

MINUTES
(Unofficial until approved)
Judiciary Standards Committee
Supreme Court Conference Room/Conference Call
September 25, 2015

Members Present

Justice Daniel Crothers, Chair
Judge Norman Anderson (until 11:30 a.m.)
Sen. Kelly Armstrong
Linda Bata
Judge Brad Cruff
Municipal Judge Steve Dawson
Anna Frissel (until 12:35 p.m.)
Judge Richard Hagar
Rep. Diane Larson
Tim Ottmar
Sheila Peterson
Judge Jay Schmitz

Members Absent

Stacey Dahl
Joel Fremstad
Sen. David Oehlke
Paul Myerchin (SBAND Liaison)
Judge John Thelen

Chair Crothers called the meeting to order at 10:30 a.m. and drew Committee members' attention to the minutes of the Committee's last meeting (November 14, 2014) - meeting material, pp. 2-4. With a correction noted on the 2nd page, the minutes were approved.

Judicial Disqualification - Supreme Court Referral - Cont'd

Staff summarized the Committee's last discussion regarding the Supreme Court's referral of an ABA House of Delegates policy urging adoption of judicial disqualification and recusal procedures concerning campaign financing in judicial elections. He said the conclusion at that time was to consider draft amendments that would establish a disqualification process for justices of the Supreme Court. He drew attention to a separately distributed summary of current disqualification/recusal rules in other jurisdictions. The summary had also been reviewed at the Committee's last meeting.

At the request of Chair Crothers, staff then reviewed draft amendments to Rule 27 (Motions) of the Rules of Appellate Procedure which would create new section (g) to establish a process for seeking the disqualification of a justice [meeting material - pp. 11-13]. He said the draft amendments are based generally on Michigan and Tennessee rule provisions and set out three general procedures:

Minutes
Judiciary Standards Committee
September 25, 2015

- Section (g)(1) provides a process by which a party may file a motion within an particular timeframe to disqualify a justice. Alternatives are set out regarding the time within which the motion could be filed. The motion must clearly state the factual and legal grounds supporting disqualification and must state that the motion is not being filed for improper purposes such as harassment, causing unnecessary delay, or needlessly increasing the cost of litigation.
- Section (g)(2) would require the subject justice to respond to the motion. Alternatives regarding a timeframe for responding are set out in the draft amendments. If the motion is denied, the grounds for denying the motion must be stated in writing.
- Section (g)(3) would allow a party to file a motion for review by the Supreme Court if the initial motion to disqualify is denied. Alternatives are set out regarding whether review would be by the entire court or the remaining justices. A decision on the motion for review must state the reasons for granting or denying the motion to disqualify.

Chair Crothers then requested discussion of the draft amendments.

Anna Frissel noted the alternatives in the draft amendments regarding timeframes for filing and response. She suggested there should be a time certain for the various actions. Judge Schmitz agreed.

Justice Crothers drew attention to the alternative provision in section (g)(1) allowing filing the motion “promptly” after the party discovers the grounds for disqualification. He said that may be problematic simply in terms of how cases are scheduled for briefing and oral argument. He noted that some jurisdictions require the motion to disqualify to be filed within a certain number of days before oral argument.

In response to a question from Judge Schmitz, Justice Crothers said the general timeframes, if there is no transcript, from filing the notice of appeal are appellant brief due forty-five days after notice, appellee brief due thirty days after that, and any appellant reply brief due fifteen days after the appellee brief is filed. Consequently, the timeframe can range from ninety to one hundred days and potentially considerably longer if a transcript is prepared.

Minutes
Judiciary Standards Committee
September 25, 2015

Judge Anderson noted draft language in section (g)(1) permitting filing of the motion after the party discovers grounds for disqualification. He said he supported the alternative to ensure that the party has the opportunity to be heard.

Judge Dawson suggested the motion should be filed “promptly” after discovery but no later than a certain number of days before oral argument.

