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**REPORT AND PROPOSED AMENDMENTS TO THE  
MINNESOTA RULES OF CRIMINAL PROCEDURE  
ON THE ISSUE OF JURY TRIAL WAIVER**

**MINNESOTA SUPREME COURT ADVISORY COMMITTEE  
ON RULES OF CRIMINAL PROCEDURE**

CX-84-2137

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## INTRODUCTION

In April 2007, the Minnesota County Attorneys Association (MCAA) submitted a letter to the Advisory Committee on Rules of Criminal Procedure requesting that the committee consider recommending to the Court that Rule 26.01, subd. 2(1)(a) be amended to permit a defendant to waive a jury trial only with prosecutor consent. The committee decided to defer consideration of the issue until the Supreme Court issued its opinion in *State v Burrell*, 743 N.W.2d 596 (Minn. 2008), because, although the Supreme Court did not accept review of the jury trial waiver issue raised in that case, it was thought the Court's opinion regarding the removal issue might be relevant to any recommendations the committee might make.<sup>1</sup> This report sets forth the committee's recommendation as well as a description of the committee discussion regarding this issue.

## CONSTITUTIONAL PROVISIONS

There are two constitutional provisions that are relevant to this issue. The provisions are set forth here as a reference for later content in this report. The first relevant provision is Minn. Const. art. 1, § 4:

Sec. 4. **TRIAL BY JURY.** The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law. The legislature may provide that the agreement of five-sixths of a jury in a civil action or proceeding, after not less than six hours' deliberation, is a sufficient verdict. The legislature may provide for the number of jurors in a civil action or proceeding, provided that a jury have at least six members.

The second is Minn. Const. art. 1, § 6:

Sec. 6. **RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS.** In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. In all prosecutions of crimes defined by law as felonies, the accused has the right to a jury of 12 members. In all other criminal prosecutions, the legislature may provide for the number of jurors, provided that a jury have at least six members. The accused shall enjoy the right to be informed of the nature and cause

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<sup>1</sup> In *Burrell*, the state challenged the defendant's request for a jury trial waiver and requested that the judge remove himself from the case on the grounds that the court had drawn conclusions on the merits of the prosecutor's case and that the court had improperly encouraged the prosecutor to dismiss the case. 743 N.W.2d at 600-01. When removal was denied at the trial court level, the prosecutor filed a writ of Mandamus with the court of appeals directing removal, and alternatively, a writ of prohibition: "(1) declaring that the trial judge abused his discretion by approving the jury trial waiver and (2) barring waiver without the State's consent." *Id.* The writs were denied. The Supreme Court accepted review on the removal issue, but not the issues stated in the application for a writ of prohibition.

of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense.

### MCAA PERSPECTIVE

In its April 2007 letter, the MCAA proposed that Rule 26.01, subd. 1(2)(a) be amended to read, “The defendant, with the consent of the State and the approval of the Court, may waive a jury trial on the issues of guilt . . .” and that similar changes be made in paragraphs (b) and (c) of the same rule. The MCAA stated its rationale as follows:

The reasons for the proposed change are three: The first being fundamental fairness; the second being a majority of the states and the federal system currently require such consent; and third, this change would reduce the practice of seeking a more favorable judge that is fairly regularly used by the defendants.

Paul Young, Assistant Anoka County Attorney, later made an in-person presentation to the committee about the issue. During the presentation, Mr. Young explained the legal basis for the MCAA’s assertion that the State has a constitutional right to a jury trial. Minn. Const. art. 1, § 6 is specific to criminal cases. The provision does not specifically address waiver of the right to a jury trial in the criminal context; however, the MCAA asserts that Minn. Const. art. 1, § 4, which *does* address waiver, has been interpreted to apply to all jury trials. The MCAA further asserts that because Minn. Const. art. 1, § 4 states the jury trial may be waived by “the parties,” which is plural, the provision suggests that both the prosecutor and defendant must be involved in the waiver decision. Moreover, Mr. Young asserted there is some comfort for the people of the State of Minnesota in knowing that a jury – a pool of several citizens – rather than a single person decided the case.

