

1 Elizabeth Burton Ortiz, Bar No. 012838
2 Executive Director
3 Arizona Prosecuting Attorneys'
4 Advisory Council
5 3838 N. Central Avenue, Suite 850
6 Phoenix, AZ 85012
7 (602) 542-7222 / FAX (602) 274-4215
8 Elizabeth.Ortiz@apaacaz.com

9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 In the Matter of:

12 **PETITION TO AMEND RULE 10.2,**
13 **ARIZONA RULES OF CRIMINAL**
14 **PROCEDURE**

15 Supreme Court No. R-21-0006

16 **COMMENT OF**
17 **THE ARIZONA PROSECUTING**
18 **ATTORNEYS' ADVISORY**
19 **COUNCIL**

20 This Petition seeks to eliminate a party's right to notice a judicial officer
21 under Rule 10.2. The main reason given by the petitioners for eliminating this
22 right is because the rule has been abused, yet no specific instances of abuse are
23 cited, other than a blanket statement that some offices have a practice of noticing
24 particular judges. This type of abuse is already prohibited by the plain language of
25 the current rule and is considered by the Arizona Prosecuting Attorneys' Advisory
Council ("APAAC") to be a violation of the Rules of Professional Conduct. If
there have in fact been offices who have such a practice then it should be dealt
with via discipline by the Arizona State Bar, not by changing a rule that the vast
majority of practitioners use appropriately.

1 In addition to alleged abuse, the Petition asserts that the right of preemptory
2 notice of a judicial officer is administratively burdensome. However, the strict
3 parameters within Rule 10.2 minimize administrative impact. Specifically, this
4 right allows a party to notice only one judicial officer during the entirety of a case,
5 allows notice only if that judicial officer has not already heard a substantive issue,
6 has stringent time limits within which to file, and mandates that good faith be
7
8 avowed to in the motion.
9

10 The Petition further contends that the Rule circumvents the will of the voters
11 who elected the judicial officer subject to the motion. The most populous counties
12 in Arizona do not elect their trial judges. Moreover, voters do not elect judges to
13
14 preside over specific cases.

15 The Petition also cites the need for public trust and confidence in the system
16 as a necessary reason to eliminate this Rule, as well as the possibility that a notice
17 under this Rule will hide deficiencies or biases of a judge that would otherwise be
18
19 aired in a notice for cause or a judicial complaint. There are several flaws with
20 these arguments. First, public confidence is not bolstered if an unprofessional or
21
22 biased judicial officer remains on a case. Nor should an individual litigant have to
23
24 wonder if they are going to be treated fairly just to ensure public confidence. Next,
25 the threshold to eliminate a judge for cause is very difficult. This is true even for
those judges who, from written rulings or statements in open court, have expressed

1 animus towards a particular litigant or type of case. Furthermore, some of the
2 evidence needed to support a motion to remove a judge for cause, such as a judge's
3 demeanor, may not have been captured on the record. Finally, the decision on a
4 motion for cause is made by the trial judge's colleague who may understandably be
5 reluctant to make findings of bias or incompetency against a colleague.
6

7 Regarding complaints to the Judicial Conduct Commission, this is not an
8 adequate substitute for Rule 10.2. A recent example from Maricopa County
9 illustrates this point. In 2020, two judges were referred to the Judicial Conduct
10 Commission for demeanor and/or bias concerns. Both were given discipline. To
11 get to that point, multiple examples were submitted to the Commission. In the
12 meantime, litigants either had to remain in those courts or risk the fallout from
13 motions for cause. Without the right to notice under Rule 10.2, lawyers will be
14 reluctant to file complaints in the future, knowing they have no mechanism to
15 avoid appearing in front of that judge. This is not mere conjecture. There are
16 judges who routinely receive poor marks in JPR surveys and/or receive significant
17 votes against retention. Those surveys and negative votes represent, in part,
18 potential litigants who do not have confidence in a particular judge's ability to
19 fairly adjudicate.
20
21
22
23

24 As far as challenging judicial rulings to appellate courts, that is and will
25 continue to be done, but those challenges take time, are often cost prohibitive, and

1 litigants should not have to be subjected to continued unsound rulings while they
2 wait for an appeal that may never fully materialize. Even if a litigant succeeded in
3 an appeal, the case will invariably involve many more rulings.
4

5 Furthermore, forcing litigants to state their reasons for noticing judges via
6 motions for cause will subject both attorneys and judicial officers to unnecessary
7 embarrassment.
8

9 This Petition seems to be placing the interests of individual judges above
10 those of the attorneys, victims, and other litigants, without giving sufficient reasons
11 to do so. For these reasons, APAAC opposes this Petition.
12

13 RESPECTFULLY SUBMITTED this 3rd day of May, 2021.

14 *Elizabeth Burton Ortiz*
15 Elizabeth Burton Ortiz, #012838
16 Executive Director
17 Arizona Prosecuting Attorneys'
Advisory Council

18 Electronic copy filed with the
19 Clerk of the Arizona Supreme Court
20 this 3rd day of May, 2021, by:

21 By: *Diana Cooney*
22
23
24
25