

Barry D. Halpern (#005441)  
Brett W. Johnson (#021527)  
Tracy A. Olson (#034616)  
Claudia E. Stedman (#036387)  
SNELL & WILMER L.L.P.  
One Arizona Center  
400 E. Van Buren, Suite 1900  
Phoenix, Arizona 85004-2202  
Telephone: 602.382.6000  
E-Mail: bhalpern@swlaw.com  
          bwjohnson@swlaw.com  
          tolson@swlaw.com  
          cstedman@swlaw.com

*On behalf of the Arizona Medical  
Association, the Arizona Osteopathic  
Medical Association and the Arizona  
Chamber of Commerce and Industry*

**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the matter of:

PETITION TO AMEND THE RULES  
10.2, 17.4, 32.10(a), and 35.4, RULES  
OF CRIMINAL PROCEDURE; RULE  
42.1, RULES OF CIVIL PROCEDURE  
FOR THE SUPERIOR COURTS; RULE  
6, RULES OF FAMILY LAW  
PROCEDURE; RULE 2(b) OF  
PROCEDURE FOR THE JUVENILE  
COURT; RULE 9(c), RULES OF  
PROCEDURE FOR EVICTION  
ACTIONS; RULE 133(d) JUSTICE  
COURT RULES OF CIVIL  
PROCEDURE; RULE 7, RULES OF  
COURT PROCEDURE FOR CIVIL  
TRAFFIC AND CIVIL BOATING

Supreme Court No. R-21-0006

COMMENT OF THE ARIZONA  
MEDICAL ASSOCIATION, ARIZONA  
OSTEOPATHIC MEDICAL  
ASSOCIATION, ARIZONA  
CHAMBER OF COMMERCE &  
INDUSTRY OPPOSING THE  
PROPOSED AMENDMENT TO THE  
VARIOUS RULES RELATED TO THE  
PEREMPTORY CHANGE OF JUDGE

VIOLATIONS; AND ETHICAL RULE  
8.4(g) OF RULE 42, RULES OF THE  
SUPREME COURT

Pursuant to Rule 28, Ariz. R. Sup. Ct., the Arizona Medical Association, the Arizona Osteopathic Medical Association and the Arizona Chamber of Commerce and Industry respectfully submit the following comment in opposition to Petition R-21-0006 to amend the various rules of procedure related to the peremptory change of judge. The abolition of peremptory judge strikes in civil trials will undermine the public's trust in our judicial system. This Petition should be rejected.

**I. STATEMENT OF INTEREST**

The Arizona Medical Association (“ArMA”) is a voluntary membership organization for Arizona physicians. Its mission is to promote leadership in the art and science of medicine and to advocate for economically sustainable medical practices, the freedom to deliver care in the best interests of patients, and health for all Arizonans. ArMA frequently represents physicians and the profession at the state capitol on legislative issues affecting physicians and their patients.

The Arizona Osteopathic Medical Association (“AOMA”) is a voluntary membership organization for Arizona osteopathic physicians. Its mission is to

promote the osteopathic medical profession, serve its members, provide osteopathic continuing medical education, and advocate for access to high quality, cost-effective healthcare. AOMA frequently provides effective advocacy on behalf of its members at the local, state, and national level to defeat legislation and regulations detrimental to patients and the profession.

Because they are key stakeholders in a highly regulated profession, both ArMA and AOMA have a unique perspective on laws impacting the medical community. Likewise, because their members are inevitable targets of professional liability lawsuits, these organizations have a keen interest in the rules which impact the discourse and fairness of civil litigation. Namely, rules that promote fairness to both parties in a civil action is essential in professional liability lawsuits because the outcome of the case can have far-reaching collateral consequences on a physician's ability to serve their communities, obtain insurance, and, ultimately earn a living.

The Arizona Chamber of Commerce and Industry (the "Chamber") is a diverse organization with its members employing over 250,000 Arizonans in all business and economic sectors, from manufacturing to services, and includes small, medium, and large employers. The Chamber is the leading voice of business, including various economic sectors which are essential, necessary and productive employers in Arizona. The Chamber frequently represents the interests of commerce and industry at the state legislature and is committed to advancing Arizona's

competitive position in the global economy. The Chamber's members are likely targets of complex and costly civil litigation and thus have a stake in rules which affect the fairness and uniformity of civil jury trials. These trials, like professional liability lawsuits, have the potential to affect not just large corporations, but individual and family-owned businesses and those individuals' ability promote a diverse economic landscape in Arizona.

Accordingly, ArMA's, AOMA's, and the Chamber's membership have a vested interest in opposing rule Petition R-21-0006, eliminating the peremptory change of judge, because the proposed rule would undermine a key resource that ensures fairness in professional liability lawsuits and corporate civil litigation.