Mr. Young explained that the issue is one of fundamental fairness. In some cases, circumstances arise that reveal the judge’s perspective on a particular case. If a defendant waives a jury trial because the judge’s point of view indicates he or she will rule favorably for the defense, the State is powerless under the current rules to challenge the jury trial waiver. Further, the right to waive a jury trial is similar to other rights that were initially interpreted to only apply to the defendant, including the right to a speedy trial and venue. Just as those rights have evolved over time to include the State, the right to waive a jury trial is a natural continuation of this trend.

Prosecutors have attempted to obtain appellate review on this issue, most recently in *State v. Burrell*, 743 N.W.2d 596 (Minn. 2008). However, the Supreme Court declined review. The MCAA is concerned that the issue will continue to evade review. Therefore, the MCAA determined that a proposed rules change was the proper forum for consideration.

## DEFENSE PERSPECTIVE

Following the in-person presentation by the MCAA, the committee requested that a representative for defense attorneys present the defense perspective for the committee's consideration. Steven Holmgren, Chief Public Defender in the First Judicial District, presented on the topic. Mr. Holmgren explained it is the point of view of the defense that Minn. Const. art. 1, § 4 applies only to civil cases. Thus, the right of the defendant to waive a jury trial in a criminal case stems from Minn. Const. art. 1, § 6, and according to case law, the right is personal.

Mr. Holmgren further explained it is the position of the defense that it is not necessary to give the prosecutor a right to object to the defendant's waiver of a jury trial because the prosecutor already has several remedies. First, there is room within the rules for the prosecutor to argue to the court for a jury trial if the victim wants there to be one.<sup>2</sup> Second, the prosecutor can seek removal of the judge. Third, the prosecutor can ask the judge to recuse himself or herself.

Finally, Mr. Holmgren asserted that the right to a jury trial is important to defendants who are of a different ethnicity or national origin than a majority of the potential jury pool. These defendants are often concerned about facing a jury trial because they are concerned that racial bias, prejudice, or events in the news relating to terroristic activities by certain ethnic groups might be held against them. Having the option of a court trial gives these defendants another way to feel confident about the American legal system.

## COMMITTEE DISCUSSION

The committee engaged in extensive discussion about this issue at seven meetings over the course of ten months. Throughout this discussion, three main issues emerged: (1) whether the issue of the State having a constitutional right to a jury trial should be addressed by the committee as a proposed rule change or by the courts in appellate review; (2) whether waiver of a jury trial should be exclusive to the defendant or shared with the State; and (3) whether the jury trial waiver issue is a proxy for the issue of removal.

### A. Forum for Addressing Jury Trial Waiver Issue

As a threshold issue, the committee discussed whether the issue of the State having a constitutional right to a jury trial should be addressed by the committee as a proposed rule change or by the courts in appellate review. Some members agreed with the assertion posited by the MCAA that Minn. Const. art. 1, § 4 provides for a constitutional right to trial by *both* parties. These members asserted that despite the existence of a constitutionally based right to a jury trial, there is no way to exercise it. Therefore, procedures are needed to allow the prosecutor to

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<sup>2</sup> In support of this position, Mr. Holmgren cited *State v Linder*, 304 N.W.2d 902 (Minn. 1981), a case in which the Supreme Court ruled it was not error for the court to deny the defendant's jury waiver.

exercise that right. Other members thought the existence of a constitutional right for the State remains in doubt, and because it is an open constitutional question, the issue should first be determined by appellate review.

When Mr. Young presented the issue in person, committee members asked him whether he thought it would be more appropriate for this issue to be decided by the Supreme Court in the form of a properly litigated case. Mr. Young and others on the committee responded that prosecutors have attempted to obtain review of this issue (most recently in *Burrell*), but the Court did not accept review, and Mr. Young expressed concern that the issue will continue to evade review.

