

Although the trial judge must, of necessity, initially determine the timeliness and legal sufficiency of a motion to disqualify him for prejudice, he cannot pass upon the truth or falsity of statements of fact in the motion and supporting affidavits. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Thus, facts are accepted as true. The change of judge is conditioned, not upon the actual fact of his prejudice, but upon the imputation of it. The facts set forth in the recusal motion must, for the purposes of the motion, be accepted as true, notwithstanding they may be known to the judge and all mankind to be false. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

While the alleged prejudicial judge may pass upon the question of law involving the sufficiency of the petition and affidavit, the question of the truth of the allegation is never tried. *Erbaugh v. People*, 57 Colo. 48, 140 P. 188 (1914).

As a matter of judicial policy, courts must take as true, for purposes of a motion to disqualify, facts stated in the affidavits and motion. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *Comiskey v. District Ct.*, 926 P.2d 539 (Colo. 1996); *People v. Cook*, 22 P.3d 947 (Colo. App. 2000); *Kane v. County Court Jefferson County*, 192 P.3d 443 (Colo. App. 2008).

Judge loses jurisdiction except to grant change. The motion and affidavits are conditions imposed by this section. Upon legally sufficient compliance, the defendant is entitled to a change as of right and the judge loses jurisdiction except to grant the change, without any inquiry into the facts. *Erbaugh v. People*, 57 Colo. 48, 140 P. 188 (1914).

When it is sought to remove the judge because of his prejudice, the law-making power of our state has not deemed it proper to vest in such judge any discretion in the premises, and the

judge whose competency is so questioned can only pronounce the judgment of the law. He cannot sit in judgment upon that which directly concerns himself. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915); *People ex rel. Bennet v. District Court*, 84 Colo. 367, 270 P. 663 (1928).

If the motion for disqualification be sufficient in form, and whether the allegations therein contained be in fact true or false, if they be set forth as facts they must be so accepted, and the judge may perform no further duty than that of entering an order of disqualification. He may not pass upon the facts. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952).

The trial judge has no discretion in the matter of recusing himself upon finding the affidavits sufficient under the rule to allege prejudice. He immediately loses all jurisdiction in the matter except to grant the change. *People v. District Court*, 192 Colo. 503, 560 P.2d 828 (1977).

Review of decision on motion. Should the trial court conclude that the motion and affidavits in support of change of judge are insufficient to require the change, and a reviewing or superior tribunal find the contrary, the question upon which the two tribunals have differed is of law, not of fact. Therefore, the finding of the trial court in such case can have no bearing upon the issue when presented to a higher tribunal. *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

Motion held sufficient. Motion for disqualification of respondent judge with request that a substitute judge be named was sufficient where petitioner had entered a plea of guilty before the respondent judge who then imposed sentence on the petitioner and on appeal petitioner's guilty plea was vacated but on remand the case was again assigned to the respondent judge. *Golden v. District Court*, 186 Colo. 300, 527 P.2d 60 (1974).

ARTICLE 7

Separate Trial - Arraignment - Plea Agreements - Deferred Prosecution and Deferred Sentencing

Editor's note: This article was repealed and reenacted in 1972. For historical information concerning the repeal and reenactment, see the editor's note before the article 1 heading.

PART 1

SEPARATE TRIAL - ALIBI NOTICE

- 16-7-101. Separate trial of joint defendants.
16-7-102. Required notice of defense of alibi.

PART 2

ARRAIGNMENT

- 16-7-201. Place of arraignment.
16-7-202. Presence of defendant.
16-7-203. Irregularity of arraignment.
16-7-204. Procedures on arraignment.

- 16-7-205. Pleas authorized on arraignment.
16-7-206. Guilty pleas - procedure and effect.
16-7-207. Court's duty to inform on first appearance in court and on pleas of guilty.
16-7-207.5. Court's duty to inform defendants with current or prior military service on first appearance in court and on pleas of guilty.
16-7-208. Failure or refusal to plead.

PART 3

PLEA DISCUSSIONS AND PLEA AGREEMENTS

- 16-7-301. Propriety of plea discussions and plea agreements.
16-7-302. Responsibilities of the trial judge with respect to plea discussions and agreements.

- 16-7-303. Fact of discussion and agreement not admissible.
16-7-304. Charges for bad checks.

PART 4

DEFERRED PROSECUTION AND DEFERRED SENTENCING

- 16-7-401. Deferred prosecution. (Repealed)
16-7-402. Counseling or treatment for alcohol or drug abuse. (Repealed)
16-7-403. Deferred sentencing of defendant. (Repealed)
16-7-403.5. Deferred sentencing - mentally ill defendants charged with certain misdemeanors - demonstration program - repeal. (Repealed)
16-7-403.7. Deferred sentencing - drug offenders - legislative declaration - demonstration program - repeal. (Repealed)
16-7-404. Charges for bad checks.

PART 1

SEPARATE TRIAL - ALIBI NOTICE

16-7-101. Separate trial of joint defendants. When two or more defendants are jointly indicted or informed against for any offense and there is material evidence, not relating to reputation, which is admissible against one or some of them but which is not admissible against all of them if they are tried separately and which is prejudicial to those against whom it is not admissible, those against whom such evidence is admissible shall be tried separately upon motion of any of those against whom the evidence is not admissible. In all other cases, defendants jointly prosecuted shall be tried separately or jointly in the discretion of the court.

Source: L. 72: R&RE, p. 220, § 1. C.R.S. 1963: § 39-7-101.

ANNOTATION

- I. General Consideration.
II. Motion for Severance.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pronouncements of the U.S. Supreme Court Relating to the Criminal Law Field: 1985-1986", which discusses a case relating to misjoinder of defendants, see 15 Colo. Law. 1615 (1986). For article, "Felony Plea Bargaining in Six Colorado Judicial Districts: A Limited Inquiry into the Nature of the Process", see 66 Den. U. L. Rev. 243 (1989).

Annotator's note. Since § 16-7-101 is similar to repealed § 39-7-11, C.R.S. 1963, CSA, C. 48, § 484, and laws antecedent thereto, relevant

cases construing those provisions have been included in the annotations to this section.

This section changes the common-law rule that existed prior to its enactment, which left the granting of separate trials to defendants jointly indicted to the discretion of the court. *Davis v. People*, 22 Colo. 1, 43 P. 122 (1895).

Goal of section. The goal underlying this section is to promote a fair determination of the issue of guilt or innocence of the defendant. *People v. Gonzales*, 198 Colo. 450, 601 P.2d 1366 (1979); *People v. Horne*, 619 P.2d 53 (Colo. 1980).

The language of this section is positive and unequivocal. *Davis v. People*, 22 Colo. 1, 43 P. 122 (1895).

This section is mandatory when it appears that a defendant would be prejudiced on a