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6 **IN THE SUPREME COURT**
7 **STATE OF ARIZONA**

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9 PETITION TO AMEND RULE
42(f)(2)(1)(D)(ii)(dd), ARIZONA
10 RULES OF CIVIL PROCEDURE

Supreme Court No. R-13-0026

**Comment of the State Bar of Arizona
on Petition to Amend Rule
42(f)(1)(D)(ii)(dd), Arizona Rules of
Civil Procedure**

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13 A Petition has been submitted to amend Rule 42(f)(1)(D)(ii)(dd) of the Arizona
14 Rules of Civil Procedure (“Rule 42(f)”). Rule 42(f) governs a litigant’s right to a
15 “Change of Judge,” providing a procedure and timeline for striking a judge as a matter
16 of right. According to the Petitioner, the “purpose of the proposed amendment is to
17 prevent a judge from misapplying” Rule 42(f) in a narrow circumstance involving ex
18 parte hearings. The State Bar respectfully opposes the Petition, on the ground that it is
19 unnecessary and that any erroneous application of Rule 42(f) in a particular case is
20 more appropriately addressed through the remedy of special action review, rather than a
21 rule change. *Taliaferro v. Taliaferro*, 186 Ariz. 221, 921 P.2d 21 (1996), (“rulings by
22 noticed judges on the propriety of the notice [of change of judge] are reviewable only
23 by way of special action relief”).

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1 **A. Background of Petition.**

2 Rule 42(f) allows each side one change of judge “as a matter of right.” Ariz. R.
3 Civ. Proc. Rule 42(f)(A). The right to a change of judge must be exercised by filing a
4 “Notice of Change of Judge,” containing a certification that the notice is timely, that the
5 party has not waived the right under subsection (f)(1)(D) of the rule, and that the party
6 has not previously been granted a change of judge in the case.

7 Rule 42(f)(1)(C) contains time limits for filing a timely notice: “A notice is
8 timely if filed sixty (60) or more days before the date set for trial.” It further provides
9 that “[w]henver an assignment is made which identifies the judge for the first time...a
10 notice shall be timely filed as to the newly assigned judge, if filed within ten (10) days
11 after such new assignment.”

12 The right to a change of judge may also be waived in certain circumstances.
13 Those include: (a) “the party has agreed to the assignment;” or (b) after notice to the
14 parties, “the judge rules on any contested issue” (subsection (D)(ii)(aa)), “grants or
15 denies a motion to dispose of one or more claims or defenses in the action” (subsection
16 (D)(ii)(bb)), “holds a scheduled conference or contested hearing” (subsection
17 (D)(ii)(cc)), or “trial commences” (subsection (D)(ii)(dd)).

18 The Petition is based on a specific matter in which Petitioner contends that a
19 Quartzsite Municipal Judge misapplied Rule 42(f) to deny a right to a change of judge.
20 The underlying facts, as recounted by Petitioner, involved an action seeking an *ex parte*
21 “injunction against harassment” against an individual named Mr. Roth. The Judge did
22 not issue an injunction at the *ex parte* hearing, but noticed a hearing on the injunction
23 request for a future date. Petitioner claims that Mr. Roth did not receive notice of the
24 initial hearing (held on May 10, 2012), where the *ex parte* request for injunctive relief
25 was denied. According to the Petition, Roth received notice of the later hearing set for

1 May 22, 2012, and filed a Notice of Change of Judge on May 17, 2012. [Petition, Ex.
2 A] The request was denied in a Minute Entry (attached to the Petition at Ex. 2), which
3 concluded that the Notice was “untimely.”

4 Even assuming, as Petitioner argues, that the Court’s denial of the request for a
5 change of judge was erroneous (which cannot be determined with certainty from the
6 Petition), the basis for that denial is unclear from the Minute Entry attached to the
7 Petition. The Minute Entry quotes subsection (f)(1)(D), governing waiver, but
8 ultimately concludes that the Notice was “untimely,” which would be governed by
9 subsection (f)(1)(C), and not (D). Nonetheless, the Petitioner speculates that the Court
10 misapplied subsection (D) on the requirements for a “waiver,” and the Petition proposes
11 an amendment based on this assumption. Petitioner argues: “It appears [the Judge] is
12 invoking Rule 42(f)(1)(D)(ii)(dd), claiming that the ex parte petition hearing marked the
13 beginning of trial.” Although the Minute Entry itself does not contain any such
14 reasoning, Petitioner proposes to address this perceived error by adding a sentence at
15 the end of subsection (D)(ii)(dd) that reads “An ex parte hearing which starts an action
16 does not mark the commencement of a trial.”

17 **B. A Change in Rule 42(f) is Not Warranted to Address the**
18 **Asserted “Misapplication” of the Rule Described in the petition.**

19 The State Bar respectfully opposes the Petition for several reasons:

20 *First*, the Petition fails to identify any inherent problem with the language of Rule 42(f)
21 as it is currently drafted. Indeed, the Petitioner acknowledges this, arguing (at 1, 7) that
22 “the Rules are not at fault and the case law is clear,” and that the Judge simply
23 “misappl[ied]” the rule. In short, Petitioner’s complaint is simply that the Court “got it
24 wrong” in denying the request for a change of judge. But changes to the Arizona Rules
25 of Civil Procedure, particularly long-standing rules such as this, should be reserved for
issues and ambiguities of more general concern and application. The rule change

1 procedure should not be used to address unique situations or alleged errors that occur in
2 individual cases and are not likely to be repeated. That is particularly true where, as
3 here, the alleged error could have been addressed through special action review at the
4 time, and the aggrieved party apparently failed to pursue that available remedy.
5 *Taliaferro v. Taliaferro*, 186 Ariz. at 223, 921 P.2d at 23 (party cannot raise on appeal
6 error in change of judge, but must proceed by special action; parties must “seek
7 immediate judicial review or forever hold their peace”).

8 *Second*, the State Bar disagrees with Petitioner’s argument (at 7) that a change is
9 warranted because “there’s no harm in stating the obvious in a Rule.” If this argument
10 were accepted as a legitimate basis for rule change petitions, the Arizona rules would be
11 cluttered with unnecessary verbiage.

12 *Finally*, based on the State Bar’s review of the Minute Entry attached to the
13 Petition, it is not clear that the proposed amendment, even if adopted, would address the
14 error that allegedly occurred. The Court’s ruling appears to be based on a determination
15 that the Notice was untimely, not that a waiver occurred. The Petition’s proposal to
16 amend the waiver provision is based on supposition concerning the basis for the Court’s
17 alleged error. The lack of certainty concerning the purported error that the Petition is
18 trying to correct further weighs against the proposed change.

19 **Conclusion**

20 For the reasons stated above, the State Bar opposes the Petition to amend
21 Rule 42(f)(1)(D)(ii)(dd) of the Arizona Rules of Civil Procedure.

22 RESPECTFULLY SUBMITTED this 20th day of April, 2013.

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25 John A. Furlong, Esq.
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Electronic copy filed with the
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this 27th day of April, 2013.

By: Kathleen A. Lundgren