

III. Rights of Parties

Rule 10. Change of Judge or Place of Trial (Refs & Annos)

→ **Rule 10.2. Change of judge upon request**

a. Entitlement. In any death penalty case, any party shall be entitled to request a change of judge as a matter of right no later than ten (10) days after the state files a notice of intention to seek the death penalty. In any criminal case other than a death penalty case, each side is entitled as a matter of right to a change of judge. Each non-death penalty case, whether single or consolidated, shall be treated as having only two sides; except that, whenever two or more parties on a side have adverse or hostile interests, the presiding judge or that judge's designee may allow additional changes of judge as a matter of right. Notwithstanding the foregoing provision, the right to a change of judge shall be inapplicable to Rule 32 petitions for post-conviction relief or remands for resentencing.

b. Procedure. A party may exercise his or her right to a change of judge by filing a pleading entitled "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. The notice shall also include an avowal that the request is made in good faith and not:

1. For the purpose of delay;
2. To obtain a severance;
3. To interfere with the reasonable case management practices of a judge;
4. To remove a judge for reasons of race, gender or religious affiliation;
5. For the purpose of using the rule against a particular judge in a blanket fashion by a prosecuting agency, defender group or law firm (*State v. City Court of Tucson*, 150 Ariz. 99, 722 P.2d 267 (1986));
6. To obtain a more convenient geographical location; or
7. To obtain advantage or avoid disadvantage in connection with a plea bargain or at sentencing, except as permitted under Rule 17.4(g).

The avowal shall be made in the attorney's capacity as an officer of the court.

c. Time for Filing. A notice of change of judge in a non-death penalty case shall be filed within ten days after any of the following:

- (1) Arraignment, if the case is assigned to a judge and the parties are given actual notice of such assignment at or prior to the arraignment;
- (2) Filing of the mandate from an Appellate Court with the clerk of the Superior Court;
- (3) In all other cases, actual notice to the requesting party of the assignment of the case to a judge.

Notwithstanding the foregoing provision, if a new judge is assigned to a non-death penalty case fewer than ten (10) days before trial (inclusive of the date of assignment), a notice of change of judge shall be filed, with appropriate actual notice to the other party or parties, by 5:00 p.m. on the next business day following actual receipt of notice of the assignment, or by the start of trial, whichever occurs sooner.

d. At the time of the filing of a notice of change of judge, the parties shall inform the court in writing if they have agreed upon a judge or judges who are available and are willing to have the action assigned to that judge. An agreement of all parties upon such judge may be honored and, if so, shall preclude further changes of judge as a matter of right unless the agreed-upon judge becomes unavailable. If no judge has been agreed upon, then the presiding judge shall immediately reassign the action.

If a judge to whom the action has been assigned by agreement later becomes unavailable because of a change of calendar assignment, death, illness, or other legal incapacity, the parties shall be restored to their rights under this rule as they existed immediately before the assignment of the action to such judge.

CREDIT(S)

Amended May 7, 1975, effective Aug. 1, 1975; June 23, 1980, effective Sept. 9, 1980; July 28, 1993, effective Dec. 1, 1993. Amended on an experimental basis, effective from July 1, 2001 to June 30, 2002. Extended May 31, 2002, until Dec. 31, 2002; June 9, 2003, until Jan. 23, 2004; Jan. 26, 2004, until July 1, 2004; June 8, 2004, until Sept. 30, 2004. Adopted in final form June 8, 2004, effective Oct. 1, 2004.

COMMENT

Rule 10.2(b). The procedure is intended to be as simple as possible. The rule uses the same title for the pleading adopted in Civil Rule 42(f), by written request, see Rule 35.3, or informally by notation in the record by the judge (following Arizona Rules of Civil Procedure 42(f)(1)(A)).

A request for change of judge is timely if made within 10 days of notice of the new assignment of judge. A party may waive the right to challenge a judge by appearing before him, however. See Rule 10.4. This time limitation is very different from the 3-days-before trial requirement of the 1956 Arizona Rules of Criminal Procedure, as amended, Rule 199.

COMMITTEE COMMENT TO 1993 AMENDMENT

The 1993 amendment to Rule 10.2(a) deleted the phrase "in Superior Court" to adapt the rule to all courts.