For some members, the determination of the proper forum for considering this issue turned on whether the right to a jury trial, and the corollary ability to waive a jury trial, is procedural or substantive. Members did not agree on the relevant legal authorities or their interpretation and so were unable to find a satisfactory answer to that question. It was noted, however, that legislation was proposed during the 2008 legislative session that would require the consent of the prosecutor before a defendant could waive a jury trial. It is expected this legislation will again be proposed during the 2009 legislative session. Therefore, if waiver of a jury trial is procedural, it is imperative that the Supreme Court address the issue before legislation is enacted.

Finally, some members commented that this issue appeared to arise in response to an appeal in which the prosecutor was not satisfied with the outcome. As such the committee seems to be serving as an alternative to the appellate process, and there is a question as to whether that is an appropriate role for the committee. It was asserted that if the committee adopts a rule change, people will be lining up to have the committee adopt rules relating to other constitutional issues that are in question without going through the appellate process first. In response, other members indicated that issues often come to the committee in that manner, and that the committee is sometimes a better forum for consideration of issues because the issues can be better fleshed out and more fully discussed in this forum than in the context of a case.

## B. Nature of the Right

Beyond the threshold issue, the committee debated whether waiver of a jury trial should be exclusive to the defendant or shared with the State. Some members echoed the MCAA's concern that this matter is a fairness issue. It was asserted that prosecutors are a party and have a right to the same process of seeking the truth as the defendant. It was noted, however, that even if the prosecutor has a right to participate in the waiver process, the prosecutor's right to a jury trial may not be equal to that of the defendant.

Others argued that the equalization premise (i.e., that what is available to the defendant should be available to the prosecution) is false because our justice system is an accusatory system. The prosecutor *is* at a disadvantage in some respects, and it is wrong to think of this as a right equal in weight to the defendant's right. For example, the defendant might be bypassing the jury as a source of racial bias. Participation by the prosecutor might force the defendant into

a situation where the defendant must choose between facing a biased jury or entering into a plea negotiation in order to avoid the jury. It is important for the defendant alone to be able to make the decision to choose or waive a jury, subject only to the requirement of court approval.

### C. Jury Trial Waiver as a Proxy for Removal

The committee further discussed whether the jury trial waiver issue is a proxy for the issue of removal. The MCAA proposal shifts the authority to grant a jury trial waiver away from the judge to the prosecutor (“The defendant, *with the consent of the State* and the approval of the Court, may waive a jury trial on the issues of guilt...”). Some members thought the proposal raised a separation of powers issue, which appeared to stem from a distrust of the judiciary. The committee wondered if the issue is not whether the State has a constitutional right to a jury trial but whether there is a systemic problem of judges unethically tipping their hand with regard to the outcome of individual cases. One example of this conduct occurred in *State v. Anyanwu*, 681 N.W.2d 411 (Minn. App. 2004), in which the court improperly injected itself into plea negotiations by promising the defendant a particular sentence and forcing a plea bargain over the prosecutor’s objection.

Some members thought providing for a right of removal at the time of the jury trial waiver might address the problem. These members indicated it was their belief that improper judicial conduct such as that described in *Anyanwu* occurs infrequently, and may only be a problem relating to certain judges. However, expanding the right of removal could provide a remedy. Other members took a more pragmatic view and commented that though the Judicial Branch budget is just a small percentage of the larger State budget, it continues to be cut while case filings continue to increase. Judges are under immense pressure to settle cases rather than go to trial. Some of the behavior labeled as judicial misconduct may instead be the result of resource pressures. Still other members commented that the committee had heard anecdotal evidence of some isolated incidents where the judge indicated in advance how the court would rule or sentence, but the rules are not designed to address isolated incidents. The rules are designed to address the vast majority of cases. If the vast majority of cases are fair, there is no problem with the rule. There may instead be a problem with certain judges, and that can be addressed in other ways.