Justice Crothers explained that requests to disqualify a justice are received periodically and can be relatively short or can be quite lengthy. He said there is a balance to be considered when reviewing a rule process that will be used by good faith petitioners and also by those who may use the process to harass or burden the system. For that reason, he said, it may be worthwhile to consider a final date beyond which a motion could not be filed and, with respect to a written response to the motion, a timeframe that recognizes the time that may be needed to respond to the motion.

Judge Cruff asked how much time would be considered generally necessary for a justice to consider and respond to a motion to disqualify. Justice Crothers said the draft language does not specify the detail that may be considered sufficient in a response, but, at least conceptually, there would be a response to what is alleged, which could be problematic since there are sometimes a multitude of reasons and allegations asserted in a request to disqualify.

Tim Ottmar said it may be preferable to have a longer time period at the outset during which the motion can be filed, which could afford more time for a response and subsequent review before the oral argument stage. Additionally, with respect to review of a denial of the motion to disqualify, he said the review should be conducted by the remaining justices. Otherwise, he said, if review is by all the justices, the justice who denied the motion to disqualify essentially acts as a lawyer arguing to support the denial.

In response to a question from Judge Schmitz, Justice Crothers said there have been occasions in which a party has sought to disqualify all the justices of the Court.

With respect to those that may abuse the process, Sheila Peterson said her experience on the Disciplinary Board was that complainants who have filed numerous complaints that are determined to be without merit have been restricted from filing additional complaints unless there is court authorization. Justice Crothers noted that the Supreme Court has been very hesitant to restrict filings and has done so on very narrow grounds.

With respect to situations in which the party later discovers the grounds for disqualification, Judge Cruff suggested an outside limit of filing the motion no less than thirty days before oral argument except for good cause.

Minutes
Judiciary Standards Committee
September 25, 2015

Judge Hagar wondered whether requiring filing the motion within thirty days of filing the notice of appeal is plausible. Justice Crothers noted that a case is not assigned administratively to a justice until after the appellee brief is filed, which would extend beyond thirty days from the notice of appeal.

Linda Bata said the draft language appears to address most issues by establishing the initial filing timeframe but also allowing filing for later discovery of possible grounds for disqualification. However, she said there should be some assurance that a party filing a motion for other than meritorious reasons should not be able to prolong proceedings or increase costs to the other party.

Justice Crothers agreed there is a basis for concern if the matter does not arise until a few days before oral argument, which could potentially require rescheduling the argument and placing additional time and expense on the other party.

Linda Bata suggested including language indicating that the other party to the case is not required to respond to the motion to disqualify.

After further discussion, **it was moved by Linda Bata, seconded by Judge Schmitz, and carried that section (g)(1) be modified to include the following sentence: “Other parties to the appeal shall not respond to the motion unless requested by the Supreme Court”.**

With respect to filing the motion to disqualify, Judge Schmitz suggested modifying the first sentence of section (g)(1) to provide that the motion must be filed within sixty days of filing of the notice to appeal and that, if the party discovers grounds for disqualification after that time, the motion must be filed within a certain time after discovery. He said in the latter circumstance the motion should include a statement regarding the date and manner of discovery of the grounds for disqualification.

Judge Hagar emphasized that there should be a time past which the motion cannot be filed, a “drop dead date”, e.g., a certain time before oral argument.

Linda Bata said the rule should not discourage the self-represented or unaware party from presenting concerns. For that reason, she said she prefers the sixty-day timeframe, with an additional allowance for presenting issues to a justice.

Judge Cruff suggested the possibility of including language similar to that in the Ohio rule, which provides that the request for recusal must be submitted no later than fifteen days before the oral argument date - except with leave of the court.

Following discussion, **it was moved by Judge Schmitz, seconded by Judge Hagar, and carried, that the first sentence of section (g)(1) be modified to read: “The motion must be filed**

Minutes
Judiciary Standards Committee
September 25, 2015

within sixty days of the filing of the notice of appeal. If a party discovers a ground for disqualification more than sixty days after the notice of appeal is filed, the motion, including a statement of the date and manner of discovery, must be filed within seven days of discovery.”

