

MINUTES
(Unofficial until approved)
Judiciary Standards Committee
Supreme Court Conference Room/Conference Call
December 11, 2015

Members Present

Justice Daniel Crothers, Chair
Sen. Kelly Armstrong
Linda Bata
Judge Brad Cruff
Stacy Dahl
Municipal Judge Steve Dawson
Anna Frissell
Judge Richard Hagar
Paul Myerchin (SBAND Liaison)
Tim Ottmar
Sheila Peterson

Members Absent

Judge Norman Anderson
Joel Fremstad
Rep. Diane Larson
Sen. David Oehlke
Judge Jay Schmitz
Judge John Thelen

Chair Crothers called the meeting to order at 10:900 a.m. and drew Committee members' attention to the minutes of the September 25 meeting [meeting material, pp. 2-8].

It was moved by Sheila Peterson, seconded by Linda Bata, and carried that the minutes be approved.

Judicial Disqualification - Supreme Court Referral - Cont'd

At the request of Chair Crothers, staff reviewed revised draft amendments to Rule 27 (Motions) of the Rules of Appellate Procedure resulting from the Committee's September [meeting material - pp.9-11].

Chair Crothers summarized comments received regarding the revised draft amendments. He said the comments emphasize the following general points: 1) a possible limitation on the timeframe for filing the motion to disqualify to address expedited appeals; 2) consideration of a justice's "duty to sit"; 3) awareness of how the process might be abused; and 4) how a review would be conducted if a party were to seek to disqualify *all* justices. He then requested discussion of the revised draft amendments and comments.

Sheila Peterson asked how frequently disqualification has been sought by a party in an expedited appeal. Justice Crothers said a request to disqualify in expedited cases is fairly rare.

Minutes
Judiciary Standards Committee
December 11, 2015

Judge Dawson suggested adding language providing that the motion must be filed within a certain time, 10 days for example, before oral argument.

Paul Myerchin drew attention to the 60-day trigger in new section (g)(1) and asked whether the timeframe could be shortened to something like 14 days after filing the notice of appeal. That, he said, may address situations involving expedited appeals. He agreed another alternative may be to simply provide an exception to section (g)(1) which could be linked to oral argument.

Linda Bata said her concern about narrowing the timeframe for filing the motion is that there should be an emphasis on providing as much opportunity as possible for a party to file the motion.

Judge Cruff generally agreed and said the revised amendments would appear to cover the majority of instances in which disqualification might be sought. He agreed also that it may be worthwhile to add a timeframe exception, linked to oral argument, for example, to address expedited appeals.

Justice Crothers suggested a qualifier to the general 60 day timeframe could perhaps require that the motion be filed “no less than 10 days before oral argument”. He said the following line in the amendments could be modified to provide simply that if discovery of the ground for disqualification occurs “after this time”, i.e., more than 60 days after the notice of appeal is filed, then the motion must be filed within seven days of discovery.

There was general agreement with the suggested language.

It was moved by Judge Cruff, seconded by Paul Myerchin, and carried that the revised amendments be modified as described.

Committee members then reviewed revised amendments to section (g)(2), which would require that an order denying the motion to disqualify must state the reason for denial, and the comment related to a justice’s general “duty to sit”.

Justice Crothers wondered whether a comment should be added that would note the emphasis on the duty to sit. Judge Cruff suggested there was likely no need to specifically address the issue in a comment.

With respect to the order providing a reason for denial, Linda Bata said the draft language does not require a lengthy opinion in response to the motion. Consequently, she said, it is likely that

Minutes
Judiciary Standards Committee
December 11, 2015

a simple, fairly short response indicating general grounds on which the motion is denied would be sufficient. Committee members agreed.

Committee members then discussed the comment related to a motion to disqualify *all* justices. Staff noted that the draft amendments do not address such a situation.

Judge Cruff said if the full Supreme Court is currently considering motions to disqualify, then the simpler route may be to reflect that process in the rule if there is a motion to disqualify all justices.

In response to a question from Sheila Peterson, Justice Crothers said it is likely, if a motion were filed under the draft amendments, that each individual justice would consider whether disqualification of the justice was appropriate. He said the question would then be how a review would occur if one were requested.

Staff said it appears there are no provisions governing motions to disqualify all justices of an appellate court in the disqualification rules from other jurisdictions.

In response to a question from Sheila Peterson, Justice Crothers said the current process is for the Supreme Court to consider *en banc* a request to disqualify all of the justices. He said that may be the preferable approach to place in the rule.

Paul Myerchin suggested that language be added to section (g)(2) to provide that the Supreme Court will consider *en banc* a motion to disqualify if the motion seeks to disqualify three or more justices.

Following further discussion, **it was moved by Tim Ottmar, seconded by Linda Bata, and carried that draft section (g)(2) be modified in the manner described.**

Sheila Peterson drew attention to draft section (g)(3), which governs the review process if an order to disqualify is denied. She asked how the review process would work with the new language placed in section (g)(2) regarding *en banc* review.

Committee members agreed that section (g)(3) should be further modified to provide that there would be no further review if there is an *en banc* consideration under section (g)(2).

It was moved by Judge Cruff, seconded by Sheila Peterson, and carried that the Committee approve the draft amendments, as further revised and subject to a final review for

wording and structure, and in the absence of any revisions requiring Committee attention approve the amendments for submission to the Supreme Court for its consideration.

Staff noted that a technical, conforming amendment to Rule 2.11, Comment [1], of the Rules of Conduct, to reflect the proposed process would be necessary. Committee members agreed the technical amendment should be included with the submission.

Judicial Improvement Program - Recommended Modifications

Chair Crothers drew attention to recommended changes to the Judicial Improvement Program which were referred to the Committee for review [meeting material, pp.16-56] and which the Committee initially reviewed at the September 25 meeting.

Staff then reviewed the general recommendations for improvement of the program process as outlined in the memorandum submitted by Sally Holewa. The memorandum summarizes the result of the Bureau of Governmental Affairs review of the recommendations made by the National Center for State Courts technical assistance team. That review followed the Committee's earlier consideration of the NCSC team's report.

Judge Cruff drew attention to the recommended pilot project involving only two judges. He said the pilot project surveying process would appear to be in place of the normal surveying process for the two judges.

Justice Crothers agreed and said the current rule provisions establish a process for surveying and there may be difficulty in isolating two judges from the normal process and imposing participation in a pilot program on the judges.

Committee members then discussed the general recommendations summarized in Ms. Holewa's memorandum. There was general agreement that the program enhancements outlined in the memorandum and the proposed amendments to Administrative Rule 48 to implement the enhancements would be beneficial. There was also general agreement that the proposed pilot project would likely be unnecessary since the enhancements appear to be generally acceptable.

Following further discussion, **it was moved by Judge Hagar, seconded by Sheila Peterson, and carried that the Committee recommend to the Supreme Court the various process enhancements and survey modifications set out in the report and recommend the related proposed amendments to Administrative Rule 48, but that the Committee not recommend implementation of the proposed pilot project.**

There being no further business, the meeting was adjourned at 11:10 p.m.