## COMMITTEE RECOMMENDATION

After a full discussion of the various aspects of this issue, the committee developed 10 potential actions that could be taken in response to the MCAA proposal. Those actions are set forth fully in the appendix, and fall into four main categories.

In the first category of potential actions, the rules would state that the defendant has the exclusive right to waive a jury trial. There are two alternatives in this category. Alternative #1 is to do nothing, which is to leave the rules as currently written, and to continue to view the right to a jury trial as the defendant’s personal right that only the defendant can waive. Alternative #2 would heighten the defendant’s personal right, and remove the requirement that the court approve the jury trial waiver.

In the second category of potential actions, the rules would state the prosecutor has a right to participate in the defendant's jury trial waiver. The four alternatives within the category range from full to limited participation. Alternative #3 is the original MCAA proposal, and requires the consent of the prosecutor before a defendant can waive a jury trial. Alternative #4 also requires prosecutor consent, but provides the court with a standard by which to override the prosecutor if denying the jury trial waiver would result in an unfair trial for the defendant. Alternative #5 also requires prosecutor consent, but presumes the defendant's jury trial will be granted unless the prosecutor can make a showing of unfairness or public necessity. Finally, alternative #6, rather than requiring prosecutor consent, permits the prosecutor the right to be heard before the court decides whether to grant or deny the defendant's jury trial waiver.

In the third category of potential actions, the rules would remain neutral, merely setting forth the waiver procedure without stating whether either party has the right to utilize it. The premise for alternative #7 in this category is that if it is improper to create a right to a jury trial for the prosecutor because the constitution is not clear, the rule should also not create that right for the defendant.

In the fourth category of potential actions, the rules would provide for a right of removal if the defendant waives a jury trial. The three options in this category are designed to combat the problem of judges tipping their hand before ruling or sentencing in a case. Alternative #8 extends the prosecutor's right of removal so that if the prosecutor has not already removed a judge the right can be exercised when the defendant waives a jury trial. Alternative #9 also extends the right of removal, but allows the prosecutor to exercise the right when the defendant waives a jury trial even if the prosecutor has already exercised that right earlier in the case. Finally, alternative #10 extends the right of removal as in alternative #9 for both the prosecutor *and* the defendant.

After all of the potential actions were identified, two options were eliminated. Alternative #3, the original MCAA proposal, was eliminated because the committee determined that even if the prosecutor has a constitutional right to a jury trial, it must be a lesser right than that of the defendant. Alternative #10, extension of the right of removal for both parties, was eliminated because it was thought this alternative would result in delay and difficulty in trial preparation.

The remaining eight options were then put to a vote. Members were permitted to vote for their top three of the remaining eight options. Members were not required to vote for three options, but if they did, were asked to rank the chosen options in order from 1 to 3. Fifteen members voted.<sup>3</sup> The full results of the vote are presented in the appendix.

Ten of fifteen members voted for alternative #1 ("Do nothing"). The second highest alternative, receiving eight of fifteen votes, was alternative #6 ("Right to be heard"). None of the remaining alternatives was supported by more than one-third of the voting members.

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<sup>3</sup> Justice Paul Anderson and Scott Christenson abstained because they are not voting members of the committee

Based upon these results, a majority of the committee recommends that the Supreme Court take no action in response to the MCAA request. Alternatively, if the Court determines that the rules should be amended in some way, the committee recommends that the Court amend the rules in accord with alternative #6, the most conservative of the possible actions. This alternative would clarify for district courts that the prosecutor has the right to some level of input prior to the court's decision whether to grant or deny the defendant's request for a jury trial waiver, but leaves the decision squarely within the court's discretion.

