

**IN THE SUPREME COURT, STATE OF WYOMING**

**OCTOBER TERM, A.D. 2013**

In the Matter of the Repeal of )  
Rule 21.1(a) of the Wyoming )  
Rules of Criminal Procedure and )  
Amendment of Rule 40.1 of the )  
Wyoming Rules of Civil Procedure )

**ORDER REPEALING RULE 21.1(a) OF  
THE WYOMING RULES OF CRIMINAL PROCEDURE  
AND  
ORDER AMENDING RULE 40.1 OF THE WYOMING RULES  
OF CIVIL PROCEDURE**

**This matter** came before the Court on its own motion following reconsideration of the rules providing for peremptory disqualification of judges in criminal and juvenile cases. On December 4, 2012, this Court entered its “Order Suspending Rules Providing for Peremptory Disqualification of Judge.” That order suspended the rules that permit peremptory disqualifications in criminal and juvenile cases. The Court stated it intended to consult the rules committees and consider the future, if any, of the peremptory disqualification rules in criminal and juvenile cases. The report and recommendation of the Permanent Rules Advisory Committee, Criminal Division, was to reinstate the rule. However, the judges serving on the committee favored elimination of the preematory disqualification rule for criminal and juvenile matters. Now, having carefully examined the matter, the Court finds it necessary and proper for the reasons set forth below to repeal Rule 21.1(a) of the Wyoming Rules of Criminal Procedure and to amend Rule 40.1 of the Wyoming Rules of Civil Procedure.<sup>1</sup>

Wyoming is in the minority of States that permit peremptory challenges of judges. R. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, 789-822 (2d ed. 2007) (state-by-state review of statutes and court rules). The peremptory disqualification rule dates back to 1975. While no clear statement of intent was provided by the Court when the peremptory disqualification rules were initially adopted, we conclude that its purpose was to allow attorneys to remove judges selectively when they had concerns

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<sup>1</sup> Because the Court has not identified any similar problems or concerns in the civil arena, the Court has chosen not to curtail, in any manner, the use of peremptory disqualifications in civil cases.

that a certain judge may have attitudes that, while not sufficient to support a motion to remove a judge for cause, created concerns for that party that the judge may have a predisposition in that particular case. It was never intended to allow wholesale removal of a judge from all cases in which that attorney may be involved. Throughout its history, Rule 21.1(a) (and its predecessor W.R.Cr.P. 23(d)) has been the subject of intermittent misuse by individual attorneys who utilized it to remove a particular judge from many or all of their cases before that judge. That misuse resulted in this Court suspending the rule and reconsidering its efficacy. In the most recent example, a prosecutor invoked Rule 21.1(a) as a means to remove an assigned judge from eight newly filed juvenile actions and another prosecutor requested blanket disqualification of a judge in all criminal matters. When misuse has risen to an unacceptable level, district judges have objected to this Court and sought relief from the burdens that practice created for them.

This marks at least the third time the rule has been abolished or suspended. The Court previously abolished the rule in 1983, reinstated it and later suspended it in 1998. Each time we ultimately reinstated the rule and admonished attorneys to not use the rule to seek removal of a judge for all cases. In 2010, at the request of the district court judges, the Board of Judicial Policy and Administration established a task force to once again evaluate the apparent misuse of the disqualification rule. Over the objection of the district court judges on the taskforce, it recommended amendments to the rule which would have required a formal procedure for handling these motions and required the judge to respond, a process perceived by the district judges to be similar to disqualifications for cause with a lesser burden of proof. On March 10, 2011, after careful consideration of the taskforce's recommendation to revise the rule, this Court reluctantly decided to leave the rule intact without limitation, but once again admonished the officers of the bar that lawyers should refrain from improper use of the rule and reminded them the rule was not intended to allow attorneys to replace a judge in all cases. By December, 2012, the practice of blanket disqualification of a local judge returned. While these situations were not widespread, they did cause the predictable disruption of multiple district court dockets and demonstrated that compliance with the intent of the rule could not be assured in the future.

The blanket use of the disqualification rules negatively affects the orderly administration of justice. Judicial dockets are interrupted, replacement judges must be recruited, sometimes including their court reporters, and unnecessary travel expenses are incurred. Peremptory disqualifications of assigned judges affect not only the specific cases at issue, but also the caseload of judges and the cases of other litigants whose cases are pending before the removed judge and the replacement judge at the same time. Where replacement judges are from other judicial districts, the cost and efficient utilization of judicial resources is greatly impacted. These costs cause financial burdens upon district courts budgets. Each district court has a limited budget for outside judges brought in to preside over cases in which challenges have been utilized. Criminal and juvenile cases comprise a significant portion of the cases on a district court's docket and, consequently, multiple disqualifications in those types of cases have a severe impact on the operation of the district court.

