

1 Honorable Barbara Rodriguez Mundell
2 Presiding Judge
3 Superior Court of Arizona, Maricopa County
4 125 W. Washington St.
Phoenix, AZ 85003
(602) 506-6130

5 IN THE SUPREME COURT OF THE STATE OF ARIZONA

7 In the Matter of:

} Supreme Court No. R-09-0012

8 PETITION TO AMEND RULE
9 92(a)(1) OF THE RULES OF THE
10 SUPREME COURT OF ARIZONA

} COMMENT OF THE SUPERIOR
} COURT OF ARIZONA, MARICOPA
} COUNTY IN OPPOSITION OF
} THE PETITION TO AMEND
} RULE 92(a)(1)

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13 The Presiding Judge of the Superior Court in Maricopa County files the
14 following comment pursuant to Rule 28, Arizona Rules of the Supreme Court, in
15 opposition of Petition R-09-0012, concerning amendment of Rule 92(a)(1),
16 Arizona Rules of the Supreme Court, relating to random assignment of cases.

17 The petition fails to identify any problem with the current assignment
18 process employed by the superior court. No special actions or appeals have been
19 filed challenging the assignment process; nor have any special actions, appeals,
20 or complaints been filed alleging problems with the assignment process. Should
21 an issue arise with a particular case assignment, the court can address the issue
22 on a case-by-case basis. Simply put, the Maricopa County Attorney’s Office is
23 seeking to “fix” a process that is not broken.

24 Currently, cases filed in the Superior Court in Maricopa County are
25 randomly assigned except for a small percentage of cases. For all cases, whether
26 or not they are assigned randomly, a party who is dissatisfied with the judicial
27 assignment may file a change of judge as a matter of right pursuant to Rule 10.2,
28 Arizona Rules of Criminal Procedure or Rule 42(f)(1), Arizona Rules of Civil

1 Procedure.¹ Regardless of the assignment process, parties are ensured an
2 impartial and unbiased judge. Judicial officers are required to disqualify
3 themselves pursuant to the Arizona Code of Judicial Conduct when the judicial
4 officers’ “impartiality might reasonably be questioned.” Ariz. R. Sup. Ct. 81,
5 Canon 3(E)(1). If a party believes the assigned judicial officer is biased, the
6 party can move to disqualify the judge for cause. A.R.S. § 12-409; Ariz. R. Civ.
7 P. 42(f)(2); Ariz. R. Crim. P. 10.1.

8 The Maricopa County Attorney’s Office proposes a generic rule for
9 random case assignment with no exceptions.² As written, the proposed
10 amendment would create a number of problems for a court as large as the
11 Superior Court in Maricopa County, with seven separate court buildings. In
12 short, the presiding judge must retain the power to specially assign cases.

14
15 ¹ If all cases are required to be randomly assigned, without exceptions, Rule 10.2
and Rule 42(f)(1) should be repealed.

16 ² A law review article succinctly provided some of the arguments against
17 random case assignment. *See* Jonathan L. Entin, The Sign of “The Four”:
18 Judicial Assignment and the Rule of Law, 68 Miss. L.J. 369 (Fall 1998) (“First,
19 cases are not equivalent. Some are easy and some are hard. Some will go to trial,
20 while most will not (and of those that do not go to trial, some will settle, whereas
21 others will terminate by a ruling on a dispositive motion). Some will attract
22 widespread public attention, but the vast majority will proceed in obscurity.
23 Because ‘(a) case is not a standard measurement,’ it is inappropriate to require
24 completely random assignment. Second, some cases are related--by issue or
25 parties--to other cases. Assigning related cases to the same judge or panel often
26 makes sense on efficiency grounds. Third, some difficult or sensitive cases
27 might be better handled by more experienced judges. Fourth, judges sometimes
28 recuse themselves from cases in which they have a conflict of interest or their
impartiality might be called into question. Fifth, some cases appear in a court
more than once. This phenomenon occurs, for instance, when a reviewing court
remands a case with instructions for further proceedings. Often, although not
necessarily in every case, returning the matter to the same judge or panel that
heard it before conserves judicial resources.” (footnote omitted)).