Respectfully Submitted,

ADVISORY COMMITTEE ON  
RULES OF CRIMINAL PROCEDURE

**APPENDIX**  
**Committee Vote Results: Jury Waiver Alternatives**

No.	Jury Waiver Alternative	Vote Totals by Rank			Total Number of Votes	Weighted Rank Score <sup>4</sup>
		Ranked 1 <sup>st</sup>	Ranked 2 <sup>nd</sup>	Ranked 3 <sup>rd</sup>		
1	Do nothing	6	3	1	10	25
6	Right to be Heard	1	6	1	8	16
9	Second Bite at the Apple – Prosecutor Only	2	2		4	10
7	Create a “Neutral” Rule	1	1	3	5	8
4	Adopt an MCAA “Light” Position	2	1		3	8
8	One Bite at the Apple	1		3	4	6
5	Shift the Burden to the Prosecution to Show Why A Jury Trial Must be Held	1	1		2	5
2	Create a Heightened Personal Right	1		1	2	4
3	Adopt the MCAA Position - Deleted	N/A				
10	Second Bite at the Apple – Prosecutor and Defendant - Deleted	N/A				

Top 3 alternatives by popular vote:

- 1) Do nothing.
- 2) Right to be heard.
- 3) Create a “neutral” rule.

Top 3 alternatives by weighted rank score:

- 1) Do nothing.
- 2) Right to be heard.
- 3) Second bite at the apple – prosecutor only.

A clear majority – 10 of 15 voting members – voted to do nothing. This fact indicates that the alternative receiving the second highest number of votes – right to be heard – is the most conservative of the remaining alternatives. Even so, only 8 of 15 supported it.

Though nearly every member submitted votes for two alternatives, just 9 of 15 members submitted a vote for a third alternative.

<sup>4</sup> Members were asked to rank their votes from 1 to 3 if they voted for more than one alternative. The weighted rank score was achieved by assigning 3 points to a rank of 1, 2 points to a rank of 2, and 1 point to a rank of 3.

No alternative below the top two alternatives was supported by more than one-third of committee members.

**A. RULE STATES THE DEFENDANT HAS THE EXCLUSIVE RIGHT TO WAIVE A JURY TRIAL**

1) Do nothing.

Under this option the rule would continue to reflect widespread existing practice and the right to a jury trial would remain the defendant's personal right, which the defendant alone waives. The state would have no right to a jury trial.

2) Create a Heightened Personal Right.

Under this option, the defendant would have the right to waive a jury trial without the approval of the court. This would create an exclusive personal right to a jury trial that is unassailable either by the court or the prosecution.

(a) Waiver on the Issue of Guilt. The defendant, ~~with the approval of the court~~ may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

(b) Waiver on the Issue of an Aggravated Sentence. Where an aggravated sentence is sought by the prosecution, the defendant, ~~with the approval of the court~~, may waive jury trial on the facts in support of an aggravated sentence provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel.

**B. RULE STATES THE PROSECUTOR HAS A RIGHT TO PARTICIPATE IN THE DEFENDANT'S JURY TRIAL WAIVER**

3) Adopt the MCAA Position.

**OPTION DELETED BY COMMITTEE VOTE 6-14-08**

(a) Waiver on the Issue of Guilt. The defendant, with the approval of the court and the consent of the prosecutor, may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

(b) Waiver on the Issue of an Aggravated Sentence. Where an aggravated sentence is sought by the prosecution, the defendant, with the approval of the court and the consent of the prosecutor, may waive jury trial on the facts in support of an aggravated sentence provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel.

4) Adopt an MCAA "Light" Position.

Under this option, the language proposed by the MCAA would be adopted, as well as a new paragraph (d) under Rule 26.01, subd. 1(2). This approach emphasizes that the decision ultimately belongs to the judge, but defines the parameters for the court's discretion.

(a) Waiver on the Issue of Guilt. The defendant, with the approval of the court and the consent of the prosecutor, may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

(b) Waiver on the Issue of an Aggravated Sentence. Where an aggravated sentence is sought by the prosecution, the defendant, with the approval of the court and the consent of the prosecutor, may waive jury trial on the facts in support of an aggravated sentence provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel.