In addition, when peremptory challenges are exercised, delays in the timely resolution of juvenile and criminal cases may result. Quick resolution of matters involving children is not only statutorily required, but of paramount concern to this Court. Further, any delay in criminal proceedings resulting from a judge's removal, however slight, can impact a defendant's speedy trial rights, potentially contributing to a dismissal of criminal charges.

Allowing unfettered peremptory challenges of judges encourages judge shopping. In practice, it permits parties to strike a judge who is perceived to be unfavorable because of prior rulings in a particular type of case rather than partiality in the case in question. Disqualifying a judge because of his or her judicial rulings opens the door for manipulation of outcomes. Such undermines the reputation of the judiciary and enhances the public's perception that justice varies according to the judge. It also seriously undercuts the principle of judicial independence and distorts the appearance, if not the reality, of fairness in the delivery of justice.

The inherent power of this Court encompasses the power to enact rules of practice. Included in this power is the authority to suspend or repeal those rules where appropriate. Wyo. Const. Art. V, § 2; Wyo. Stat. Ann. § 5-2-114 (LexisNexis 2013); *White v. Fisher*, 689 P.2d 102, 106 (Wyo. 1984). In accordance with our inherent authority, and given our duty to ensure the orderly and efficient function of Wyoming's judicial system, we find it advisable to repeal and amend the rules that permit peremptory disqualifications in criminal and juvenile cases. It is therefore

**ORDERED** that Rule 21.1(a) of the Wyoming Rules of Criminal Procedure, a copy of which is attached hereto, shall be, and hereby is, repealed, effective immediately; and it is further

**ORDERED** that Rule 40.1(b)(1) of the Wyoming Rules of Civil Procedure shall be, and hereby is, amended in the manner indicated in the attachment to this order. The amendment shall become effective immediately; and it is further

**ORDERED** that this order and the attachments shall be published in the advance sheets of the Pacific Reporter; the attachments be published in the Wyoming Court Rules Volume; that this order and the attachments be published online at the Wyoming Judicial Branch's website, <http://www.courts.state.wy.us>; and that this order and the attachments be spread at length upon the journal of this Court.

**DATED** this 26th day of November, 2013.

BY THE COURT:

/s/

MARILYN S. KITE  
Chief Justice

## Wyoming Rules of Criminal Procedure

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### Rule 21.1. Change of judge.

~~(a) — *Peremptory disqualification.* — A judge may be peremptorily disqualified from acting in a case in which a felony is charged by the filing of a motion so requesting. A party may exercise the peremptory disqualification only one time and against only one judge. The motion shall be filed by the state at the time the indictment or information is filed in the district court, designating the judge to be disqualified. The motion shall be filed by the defendant in open court at arraignment, designating the judge to be disqualified, except that a defendant who is not represented by an attorney at arraignment may file the motion within 10 days after the arraignment. After a judge has been peremptorily disqualified upon the motion of a party, the opposing party may file a motion for peremptory disqualification within five days of being notified of the identity of the judge to whom the case has been assigned. Upon the filing of a motion for peremptory disqualification the disqualified judge shall take no further action except to conduct the arraignment and to assign the case to another judge. [Repealed]~~

## Wyoming Rules of Civil Procedure

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### **Rule 40.1. Transfer of trial and change of judge.**

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#### **(b) *Change of judge.* –**

(1) **Peremptory Disqualification.** – A district judge may be peremptorily disqualified from acting in a case by the filing of a motion requesting that the judge be so disqualified. The motion designating the judge to be disqualified shall be filed by the plaintiff within five days after the complaint is filed; provided, that in multi-judge districts, the plaintiff must file the motion to disqualify the judge within five days after the name of the assigned judge has been provided by a representative of the court to counsel for plaintiff by personal advice at the courthouse, telephone call, or a mailed notice. The motion shall be filed by a defendant at or before the time the first responsive pleading is filed by the defendant or within 30 days after service of the complaint on the defendant, whichever first occurs, unless the assigned judge has not been designated within that time period, in which event the defendant must file the motion within five days after the name of the assigned judge has been provided by a representative of the court to counsel for the defendant by personal advice at the courthouse, telephone call, or a mailed notice. One made a party to an action subsequent to the filing of the first responsive pleading by a defendant cannot peremptorily disqualify a judge. In any matter, a party may exercise the peremptory disqualification only one time and against only one judge. This rule, and the procedures set forth herein, shall not apply to criminal cases or proceedings in juvenile court.