1 Judicial economy often dictates special assignment. When multiple cases
2 are filed against a party, the presiding judge must have the authority to assign
3 these cases to the same judge. Through purely random case assignment, a
4 criminal defendant could have multiple cases proceeding at the same time in
5 multiple courtrooms, requiring additional prisoner transport, as well as
6 additional time from the prosecuting attorney, defense attorney, and the court.

7 In addition, certain cases require special assignment. Cases in which the
8 defendant poses a higher than normal security risk may be more appropriately
9 assigned to a judge at the downtown court complex than a judge at the Southeast
10 Court. Within the downtown court complex, the case may be more appropriately
11 assigned to a judicial officer located near a holding area that can accommodate
12 defendants with a high security risk. Cases with widespread media interest
13 require a larger courtroom to accommodate the media, victims and the public.
14 Likewise, cases with an unusually high number of parties require a larger
15 courtroom.³ Under the current rules, the presiding judge can assign cases such as
16 these to judicial officers who have larger courtrooms.⁴ Moreover, certain cases
17 should be assigned to more experienced judges, such as capital cases and certain
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19 ³ Several types of criminal cases generally have more than 20 defendants. *See,*
20 *e.g.*, CR2008-009407 (59 defendants in a drug/conspiracy case); CR2008-
21 009416 (43 defendants in a human smuggling/drug/money laundering case);
22 CR2008-007339 (44 defendants in a fraud/forgery case); CR2008-007359 (54
23 defendants in a prostitution/money laundering case).

24 ⁴ Without a larger courtroom, criminal cases involving a high number of
25 defendants may require severance and separate trials based solely on the
26 courtroom space available, resulting in more than one trial and the expenditure
27 of additional court resources, including jurors, court time, pretrial detention,
28 prosecution time, and defense counsel time. *See, e.g.*, CR2008-115234 (a case
with five defendants ready to proceed with trial against all five defendants in one
trial required severance because five defense counsel tables would not fit in the
courtroom).

1 complex cases.⁵ The current rules provide the presiding judge with the authority
2 to specially assign these cases as appropriate.

3 The presiding judge is generally in the best position to specially assign
4 cases. The presiding judge can identify potential conflicts of interest prior to
5 assignment, such as when a judicial officer is a party, victim, or witness in a
6 particular case or when a prosecuting attorney is married to a judicial officer.
7 The presiding judge can anticipate judicial rotations and assign cases
8 appropriately. For example, if a judicial officer will be rotated off a criminal
9 assignment in four months, the presiding judge could elect not to assign capital
10 cases to the judicial officer, knowing the majority of capital cases do not resolve
11 in four months. Likewise, the presiding judge is aware of personal information
12 about the judges that could affect assignment, such as health issues that may
13 require a leave of absence.

14 The proposed rule would prevent the presiding judge from balancing the
15 case loads of judicial officers. All cases are not equivalent, and as such the
16 number of cases alone cannot be used to evaluate the amount of work in each
17 division. Rather, the presiding judge can look at the case inventory in each
18 division and decide which divisions can take more cases based on current case
19 loads and the types of cases.

20 A rule such as the one proposed would prevent the court from
21 implementing a master calendar program. The Criminal Department is currently
22 conducting a master calendar pilot program, in which cases are assigned to the
23 master calendar, rather than a specific judge. On the trial date, the parties are
24 directed to a judge's courtroom, based on availability, for trial. The proposed
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26 ⁵ The Arizona Supreme Court Capital Case Task Force's Report of
27 Recommendations to the Arizona Judicial Council of September 2007 noted
28 "capital trials should be assigned to the more experienced members of the
criminal bench."

1 rule would prevent such a program, which could prevent the court from
2 implementing an effective and efficient case processing plan.

3 Purely random case assignment would also defeat the purpose for the
4 multiple locations for the Superior Court in Maricopa County. In addition to the
5 Downtown Court Complex, the Superior Court in Maricopa County operates
6 three regional court centers in the Valley, as well as two juvenile court centers.
7 The multiple locations are intended to increase the community's access to swift,
8 fair justice, which is part of the strategic agenda of the Arizona Judicial
9 Department. Under the current system, members of the community can seek
10 legal action, including Orders of Protection and Injunctions against Harassment,
11 at any courthouse that is conveniently-located to them. Under purely random
12 case assignment, self-represented individuals may have to travel several miles
13 further to conduct their court business, increasing the time it takes for these
14 individuals to access the justice they seek.