\* \* \*

(d) The defendant must be allowed to waive a jury if the court finds there is a substantial risk that the defendant will not receive a fair jury trial. The court must consider the nature of the charge, circumstances of the offense, or characteristics of the defendant in making the decision to permit waiver.

5) Shift the Burden to the Prosecution to Show Why A Jury Trial Must be Held.

These proposals might minimize the possibility of gamesmanship in the prosecutor's challenge.

(a) Waiver on the Issue of Guilt. The defendant, with the approval of the court and the consent of the prosecutor, may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

(b) Waiver on the Issue of an Aggravated Sentence. Where an aggravated sentence is sought by the prosecution, the defendant, with the approval of the court and the consent of the prosecutor, may waive jury trial on the facts in support of an aggravated sentence provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel.

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(d) The defendant must be allowed to waive a jury unless the prosecution establishes that there is a substantial risk that a fair trial will be denied in the absence of a jury. The court must consider the nature of the charge, circumstances of the offense, or characteristics of the defendant in making the decision to permit waiver.

- Or -

(d) The defendant must be allowed to waive a jury unless the prosecution establishes that the public has a heightened stake in the proceedings that can only be satisfied by a jury trial. The court must consider the nature of the charge, circumstances of the offense, and the profile of the case in permitting waiver.

6) Right to be Heard.

The court must still approve the defendant's waiver, but in this variation the prosecutor has at least the right to be heard regarding the issue.

(a) Waiver on the Issue of Guilt. The defendant, with the approval of the court, and after having heard from the prosecutor, may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

(b) Waiver on the Issue of an Aggravated Sentence. Where an aggravated sentence is sought by the prosecution, the defendant, with the approval of the court, and after having heard from the prosecutor, may waive jury trial on the facts in support of an aggravated sentence provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel.

**C. RULE REMAINS NEUTRAL; IT STATES NOTHING REGARDING EITHER PARTY'S RIGHT TO A JURY TRIAL WAIVER; IT FOCUSES SOLELY ON THE WAIVER PROCEDURE ITSELF**

7) Create a "Neutral" Rule.

This proposal is termed "neutral" because it avoids any implication that either: (a) the defendant has the right to waive a jury; or (b) the State has the right to insist on one. In this respect, the proposal is purely procedural. It simply provides a forum should the defendant request waiver. The defendant must cite legal sources outside the proposed rule in support of his request for waiver, and the State must do likewise in opposing that request. The proposal accomplishes "neutrality" by removing from the existing rule a qualified, rule-based right of waiver. Qualified because the existing rule requires the district court's approval for waiver; rule-based because the existing rule does not claim a constitutional basis for the waiver right it contains. Under this option, Rule 26.01, subd. 1(2)(a) would be revised to read:

(a) Waiver on the Issue of Guilt: ~~The defendant, with the approval of the court, may waive~~ If the defendant moves to waive a jury on the issue of guilt, any jury trial waiver on the issue of guilt provided the defendant does so personally must be done in person, in writing, or orally upon the record in open court, after ~~being advised by the court~~ advises the defendant of the right to trial by jury and after ~~having had the defendant is given~~ an opportunity to consult with counsel.

Similar language for subd. 1(2)(b), waiver on the issue of an aggravated sentence. This approach acknowledges that the matter is unsettled and that the rule ought not create substantive rights where the court has not weighed in on the issue.

**D. RULE PROVIDES FOR A RIGHT OF REMOVAL IF THE DEFENDANT WAIVES A JURY TRIAL**

8) One Bite at the Apple

If the defendant waives trial, the state is allowed to remove the judge only if the state has not previously exercised the right of removal.