Committee members then discussed section (g)(2), which requires the justice subject to the motion to disqualify to grant or deny the motion. Alternatives - promptly or within X days - are set out with respect to the timeframe for response.

Judge Hagar said he would be reluctant to impose a specific time within which the justice must respond.

Following discussion, **it was moved by Judge Hagar, seconded by Anna Frissel, and carried that “promptly” be selected as the timeframe for granting or denying the motion to disqualify.**

Rep. Larson asked whether, in denying a motion to disqualify, the justice would be required to address and deny each allegation in the motion. Justice Crothers responded that the draft language simply requires a written order denying the motion and does not address what must be contained in the order.

Committee members next reviewed section (g)(3), which permits a party to file a motion for review of an order denying the motion to disqualify. The motion for review would be required to be filed within a time to be designated of entry of the order denying the motion.

Tim Ottmar noted the alternative of review by all the justices or the remaining justices of the Court. For reasons previously stated, he suggested that the review should be conducted by the remaining justices.

Judge Hagar wondered whether review by a designated number of justices could be an alternative.

Judge Schmitz noted the difficult situation if a motion is filed to disqualify all justices of the Court.

Judge Dawson asked whether the review is a review of the order denying the motion to disqualify or a review *de novo* of the initial motion to disqualify. Additionally, he asked whether a review or appeal process is necessary.

Judge Schmitz said he would prefer that there be no review, Judge Hagar agreed.

Minutes
Judiciary Standards Committee
September 25, 2015

Staff noted that several of the jurisdictions in the rule summary do not provide for a review process. However, he said, the Council of Chief Justices resolution that was included in referral of the issue to the Committee noted the importance of a method for reviewing a denial of a motion to disqualify.

Judge Schmitz suggested that if section (g)(3) is to be retained, it should be revised to provide that 1) the party may file a motion for review of an order denying a motion to disqualify within seven days of entry of the order denying the motion, 2) the motion for review and motion to disqualify must be promptly considered by the remaining justices, and 3) the decision on the motion must state the reasons for granting or denying the motion.

Following discussion, **it was moved by Judge Schmitz and seconded by Sheila Peterson that section (g)(3) be revised as indicated.**

Judge Dawson said the reason for disqualifying or recusing should be with the subject justice. He said the other justices would be placed in a difficult situation if required to assess whether disqualification is required under the circumstances. He said he would encourage a “no” vote on the motion.

In response to a question from Judge Hagar regarding the consequence of not including a review process, Justice Crothers said one consideration is that the lack of a review process contributes to a possible perception that judges are shielding one of their own. Additionally, he noted there is a school of thought that there is simply no authority to remove a duly elected justice by a disqualification process; the alternatives being recourse to judicial discipline, impeachment, or defeat at an election.

In response to a question from Judge Hagar, Judge Schmitz said his intention is that the review be conducted with respect to the order denying the motion to disqualify.

With the consent of the second, the motion was modified to reflect the stated focus of the review.

Following further discussion, **it was moved by Judge Hagar and seconded by Judge Cruff, as a substitute motion, that section (g)(3) be deleted.**

In response to a question from Judge Hagar, Justice Crothers said that if there is a rule establishing a disqualification process, it is likely preferable that there be some mechanism for review. Linda Bata agreed.

Following further discussion, **the substitute motion failed.**

Minutes
Judiciary Standards Committee
September 25, 2015

Committee members then continued discussion of the original motion.

Linda Bata wondered whether the revised language is substantively different from the draft language. Judge Schmitz noted that the revised language would clarify that the review is with respect to the order denying the motion to disqualify.

Following additional discussion, **the motion carried.**

Committee members agreed the revised amendments should be distributed to the justices and Supreme Court clerk staff for comments regarding possible process and timing issues and general feasibility.

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.14-52]. He said a particular point of discussion is the recommended pilot project involving only two judges. He noted that the rule governing the program directs the surveying process within certain parameters and it may be difficult to isolate two judges to participate in a pilot surveying process.

Committee members agreed review of the recommendations would be deferred to the next meeting.

There being no further business, the meeting was adjourned at 12:50 p.m.

Jim Ganje, Staff