15 The proposed amendment fails to provide any exceptions to random case
16 assignment. Recognizing the concerns listed above, most court and local rules
17 requiring random case assignment include exceptions. *See* Entin, supra note 2
18 (“Many multi-member district courts have adopted explicit rules or policies
19 generally calling for random assignment of cases. Those systems frequently
20 contain express exceptions or authorize departures from strictly random
21 assignment to promote efficiency. A similar pattern appears at the state level.
22 Court rules generally govern assignment and typically involve some form of
23 random procedure, subject to efficiency or practicability exceptions.” (footnotes
24 omitted)). For example, many federal district courts allow for assignment by the
25 Chief Judge, with the approval of the Court, for “equitable division and just,
26 efficient and economical determination of the business of the Court.” *See, e.g.,*
27 Eastern District of California, Automated Case Assignment Plan, subsection
28 (f)(4). *See also* Northern District of California, General Order No. 44,

1 Assignment Plan, subsection F (“The Executive Committee may make such
2 other assignments, reassignments or related orders as are conducive to the
3 equitable division and just, efficient and economical determination of the
4 business of the court.”). In addition, the proposed amendment fails to allow for
5 assigning related cases to one judicial officer, which is contrary to principles of
6 judicial economy.

7 Random case assignment is not mandated. No constitutional provision or
8 statute, either federal or state, requires random case assignment. *See, e.g., State*
9 *v. Eastlack*, 180 Ariz. 243, 254, 883 P.2d 999, 1010 (1994) (“First, we agree
10 with Judge Meehan's ruling that ‘there [is] no basis either by rule or by statute
11 for random selection’ of judges in capital (or other) cases. Defendant points to
12 no authority requiring superior courts to make random selections. In fact, Rule
13 10.1(c) expressly contemplates that the presiding judge selects judges in criminal
14 cases.”); *Francolino v. Kuhlman*, 365 F.3d 137, 141 (2d Cir. 2004) (finding that
15 impartiality required by due process “does not depend on the manner in which
16 [judge] was selected”); *U.S. v. Edwards*, 39 F. Supp. 2d 692, 707 (M.D. La.
17 1999) (“It is also well-settled that a defendant does not have the right to have his
18 case heard by a particular judge. Nor does a defendant have the right to have his
19 judge selected by a random draw.” (footnotes omitted)); *U.S. v. Keane*, 375 F.
20 Supp. 1201, 1204 (N.D. Ill. 1974), *aff’d in part, rev’d in part on other grounds*,
21 522 F.2d 534 (7th Cir. 1975) (“[D]ue process does not accord [defendant] a right
22 to have a judge assigned to his case on a random basis.”); *U.S. ex rel Monty v.*
23 *McQuillan*, 385 F.Supp. 1308, 1310 (E.D.N.Y.1974) (same); *U.S. v. Simmons*,
24 476 F.2d 33, 35 (9th Cir.1973) (same).

25 In fact, many courts lack a rule relating to case assignment, including a
26 few district courts in the Ninth Circuit. *See, e.g.,* District Court for the Central
27 District of California, District Court of Nevada, Eastern District Court of
28 Washington, and Western District Court of Washington. Assignment rules in

1 other district courts in the Ninth Circuit do not require random case assignment.
2 *See, e.g.*, District Court of Hawaii, Local Rule 40.1 (“Cases will be assigned as
3 determined by the court.”); District Court of Idaho, Local Rule 40.1 (“Civil and
4 criminal cases will be assigned by the Clerk to the respective judges of the Court
5 by lot. . . . Death penalty and pro se cases are assigned on a rotating basis
6 founded upon workload and relative assignment of a companion case.”).

7 The Petition to Amend Rule 92(a)(1) fails to demonstrate a problem with
8 the current rules. In addition, the proposed change would negatively impact trial
9 courts by preventing the presiding judge from ensuring an even distribution of
10 work among the judicial officers, and from best utilizing the judicial resources
11 available, such as assigning complex and capital cases to more experienced
12 judges.

13 Respectfully submitted this 20th day of May, 2009.

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16

Honorable Barbara Rodriguez Mundell
17 Presiding Judge
Superior Court of Arizona, Maricopa County

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