*Add a new paragraph (d) under Rule 26.01, subd. 1(2):*

(d) If the court grants the defendant's jury trial waiver, the prosecutor may file a notice to remove the judge if the prosecutor has not already exercised that right under Rule 26.03, subd. 13(4).

*Amend Rule 26.03, subd. 13(4) as follows:*

**Rule 26.03 Procedures During Trial**

\* \* \*

(4) Notice to Remove. The defendant or the prosecuting attorney may serve ~~on the other party and file with the court administrator a notice to remove the~~ judge assigned to a trial or hearing. The notice shall be served and filed within ~~seven~~(7) days after the party receives notice of which judge is to preside at the trial or hearing, or, for notices served by the prosecutor after the defendant has been granted a jury trial waiver, within 7 days after the waiver is granted, but not later than the commencement of the trial or hearing. No notice to remove shall be effective against a judge who has already presided at the trial, Omnibus Hearing, or other evidentiary hearing of which the party had notice, except upon an affirmative showing of cause on the part of the judge. After a party has once disqualified a presiding judge as a matter of right, that party may disqualify the substitute judge only upon an affirmative showing of cause.

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9) Second Bite at the Apple – Prosecutor Only

If the defendant waives a jury trial, the state is granted a second removal right. This covers the chief concern – the judge tips his hand and the wise defense attorney now waives a jury.

*Add a new paragraph (d) under Rule 26.01, subd. 1(2):*

(d) If the court grants the defendant’s jury trial waiver, the prosecutor may file a notice to remove the judge under Rule 26.03, subd. 13(4) regardless of whether the prosecutor has exercised the right previously.

*Amend Rule 26.03, subd. 13(4) as follows:*

**Rule 26.03 Procedures During Trial**

\* \* \*

(4) Notice to Remove. The defendant or the prosecuting attorney may serve on the other party and file with the court administrator a notice to remove the judge assigned to a trial or hearing. The notice shall be served and filed within ~~seven~~(7) days after the party receives notice of which judge is to preside at the trial or hearing, or, for notices served by the prosecutor after the defendant has been granted a jury trial waiver, within 7 days after the waiver is granted, but not later than the commencement of the trial or hearing. No notice to remove shall be effective against a judge who has already presided at the trial, Omnibus Hearing, or other evidentiary hearing of which the party had notice, except upon an affirmative showing of cause on the part of the judge. After a party has once disqualified a presiding judge as a matter of right, that party may disqualify the substitute judge ~~only~~ upon an affirmative showing of cause or as permitted under Rule 26.01, subd. 1(2).

\* \* \*

10) Second Bite at the Apple – Prosecutor and Defendant

**OPTION DELETED BY COMMITTEE VOTE 6-14-08**

If the defendant waives a jury trial, both the state and defendant may exercise a single right of removal regardless of whether either party has previously exercised a right of removal.

*Add a new paragraph (d) under Rule 26.01, subd. 1(2):*

(d) If the court grants the defendant's jury trial waiver, the prosecutor or defendant may file a notice to remove the judge under Rule 26.03, subd. 13(4) regardless of whether the prosecutor or defendant has exercised the right previously.

*Amend Rule 26.03, subd. 13(4) as follows:*

**Rule 26.03 Procedures During Trial**

\* \* \*

either the defendant or the prosecuting attorney may appear on the other party and file with the court administrator a notice to remove the judge assigned to a trial or hearing. The notice shall be served and filed within seven (7) days after the party receives notice of which judge is to preside at the trial or hearing, or, for notices served by the prosecutor after the defendant has been granted a jury trial waiver, within 7 days after the waiver is granted, but not later than the commencement of the trial or hearing. No notice to remove shall be effective against a judge who has already presided at the trial, Omnibus Hearing, or other evidentiary hearing of which the party had notice, except upon an affirmative showing of cause on the part of the judge. After a party has once disqualified a presiding judge as a matter of right, that party may disqualify the substitute judge only upon an affirmative showing of cause or as permitted under Rule 26.01, subd. 1(2).

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