends were again exercising that pesky First Amendment right, shouting “Loser!” (one time) from a passing car to one of their political adversaries walking on the sidewalk. (Quartzsite had just held a

² See Michael Roth's petition to Repeal unconstitutional ARPOP Rule 6(E)(4)(e)(2), R-12-0007 in Protective Order procedure. As of this writing, the comment period is still open.

contentious election, and this person's side soundly lost. Hence the salutation “Loser.”) So, following Councilman Winslow’s precedent, as often happens in Arizona, the loser ran to a judge seeking an ex parte Injunction against Harassment to stop Mr. Roth’s First Amendment right to “even hurtful speech.” (Quoting Chief Justice Roberts in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011).)³

The loser ran to Quartzite Municipal Judge Larry King, the presiding judge there (because he’s the only judge) and petitioned him for an IAH. While Judge King did not issue an ex parte civil injunction at the time, he set a hearing, sua sponte, to issue an injunction.

As soon as Mr. Roth received notice that a hearing had been set, he filed a timely Rule 42(f)(1) Notice for change of judge. (Exhibit 1.)

Nevertheless, even though Mr. Roth's Notice was timely (having been filed within 10 days of learning for the first time that Judge King had been assigned as the trial judge (albeit by Judge King himself – the peculiarities of a small town court)), Judge King denied Mr. Roth's constitutional right to a change of judge. The basis for the denial? A rather creative interpretation of when a “trial commences,” citing Rule 42(f)(1)(D)(i)(dd).

³ See also *LaFaro v. Cahill* overturning a civil injunction against harassment on First Amendment grounds. (203 Ariz. 482, 56 P.3d 56 (App. Div.1 2002))

From Judge King's Minute Entry (Exhibit 2), Judge King focused on the waiver of the right to a change of judge, saying “Waiver of the right occurs after a judge is assigned to preside at trial or is otherwise permanently assigned the action.” And then he quotes the litany of waivers listed in Rule 42(f)(D).

After a judge is assigned to preside at trial or is otherwise permanently assigned to the action, a party waives the right to change of that judge as a matter of right when:

- (i) the party agrees to the assignment; or
- (ii) after notice to the parties
 - (aa) the judge rules on any contested issue; or
 - (bb) the judge grants or denies a motion to dispose of one or more claims or defenses in the action; or
 - (cc) the judge holds a scheduled conference or contested hearing; or
 - (dd) trial commences.

Judge King then writes, “In the instant matter, there has been an ex-parte hearing on May 10, 2012 at which the Petition was denied and **a hearing set**. Judge King presided at that hearing. . . . The 'set a hearing' acts as a continuance of the original hearing. Accordingly, for the reasons explained above the Notice of Change of Judge is untimely.”

It appears Judge King is invoking Rule 42(f)(1)(D)(ii)(dd), claiming that the ex parte petition hearing marked the beginning of trial.

On its face that can't be right, because (ii)(dd) is predicated on (ii) receiving

notice. Mr. Roth had not received notice of the ex parte hearing. By the very definition of an ex parte hearing, Mr. Roth couldn't have waived his right to anything because he wasn't there! He didn't even know there was an action against him.

Crucially for this petition, such a denial is a deprivation of a litigant's constitutional right to due process, per this Court long ago in *Marsin v. Udall*. Then, as now, "Respondent [judge] refused to recognize the affidavit [for disqualification] upon the ground that he had theretofore heard and passed upon the foregoing motions and the affidavit was, therefore, not timely made and that he was required to try the case."

So here, as in *Marsin*, Judge King refused to recognize a timely notice for disqualification claiming the notice was not timely made, because Judge King, acting as the assignment judge, had previously acted in the matter. ⁴

The Arizona Supreme Court rejected that thinking, saying "The right to a

⁴ Ironically, Judge King ruled exactly the opposite in granting Mr. Roth's simultaneous Rule 52(a) motion for finding of facts, even though Rule 52(f) has language similar to Rule 42(f) which requires the motion be filed before "trial." Nevertheless, Judge King granted that motion as timely, even though he denied Roth's Rule 42(f) motion for being untimely. The Commission on Judicial Conduct was made aware of this inconsistency, but did not conclude it was evidence of bias or unethical behavior. See Case No. 12-135.

fair and impartial trial before a fair and impartial judge is a valuable substantive right originating in the common law and recognized by statute in both criminal and civil cases. Neither this court nor the superior court can by rule of procedure deprive a party of the opportunity to exercise this right. ”

Further, “It has even been held by the Supreme Court of the United States that under some circumstances a procedure that had such effect offended the due process clause of the Federal constitution.”