## **II. REASONS PROPOSED RULE AMENDMENT SHOULD NOT BE ADOPTED.**

In its rule Petition, the Committee of Presiding Judges (the "Committee") details various concerns regarding Criminal Rule 10.2 and its alleged abuse and overuse to engage in undue gamesmanship or to delay criminal trials. However, the Committee offers no reason or evidence to show that the same kind of alleged abuse is present in civil trials. In ArMA, AOMA, and the Chamber's experience, no such abuse exists. As many other commentators in opposition note, despite being an essential tool to mitigate judicial bias, parties to civil litigation rarely use peremptory judge strikes. Simply, in the civil litigation context, the possibility of a bar complaint serves as a strong deterrent and prevents attorneys from using peremptory judge

strikes in a haphazard and overzealous manner.

If the same issues and possibilities for abuse that the Committee cites from the criminal setting *do* exist in the civil setting, trial lawyers and their clients—the stakeholders who will be most severely affected by the elimination of peremptory judge strikes—should be able to examine that evidence and weigh in on its persuasiveness.

The Committee also asserts that when litigants are permitted to exercise a peremptory judge strike, they contravene the will of voters, because “many” judges are elected. (Petition R-21-0006, at 4). As a result, the Committee claims, peremptory judge strikes undermine the public trust. This argument is inapplicable to the civil context, especially as applied to professional liability and complex commercial trials, for two reasons.

First, the argument ignores that although some judges in Arizona’s smaller counties are elected, judges from Maricopa, Pima, Pinal, and Coconino Counties<sup>1</sup> are appointed. For example, available data from fiscal year 2017 reflects that of the 415 medical malpractice cases filed in the state of Arizona, 302 of those cases were

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<sup>1</sup> As Arizona’s most populous counties (with more than 250,000 people each), Maricopa, Pima, and Pinal Counties are subject to the merit selection system under the Arizona Constitution. Ariz. Const. art. 6, § 41(A). Coconino County voters elected into the merit selection system in 2018. *Merit Selection of Judges*, Coconino County, Arizona, <https://www.coconino.az.gov/2001/Judge-Merit-Selection#:~:text=In%202018%2C%20Coconino%20County%20voters,merit%20s%20election%2Djudicial%20retention%20election>.

filed in Maricopa County alone. *See Superior Court: Narrative Summary*, AZ Courts, <https://www.azcourts.gov/Portals/39/2017DR/SuperiorCourt.pdf#page=17> (additionally, 57 medical malpractice cases were filed in Pima County, 12 were filed in Coconino County, and 9 were filed in Pinal County, leaving 35 medical malpractice cases filed in the remaining counties).

Second, as one of the only tools at the Bar's disposal to mitigate judicial bias, the preservation of peremptory judge strikes is essential to maintaining the value of public trust that the Committee emphasizes throughout its Petition. Namely, when litigants do need to notice a change of judge, it builds, rather than destroys, public trust in our judicial system because it communicates to litigants and the community at large that members of the Bar are leveling the "playing field for their clients and ensur[ing] that the men and women who judge their cases have at least some level of accountability." (Pima County Bar Association, Comment in Opposition to Petition R-21-0006, at 3).

Indeed, in the context of professional liability cases, the peremptory judge strike rule serves an important purpose. It is unavoidable that judges come to the bench with personal or familial experiences, including, at times, medical liability claims or certain business disputes that cause bias. While the previous professional or inter-personal experiences of our judiciary are unavoidable, it is critical that litigants have a fair opportunity to present their case. In fact, being able to try a case

before an unbiased judge is a substantive right in our judicial system that it has been codified by Arizona law. *See* A.R.S. § 12-409. It is inappropriate for a procedural rule change to impact such a right. While ArMA, AOMA, and the Chamber have the utmost respect for the members of the judiciary and full faith in their ability to fairly adjudicate the majority of matters that come before them, when their members are parties to high-stakes litigation, they cannot rely on a judge’s willingness to recuse him or herself. These infrequent circumstances justify the use of a peremptory judge strike.

While the Committee argues that a request for recusal may be more appropriate so as not to “hide the truth,” ArMA, AOMA, and the Chamber respectfully disagree. Requests to recuse judges under these circumstances are awkward, time consuming, and waste precious litigant and judicial resources in the administration of justice. The peremptory judge strike rule is an efficient way for parties to maintain fairness in already expensive and complex professional liability and commercial cases.

### **III. CONCLUSION**

Peremptory judge strikes should remain a viable resource in litigants’ tool-kit to ensure that justice is administered fairly and impartially. In the rare case when a judge may be biased or be partial to the outcome of a case, civil litigants deserve to have an efficient means to obtain a different judge to preside over their case. Holding

members of the judiciary accountable through the infrequent use of peremptory judge strikes not only serves to build the public trust, but also helps to ensure that litigants receive a fair and impartial trial. Accordingly, ArMA, AOMA, and the Chamber firmly oppose the adoption of rule petition R-21-0006.

Respectfully submitted this 3rd day of May, 2021.

SNELL & WILMER L.L.P.

By: /s/ Barry D. Halpern

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