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April 29, 2021

Arizona Supreme Court

Re: R-21-0006 - Petition to Amend Various Rules of Procedure Related to the
Peremptory Change of Judge

Dear Justices and Members of the Committee:

I am opposed to the proposed rule change to eliminate the peremptory change of judge. I have been an actively practicing lawyer in Tucson for just under 50 years. My deceased father and uncle began practicing in 1927 and 1939 and practiced for 50 and 60 years respectively, and my deceased younger sister practiced over 25 years. My brother-partner has practiced just under 51 years. We all were, and brother and I are still, active practitioners and trial lawyers.

I wholeheartedly endorse the comments from the Pima County Bar Association's rule committee, and Pima County Superior Court judges Sakall, Lee, Gordon and Andrew Jacobs, Esq.

I disagree with the presiding judges' reasoning and instead believe both the bar and the public will view the elimination of the peremptory challenge as an attempt by the Court to protect and mask the inexperience and inadequacies of certain members of the bench. There are more important problems with the bench that need to be addressed, and eliminating peremptory challenges only exacerbates the problem.

When brother and I first started practicing in 1970 and 1971, virtually all lawyers in private practice were general practitioners. When those general practitioners became judges and commissioners, they brought a wide breadth of legal knowledge and experience to the bench. However, as time passed, lawyers began to specialize in certain areas of the law and were no longer general practitioners. Eventually, the State Bar recognized the evolution that was taking place and began to certify specialists in various areas. Since then the bar has evolved even further with almost all private practitioners now limiting their practice to one or possibly two areas.

Unfortunately, there has been a failure by the Governor's office, the legislature, and to a certain extent, the presiding judges and the bench to evolve in the same fashion by establishing a specialized bench. While outstanding and sometimes certified specialist lawyers are appointed to the bench by the Governor or, in the case of a commissioner, by the presiding judge, often those appointees are assigned to bench positions where they have absolutely no prior experience or knowledge. I have been a family law practitioner almost exclusively for the last 35-40 years. In Pima County, it is common for a judge or commissioner to be assigned to the family law bench without any prior experience in family law. In fact, a few years ago, three retained judges were assigned to the family law bench and collectively not one

had ever tried or heard a family law case. Those three were known by the family law bar as “the three blind mice.” And that was not an aberration ~ it occurs all the time.

The impact of an inexperienced judge is far reaching. Lawyers are opportunists and will try to “get away” with anything they can in representing their clients. However, with an experienced judge, they will get away with far less. Additionally, a case is less likely to settle with an inexperienced judge. Finally, the cost to try a case is greater with an inexperienced judge because, in most instances the trial is longer, and the lawyers end up charging their clients more in order to “educate” the judge.

Also, consider the impact on litigants and clients. Clients almost always want to know about their judge’s knowledge and experience. Imagine the effect on a client when he/she finds out their trial judge has no experience with, or ever tried a case like theirs in their entire legal career. Under those circumstance, it would be malpractice to not advise them of the peremptory challenge and not use it. This brings up the next point.

When a peremptory challenge is filed, the Rule allows the lawyers or parties in the case to stipulate to a specific judge if that judge is willing to take the case. In fact, it is not uncommon for lawyers to jointly collaborate to file a change of judge in order to get an experienced and knowledgeable judge on their case.

The bench contends inexperienced judges are intelligent and will eventually “learn the ropes.” That is the same as saying a cardiovascular surgeon can learn to perform foot surgery like an orthopaedic surgeon; maybe so, but what are the results until they learn? Like patients, litigants should not be guinea pigs thrown to the mercy of the lions while judges are learning the ropes.

Additionally, in my many years of practicing, I have seen some judges roll up their sleeves and jump into learning the ropes, while others just “put in their time and do their penance” until moved to a different bench. Even still, until the diligent and dedicated ones who roll up their sleeves and jump in and actually learn the ropes, litigants and lawyers suffer with their rulings which often result in otherwise preventable appeals, all at the clients’ cost and expense. It is a travesty that litigants and lawyers should have to suffer through such circumstances.

However, the travesty does not end there. There is yet another deficiency in the bench that exacerbates the dilemma of inexperienced judges, it is the “rotation system.” This is the practice of rotating judges and commissioners from one bench to another every two or three years. Just about the time an inexperienced judge or commissioner is beginning to learn the ropes, make good decisions, become “predictable” so their cases can settle, they are rotated to another bench and replaced by another inexperienced judge. And the inequitable and frustrating cycle continues.

I speak from my heart. I come from a family of lawyers and am proud to be a lawyer and in a noble but not perfect profession. I have strived to improve our system for years. Unfortunately, however, the public image of the entire judicial system continues to decline and we do not need to tarnish it further by our own action. Instead, conduct a poll of trial lawyers, and especially family law lawyers, and see to what extent this opinion is echoed. I believe there will be a large majority, especially in the major counties, who agree. If so, eliminating the peremptory change of judge rule is not a solution to the problem.

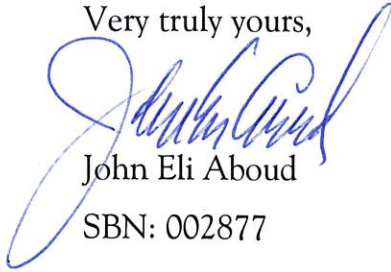
However, I believe there is a solution. Instead of eliminating the rule, the Court should assemble a task force consisting of trial lawyers, including family law lawyers, judges, members of the public, and legislators to recommend rules and laws establishing a specialized bench and altering the existing practice of rotating judges into bench assignments where they have no

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knowledge or experience. I would be honored to serve on such a committee.

Thank you for allowing me to comment.

Very truly yours,

A handwritten signature in blue ink, appearing to read "John Eli Aboud", with a large, stylized flourish extending from the bottom left.

John Eli Aboud

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