COURT COMMENT TO EXPERIMENTAL 2001 AMENDMENTS TO RULES 10.2(A), (B) AND (D)

Rule 10.2 is intended to ensure a party's right to have a matter heard before a fair and impartial judge without the necessity of divulging details that could cause needless embarrassment and antagonism or showing actual bias which may be difficult to prove. *Anonymous v. Superior Court ex rel. County of Pima*, 14 Ariz. App. 502, 484 P.2d 655 (1971). Rule 10.2(a) limits the number of notices to one per side except in death penalty cases. In multiple defendant cases, where the co-defendants have adverse or hostile interests, additional notices may be granted as a matter of right as in civil cases. The lawyer who files a notice of change of judge in any of the circumstances enumerated in § 10.2(b) has abused the rule and may face discipline for violating the lawyer's professional responsibilities (see ER 8.4(g), Rule 42. Rules of the Supreme Court).

The Court has adopted the experimental amendments to this rule and ER 8.4. Rule 42, Rules of the Supreme Court, in an effort to address abuse of this rule. If such abuse is not substantially reduced as a result of the amendments at the conclusion of the one-year experiment on June 30, 2002, the Court at that time will abolish the peremptory change of judge in most criminal cases as recommended in a proposal by the Arizona Judicial Council. See R-00-0025.

Court Comment to 2004 Amendments to Rules 10.2(a), (b) (c) and (d)

Arizona is one of a minority of states that allow a party to file a notice of change of judge without cause. The purpose of the rule is to allow a party to ask for a new judge when a party may perceive a bias that does not rise to disqualification under the rules allowing a challenge for actual bias or prejudice.

Arizona's rule permitting peremptory change of judge has historically been viewed as "salutary" on the grounds that "it is not necessary to embarrass the judge by setting forth in detail the facts of bias, prejudice or interests which may disqualify him nor is it necessary for judge, litigant and attorney to involve themselves in an imbroglio which might result in everlasting bitterness on the part of the judge and the lawyer." *Anonymous v. Superior Court*, 14 Ariz. App. 502, 504, 484 P. 2d 655 (1971).

However, just as peremptory challenges of jurors led to abuses of race or gender-based disqualification, the peremptory notice of judge has been subject to abuse, including attempts through "blanket" challenges to bring pressure upon judges and thereby undermine judicial independence. *State v. City Court of City of Tucson*, 150 Ariz. 99, 722 P. 2d 267.

The Court adopted this amendment and the amendments to ER 8.4, Rule 42, Rules of the Supreme Court, in 2004 in an effort to address abuse of Rule 10.2 while preserving the traditional benefits of the right to peremptory change of judge.

APPLICATION

<Order dated June 26, 1998, declared in part:>

<"IT IS ORDERED that Rule 10.2, Rules of Criminal Procedure, is suspended with respect to requests by the prosecutor in Bullhead City Municipal Court as of the date of this order. See *State v. City Court of Tucson*, 150 Ariz. 99, 104 (1986).>

<"The Bullhead City Attorney may upon a showing of cause apply to this Court to have this order vacated.>

<"Consideration of the Petition by Judge Carol under Rule 28, Rules of the Supreme Court (See R-98-0015) is continued.">

HISTORICAL NOTES

Source:

Code 1939, §§ 44-1203, 44-1204, 44-1207.

Rules Cr.Proc. §§ 250, 251, 254.

1956 Rules Cr.Proc., Rules 198, 199, 202.

Order dated May 23, 2001, stated in part:

"IT IS ORDERED amending Rule 10.2, Rules of Criminal Procedure, and ER 8.4, Rule 42, Rules of the Supreme Court, . . . on an experimental basis, to be effective from July 1, 2001 to June 30, 2002. If abuse of Rule 10.2 is not substantially reduced as a result of the . . . amendments at the conclusion of the one-year experiment, the Court at that time will abolish the peremptory change of judge in most criminal cases as recommended in a proposal by the Arizona Judicial Council. Presiding Judges are hereby directed to keep statistics on the use of Rule 10.2 and report back to the Court on the results of the experiment."

16A A. R. S. Rules Crim. Proc., Rule 10.2, AZ ST RCRP Rule 10.2

Current with amendments received through 6/24/09