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11 **ARIZONA SUPREME COURT**

12 **PETITION TO AMEND VARIOUS
13 RULES OF PROCEDURE
14 RELATED TO THE PEREMPTORY
15 CHANGE OF JUDGE**

16 R-21-0006
17 MARICOPA COUNTY ATTORNEY'S
18 COMMENT IN OPPOSITION

19 The Maricopa County Attorney's Office (MCAO) submits this comment in
20 opposition to the Petition to modify various rules of procedure to eliminate a party's
21 right to a one-time change of judge. The rules in question allow a litigant to move to a
22 new judge to avoid even the appearance of or potential for bias that might
23 unintentionally interfere with the judge's ability to fairly preside over a case. These
24 rules are very limited in that the notice can only be used once in a case and it must be
25 used very early in the proceedings. Rule 10.2 of the Rules of Criminal Procedure adds
26 additional requirements. While that rule does not require any stated reason for
27 exercising the right, it does require an avowal from counsel that the rule is not being
28 used for an improper purpose as described in the rule. Using the rule for an improper

1 purpose violates both the rule and Arizona’s ethical rules. *See* Ariz. R. Crim. P.
2 10.2(b); R. Sup. Ct. Ariz. 42, ER 8.4.
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4 The Petition begins by pointing to possible abuse of these rules to justify
5 eliminating them. To demonstrate abuse, the Petition relies on the work of an ad hoc
6 committee that looked at Criminal Rule 10.2 roughly twenty years ago. The Petition
7 does not cite to any specific examples showing abuse of the rule but just references that
8 committee’s identification of *perceived* and *potential* abuses. [Petition at 3 (emphasis
9 added)]. That committee recommended, and this Court adopted, the modifications to
10 Rule 10.2 and the ethical rule cited above that require an avowal that the notice is not
11 being used for an improper purpose. Those changes have been permanent parts of the
12 rules for more than 15 years, yet the Petition provides no data or analysis to support
13 any claim of abuse of the rule.
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17 Petitioners also appear concerned that these rules do not permit judicial inquiry
18 into the “propriety of reasons for the notice.” [Petition at 3]. Of course, permitting
19 courts to do so would defeat the entire purpose of these rules. Additionally, it is not
20 clear why this is a problem because judges frequently rely on the avowals of counsel
21 for a variety of matters during the course of litigation. The Petition fails to provide any
22 evidence that these rules are being abused.
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25 After discussing possible abuses, the Petition moves to the administrative
26 challenges of having these rules, stating that those challenges “cannot be overstated.”
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1 [Petition at 4]. The Petition provides no data or examples to demonstrate that these
2 rules cause any administrative burden. MCAO cannot speak to the experience in other
3 counties, of course, but, in Maricopa County at least, we are unaware of any significant
4 administrative burden caused by these rules. Given the long history of these rules in
5 Arizona, it would be interesting to hear why, as our judicial system has expanded over
6 the years, these rules are suddenly unworkable when courts have managed to
7 implement them for many decades. The Petition does not provide any explanation.
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10 The Petition also cites the need for public trust and confidence in the system as
11 a reason to eliminate these rules, as well as the possibility that the rules will hide
12 deficiencies or biases of a judge that would otherwise be aired in a notice for cause or
13 a judicial complaint. Neither of these arguments justify the elimination of these rules.
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16 First, the suggestion that the for cause rule is an alternative to the rules in
17 question ignores the realities of a for cause motion. Not having to rely on a change of
18 judge for cause motion avoids potential embarrassment and future acrimony between
19 the judge and attorney. Additionally, the threshold to eliminate a judge for cause is
20 appropriately a very high one. For example, a judge expressing general animus towards
21 a particular litigant or type of case is unlikely to ever rise to the level to sustain a
22 removal for cause. Reliance on a for cause finding also ignores the reality of the
23 possible consequences to a practitioner—who may have multiple cases or future cases
24 before the judge—in alleging that a judge is biased. Finally, the decision on a motion
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1 for cause is made by the trial judge's colleague, who may understandably be reluctant
2 to make the necessary findings against a colleague absent a very clear and obvious bias.
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4 Second, it is not clear, and appears counterintuitive, that *more* motions for
5 removal for cause will bolster public confidence in the judiciary or the system. Instead,
6 the elimination of rules allowing for a "no cause" change of judge are likely to decrease
7 public confidence in the fairness of the system. Imagine a situation where a lawyer
8 tells a client or victim that they have obtained a new judge because the originally
9 assigned judge made it clear in the past that the judge does not like this type of case.
10 That client or victim, and the members of the public they talk to, will think the system
11 is fairer and more just, not less. On the other hand, if the lawyer tells the client or
12 victim about the judge's previous comments about this particular type of case but
13 explains there is nothing that can be done about it, the client or victim has less
14 confidence in any adverse rulings during the case.
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18 Third, regarding complaints to the Judicial Conduct Commission, this is not an
19 adequate substitute for these rules. As an example, in 2020, two judges were referred
20 to the Judicial Conduct Commission from Maricopa County for demeanor and/or bias
21 concerns. Both were disciplined. Knowing that a single, isolated event should not
22 warrant a complaint to the Commission, litigants had to deal with the problems for
23 some time before a complaint could reasonably be submitted to the Commission.
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1 justify a judicial complaint is not a replacement for the ability to avoid the situation
2 immediately with a motion for change of judge as a matter of right.
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4 Additionally, if the rights provided under these rules are eliminated, lawyers will
5 be even more reluctant to file judicial complaints in the future because they will have
6 no way to avoid appearing in front of that judge in future cases. This reality is
7 highlighted by the fact that Judicial Performance Review (JPR) surveys are
8 anonymous. They are anonymous for a reason. If judges know who complains about
9 them, which they would in a motion to remove for cause or a judicial complaint,
10 lawyers are not likely to be candid about problems with those judges. In every JPR
11 review, there are judges who receive poor marks in some areas and, at times, some
12 receive a significant number of votes against retention. Each of those negatives
13 indicate, at least in part, that there are litigants who do not have confidence in that
14 particular judge's ability to fairly adjudicate certain cases. The only realistic chance
15 litigants have to avoid having that judicial officer control their case is to use the notice
16 permitted under these rules. Eliminating that right will make lawyers less likely to
17 publicly question a judicial officer through a motion for cause or a complaint to the
18 Commission.
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24 Of course, as the Petition notes, litigants can challenge judicial rulings to
25 appellate courts. Appellate rights are not, however, a real substitute for these rules.
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1 Appellate litigation takes time, it must usually wait until the case is completely
2 resolved, and it can be cost prohibitive.
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4 Arizona has a long history of permitting parties a one-time per-case change of
5 judge. Petitioners have not provided any persuasive reasons why this practice needs to
6 be abandoned. For these reasons, MCAO opposes this Petition.
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8 Respectfully submitted this 3rd day of May 2021.

9 ALLISTER ADEL
10 MARICOPA COUNTY ATTORNEY

11 By /s/ Kenneth N. Vick
12 KENNETH N. VICK
13 CHIEF DEPUTY
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