While one might argue that this was legal error on Judge King’s part, since the Rules are not at fault and the case law is clear. Nevertheless, if it happened once, it can happen again.

Since a misuse of this Rule can cause the deprivation of a constitutional right, and since there’s no harm in stating the obvious in a Rule, we need to spell things out. The Court has an excellent chief staff attorney, and I trust she knows better than I what to craft to prevent this abuse in the future.

Nevertheless, I offer the following proposal to start the ball rolling.

II. Contents of the Proposed Rule Amendment

Rule 42(f). Change of Judge

1. Change as a Matter of Right.

(D) Waiver. After a judge is assigned to preside at trial or is otherwise permanently

assigned to the action, a party waives the right to change of that judge as a matter of right when:

- (i) the party agrees to the assignment; or
- (ii) after notice to the parties
 - (aa) the judge rules on any contested issue; or
 - (bb) the judge grants or denies a motion to dispose of one or more claims or defenses in the action; or
 - (cc) the judge holds a scheduled conference or contested hearing; or
 - (dd) trial commences. (An ex parte hearing which starts an action does not mark the commencement of a trial.)

Such waiver is to apply only to such assigned judge.

SUBMITTED this 10th day of January, 2013

By /s/ Mike Palmer
Mike Palmer
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Phoenix, AZ 85023

EXHIBIT 1

EXHIBIT 2

**IN THE MUNICIPAL COURT OF
THE TOWN OF QUARTZSITE, STATE OF ARIZONA**

HR2012-0012

5/17/2012

HYGEIA HALFMOON

v.

MICHAEL ROTH

MINUTE ENTRY

The Court has received and considered the Defendant's Notice of Change of Judge and Motion for Continuance. Pursuant to Rule 42 (f) the defendant is entitled as a matter of right to a change of one judge. The party seeking a change of judge as a matter of right must certify that (i) the notice is timely, (ii) the party has not waived the right under subsection (f)(1)(D) of the rule, and (iii) the party has not previously been granted a change of judge as a matter of right in the case.

Waiver of the right occurs after a judge is assigned to preside at trial or is otherwise permanently assigned to the action. A party waives the right to change of that judge as a matter of right when:

- (i) the party agrees to the assignment; or
- (ii) after notice to the parties
 - (aa) the judge rules on any contested issue; or
 - (bb) the judge grants or denies a motion to dispose of one or more claims or defenses in the action; or
 - (cc) the judge holds a scheduled conference or contested hearing; or
 - (dd) trial commences.

Such waiver is to apply only to such assigned judge.

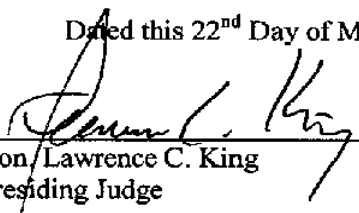
In the instant matter, there has been an ex-parte hearing on May 10, 2012 at which the Petition was denied and a hearing set. Judge King presided at that hearing. Pursuant to the

Arizona Rules of Protective Order Procedure, Rule 6 (E) (5), “[i]f after the ex parte hearing the judicial officer does not have sufficient information to grant the Order of Protection, the judicial officer may deny the request or set a hearing within 10 days with reasonable notice to the defendant. “ The “set a hearing” acts as a continuance of the original hearing. Accordingly, for the reasons explained above the Notice of Change of Judge is untimely.

IT IS ORDERED that the matter will remain with the current assigned Judge.

IT IS ORDERED denying the motion to continue.

Dated this 22nd Day of May 2012.

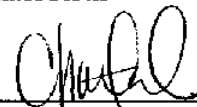


Hon. Lawrence C. King
Presiding Judge

Copies to:

Hygeia Halfmoon

Michael Roth



Deputy Clerk

Date: 5/22/2012