

June 22-2009

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CLERK OF THE SUPREME COURT
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Hon. John C. McKeon
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FILED

JUN 22 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE REVISED RULES ON

SUBSTITUTION OF DISTRICT JUDGES

WRITTEN PUBLIC COMMENT

To: Chief Justice Mike McGrath and Justices, Montana Supreme Court

I respond to current efforts to revise the substitution rule now codified in §3-1-804, MCA. The following constitutes my public comment on the proposed revised rules filed May 22, 2009.

1. The proposed revision does little to recognize or solve a significant misuse of the substitution rule. In this regard, I do concur with the following comments derived from those offered by District Judges Dirk M. Sandefur and Julie Macek of the 8th Judicial District:

a. The current preemptory substitution rule allows the arbitrariness and caprice of self-interested litigants and lawyers to eviscerate the essential independence of the judiciary. The current rule is frequently seen as being invoked for tactical reasons or for the purpose of "judge-shopping," i.e., removing the assigned judge from the case on grounds other than a belief that he is personally prejudiced.

1 b. Application of the preemptory substitution rule often results in delay of judicial
2 proceedings, inefficiencies, inconveniences and increased expense.

3 c. Many overlapping safeguards now exist to guarantee that litigants receive a fair
4 trial without need for an arbitrary substitution rule, including but not limited to direct appeal,
5 pre-dispositional supervisory control by the Montana Supreme Court, preliminary
6 disqualification of judges for cause (bias or prejudice), and over-arching regulation and
7 enforcement of judicial conduct by the Montana Judicial Standards Commission.
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9 d. A requirement of cursory affidavit from the moving party attesting to a good
10 faith reason to believe one cannot have a fair and impartial proceeding before the district judge
11 would provide a more acceptable basis for substitution and discourage misuse of this rule.
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13 2. Revision is needed to assure the rule is not used to cause a hearing to be held
14 beyond mandated statutory deadlines.

15 3. The same rationale for eliminating a right to substitution after the grant of a new
16 trial should apply to remand after a summary judgment ruling or reversal on judgment of
17 dismissal. In either case, the district judge is required to apply the law as announced in the
18 Supreme Court decision.
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20 Thank you for the opportunity to give comment.

21 Dated this 19th day of June, 2009.

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23 
24 John C. McKeon
District Judge

25 cc: counsel
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