

ORIGINAL

FILED

May 19 2014

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Randall A. Snyder
President, State Bar of Montana
P.O. Box 717
Bigfork, MT 59911

Matthew B. Thiel
Chair, Board of Trustees
P.O. Box 8125
Missoula, MT 59807

FILED

MAY 19 2014

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 09-0289

**IN THE MATTER OF THE
PETITION FOR REVISION
OF JUDGE SUBSTITUTION**

**STATE BAR OF MONTANA'S
COMMENTS**

An Original Proceeding

COMES NOW Randall Snyder, President of the State Bar of Montana and Matthew Thiel, Chair of the Board of Trustees of the State Bar of Montana, to provide the Trustees' response and comments to the Petition for Revision of Judge Substitution filed February 4, 2014.

The Board submits that the Montana Judges Association proposed amendments be denied.

I. HISTORY.

Montana may have had its judge substitution scandals in the early 20th Century, but judge substitution has been an issue for all Courts using the mechanism since before the beginning. “Judicial disqualification is of ancient origin” asserts a 2008 ABA Draft “For Discussion Purposes Only” Report of the Judicial Disqualification Project. The ABA’s Report is found at: http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/jdp_geyh_report.authcheckdam.pdf.

Citing Roman Law from 530 A.D., the ABA Report quotes an amendment to the Justinian Code:

It is the clearest right under general provisions laid down from thy exalted seat, that before hearings litigants may recuse judges. A judge being so recused, the parties have to resort to chosen arbitrators, before whom they assert their rights. Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue be joined, so that the cause go to another; the right to recuse having been held out to him.

One result of the historical turmoil is that judicial substitution has been studied relentlessly by the ABA, the National Center for State Courts, the Federal Judiciary and a multitude of scholars. The studies often result in recommended processes, with a stated goal of creating a system that is fair, impartial and respected by observers and participants alike. Montana’s process is well grounded in history, serves sound purposes in the present and should not be altered.

II. JUDICIAL SUBSTITUTION IN MONTANA’S SURROUNDING STATES USE MONTANA’S CURRENT PEREMPTORY SUBSTITUTION STRUCTURE. INDEED, THE ABA RECOMMENDS A SUBSTITUTION PROCEDURE, CITING MONTANA’S STATUTE.

Court rules and state statutes allowing automatic substitution of judges, without a determination of cause, are the standard procedure in the surrounding states. A survey of Idaho, North Dakota, South Dakota, and Wyoming statutes and rules confirm that peremptory challenge procedures similar to Montana’s current statute are the norm. Idaho Rules Civ. Proc., 40(d)(1-2), N.D. Century Code § 29-15-21, S.D. Codified Laws §§ 15-12-21 to -21.1 and 15-12-37, and Wyo. Stat. Ann. § 2-2-110 and § 5-9-119.

To the extent there is deviation from the Montana structure, the other states’ judge substitution requests must be accompanied by an affidavit of prejudice alleging that a fair trial cannot be had before the assigned judge. However, the statement of prejudice is typically just that, so the taint (for lack of a better word) remains without explanation. Even with the affidavit, the other states’ structures allow the automatic substitution with no further proceedings. The timing for peremptory challenges also varies. Idaho’s shortest time frame limits the motion to 7 days after service of written notice or order setting the action for a status conference. Idaho Rules Civ. Proc., 40(d)(1-2).

In 2008, nineteen states employed a procedure for peremptory challenges of judges: Alaska, Arizona, California, Hawaii, Idaho, Illinois, Indiana, Minnesota,

Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin and Wyoming. ABA Report of the Judicial Disqualification Project, September, 2008 Draft, p. 30.

The ABA Report specifically recommended that states consider adopting peremptory challenge procedures, specifically citing Montana's statute.

http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/jdp_geyh_report.authcheckdam.pdf at p. 60. Earlier in the Report, they explain:

There is an understandable disinclination of judges to disqualify themselves on the grounds that their impartiality might reasonably be questioned. To concede that one's conduct may have created the perception of partiality is in apparent tension with the ethical obligation to "act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary." Moreover, the judge who takes an oath to be impartial and firmly believes that she can be impartial in a given case may be loath to credit arguments that a reasonable observer would think otherwise. This disinclination is often compounded by the suspicion that disqualification requests are motivated less by concern for the apparent partiality of the judge than by a strategic desire to exclude a judge who is likely to be unsympathetic on the merits. Finally, there are practical problems to frequent disqualification that judges wish to avoid: evenly divided supreme courts; an acute shortage of judges in rural areas; an inadequate workforce to handle the business of urban courts... In the absence of a consensus as to when disqualifying perception problems arise, judges have a natural tendency to err on the side of non-disqualification.

Id. at p. 53-54. The Report explains that the key to escaping the paradox of admitting impartiality while remaining impartial is elimination of the judge's

burden of deciding whether he or she is qualified to sit. In other words, the key is peremptory challenges.

III. THE CURRENT PEREMPTORY SYSTEM WORKS.

It is the opinion of all lawyers consulted that disqualification of a judge is not an arbitrary choice. Instead, disqualification is a decision made with careful thought and involves many, many factors. It is not a simple decision. It is a difficult one, for both the client and for the attorney.

It is the opinion of the Board of Trustees that the current disqualification system works. It is used intelligently and sparingly by most. The Judges' proposed amendments insert overt distrust and financial barriers in a system that has worked well for more than 100 years. The proposed cost of \$500 greatly exceeds the cost of any other court fee in Montana. The only conclusion can be that the proposed cost is designed to prevent disqualification motions.

IV. CONCLUSION.

A fair and impartial judiciary is the core of our democratic process. Imposition of financial disincentives and demarcation of negative consequences for those who use the peremptory challenge erodes public confidence in the integrity of the judicial system. It will serve both the public interest and members of the profession if the Montana Judges Association Petition is denied.

While the concerns that plague judicial substitution toll on, they are not as dire as Shakespeare's Queen Katharine of Aragon in her effort to recuse the Judge assigned to her case in *Henry the Eighth*:

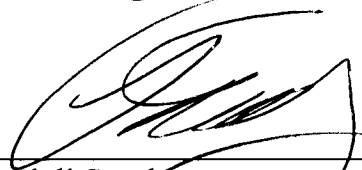
I do believe,
Induced by potent circumstances, that
You are mine enemy, and make my challenge.
You shall not be my judge, for it is you
Have blown this coal betwixt my lord and me
Which God's dew quench. Wherefore I say again
I utterly abhor, yea, from my soul
Refuse you for my judge; whom yet once more
I hold my most malicious foe, and think not
At all a friend to truth.

There are no enemies here. The Judiciary and Trustees' common goal of maintaining an impartial judiciary and access to a substitution mechanism can be accomplished. But not by changing the rules.

The State Bar thanks the Court for inviting its participation and considering its position with respect to this critical professional issue.

DATED this 16 day of May, 2014.

By:



Randall Snyder
President, State Bar of Montana



Mathew Thiel
Chair, State Bar of Montana Board of Trustees

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2014, a true and accurate copy of the above State Bar of Montana Comments was mailed to the following via US Mail, first class postage prepaid:

Judge Russell C. Fagg
Montana Judges' Association President
217 North 27th Street, Room 508
P.O. Box 35027
Billings, MT 59107

Judge Loren Tucker
Substitution Committee Chairman
2 South Pacific #6
Dillon, MT 59725

