

Peremptory Rule 101

By Alex Sitz III

The status of the Peremptory Disqualification Rule has been the topic of conversation on the WTLA listserv on a number of occasions. In regard to recent developments, the questions often arise whether it has been suspended for all cases, whether one must now pay an administrative fee to invoke the Rule, and if it does still exist—how exactly does one use it? In addition to discussing the current status of the Rule, I will also discuss my personal experience in issuing blanket peremptory disqualifications of a local district court judge for almost a two (2) year period, and how this circumstance was finally resolved.

First, the Wyoming Supreme Court initially suspended use of the Peremptory Disqualification Rule, Wyoming Rule of Criminal Procedure 21.1(a), in felony criminal cases on December 4, 2012. This was a result of the misuse of the Rule by two (2) separate prosecutors. One prosecutor was invoking the Rule in several juvenile cases, and the other issued a blanket use of the Rule in all felony criminal cases that came through his office. The Rule was suspended while the Court further considered whether to repeal it altogether. It should be noted that the Peremptory Disqualification Rule has not been allowed in misdemeanor criminal cases. However, after further consideration this past year the Court then issued an Order dated November 26, 2013, which repealed Wyoming Rule of Criminal Procedure 21.1(a), indefinitely; now it is no longer available in any type of criminal case.

Second, because juvenile cases are considered civil in nature the Wyoming Supreme Court per its November 26, 2013, Order also amended Wyoming Rule of Civil Procedure 40.1, to add a sentence at the end which states: "[t]his rule, and the procedures set forth herein, shall not apply to criminal cases or proceedings in juvenile court." Although the Court had already repealed the criminal Rule allowing peremptory disqualifications, it had to also reference it in the civil Rule to avoid the operation of Wyoming Rule of Criminal Procedure 1 which states:

"[i]n the event that a procedure is not established by these rules, the Wyoming Rules of Civil Procedure shall govern." Accordingly, the Court's November 26th Order effectively eliminated the use of the rule in all criminal cases and all juvenile cases.

One can certainly understand the problematic nature of allowing the peremptory disqualification Rule in criminal cases where a defendant has a 180 day right to speedy trial, or in juvenile cases which are supposed to be brought to trial and adjudicated within 60 days but no later than 90 days. Although one can understand the problematic nature when the Rule is invoked in a blanket fashion, when properly used selectively the Rule can be effective. However, the problem with the Rule was exacerbated when local prosecutors used it on an automatic basis. With those tight time lines it wreaked havoc when forced to find an alternate judge, and then having that alternate judge cram a trial setting into his docket that is already overcapacity to accommodate the new case. The question seems to be why couldn't this issue have been resolved with the problematic prosecutors on a narrower basis

than complete repeal? Or, is the underlying issue related to a judiciary that is already operating overcapacity and can't effectively accommodate the peremptory requests because of its current caseload?

From my own personal experience and the problems I perceived from my local district court bench, I along with my law partner began to issue blanket peremptory disqualifications to our local judge in 2009 and 2010 in mostly civil cases, but also in one felony criminal case. After the second year of doing so, the Wyoming Bench-Bar Committee stepped in at the insistence of the Wyoming Supreme Court and kindly but firmly requested that we mediate the situation. On a Friday morning in late May of 2010, we sat in a conference room at the Cody Holiday Inn with the committee comprised of Judge Waldrip, Judge Young, Angela Dougherty, Jason Tangeman, the late Michael Zwickl, and Richard Honaker to attempt resolving the perceived issues. The process was akin to a formal mediation wherein confidential mediation statements were drafted and submitted to the Committee, and then the Committee met with each side separately throughout the day to hear and address

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the concerns we had. After spending the better part of the day with the parties, I was happy to say that the Bench-Bar Committee was finally able to resolve the perceived issues and to this day our relationship with our local judge could not be better. Although we had no obligation to mediate with the Committee it would be a safe bet that most, if not all, attorneys in Wyoming would attempt the same if so requested. Therefore, the question must be raised why this process could not have been invoked with the problematic prosecutors that led to the current suspension of the rule? Maybe it was and this fact has not been reported publicly, however, I will state that I am grateful to all those involved in my own personal experience related to the use of the Peremptory Rules.

The second underlying question posed is whether use of the Rule has exacerbated caseload problems of a judiciary

which is already operating over capacity? From my own perspective in the Big Horn Basin region of this state, there are sitting judges in our area which are responsible for all the criminal and civil cases in three (3) separate counties, and likely doing the workload that 1 ½ judges do in other areas of the state. I know this situation is not unique and also happens throughout other portions of our state. But one must raise the question how this caseload concern peripherally affected the decision to repeal the Rule? Understandably, when blanket peremptory challenges get used in these areas it becomes even more problematic.

Although many of us are disappointed with the Wyoming Supreme Court's decision to repeal and amend the Peremptory Disqualification Rules, Chief Justice Kite authored a strong opinion explain-

ing the Court's rationale behind its order, and the same can be read at the link following this article.

Furthermore, from a practitioner's standpoint when using the Peremptory Rules in civil cases it is important to understand that it can only be used in a newly filed action. Thus, for example, when you return to court five years later seeking to modify custody from an old divorce case you cannot now attempt to invoke the Rule in order to get a new judge's perspective.

The bottom line is, the current status of the Peremptory Disqualification Rule is that it can only be used in civil cases which are not filed in a juvenile court, and can only be used at the onset of a new case. No additional administrative fees are required to invoke the Rule. ❶

PEREMPTORY RULE 101 REPEAL AND AMMENDMENT:

<http://courts.state.wy.us/CourtRules/Orders/PeremptoryDisqualificationOrder-Rev-20131126.pdf>