

MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

January 26, 1987

The meeting of the Judiciary Committee was called to order in room 312 D of the Capitol on January 26, 1987 at 8:00 a.m. by Chairman Earl Lory.

ROLL CALL: All members present with the exception of Rep. Fritz Daily who was excused.

HOUSE BILL NO. 141:

REP. FRANCIS BARDANOUE, district #16, sponsor, explained that this bill raises money to meet expenses caused by the filing of motions for substitution which disqualify district judges. This is a procedure in which within ten days of assignment of a judge, a party may ask that a new judge be assigned to the case. This bill would require a filing fee of \$100.00 for such a motion. He further explained that the fiscal note for this bill is not correct. Rep. Bardanouve is adding on a subsection five (5) to this bill to include that the \$100.00 filing fee will all go to the state fund. At the current time, 32% of collected fees go to the county general fund and 68% go to the general fund.

SUPPORTERS:

Henry Loble, District Judge, Helena, submitted written testimony (Exhibit A). He stated that calling in a district judge often necessitates miles of travel and other expenses because the state of Montana is so large. This bill would help meet expenses caused by parties filing substitution motions and would discourage the filing of frivolous motions. Judge Loble also submitted copies of part 8 and 10 of the Supreme Court Rule. (Exhibit B).

Thomas A. Olson, District Judge, representing Mt. Judges Association, submitted written testimony (Exhibit C). District courts call the procedure "substitution of judges" and this bill imposes a filing fee of \$100.00 for use of this procedure. In civil cases, any party may do this twice; in a criminal case there is only one substitution allowed. The Mt. Judges Association has petitioned the Supreme Court to streamline the procedure and to eliminate chances for abuse. A \$100.00 filing fee would cut down on

frivolous use and give the state a way to off-set the high costs of this privilege.

Thomas Honzel, District Court Judge, Helena, went on record in support of this bill.

Roger Tippy, Attorney, Helena, favors this bill if it went on to amend the section exempting state agencies from paying court fees. He submitted an amendment to Section 3, Section 25-10-405 (Exhibit D). He feels state agencies should be on an equal footing with private litigants.

Karl England, Montana Trial Lawyers Association, generally supports the idea of creating a fee for filing a motion for substitution of a judge. A point he wants to raise is that the higher the fee, the higher the number of people who may not be able to afford to have the use of a right that others with more money will have. \$100.00 might be too high of a fee. This would be the highest fee charged in the statutes.

NO OPPONENTS

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 141:

Rep. Rapp-Svrcek asked Rep. Bardanouve why all the money would go into the state general fund. The amount of money would be minimal and to divide it in too many directions would not be cost effective. Rep. Rapp-Svrcek asked John MacMaster if it would be possible to amend this bill with the suggestion of the Chief Justice. He answered that you would not be changing the original purpose of the bill but would be adding another purpose to it.

Rep. Addy stated to Judge Loble that if attorneys had to pay \$100.00 per case they would not be challenging the judges so often but that it often turns into a judge taking this action personal. Judge Loble explained that this procedure is not a personal matter. He does not think it should result in a grudge. He sees this procedure as just a money saving process.

Rep. Hecer questioned Rep. Bardanouve on why a fee is charged for judges that are being disqualified for no reason and judges who are being disqualified for reason. Aren't the costs the same for a judge's travel and expenses?

Rep. Bardanouve answered that in the eye of justice a citizen has the right to disqualify a judge. If he is doing it just to do it, it is a luxury we cannot afford. The judges feel this fee is fair.

Rep. Eudaily asked Judge Loble if there is a special provision in the law for a disqualified reason that is not stated in this bill? Judge Loble stated that it is in a statute referred to in Exhibit B. It sets out the reasons for disqualification of a judge but it is not a motion for substitution.

Rep. Bardanouve closed the hearing.

HOUSE BILL NO. 235:

Rep. Addy, District # 94, sponsor of this bill, intends to clarify procedures and to have it easier or clearer to decide how to go about accomplishing something that the statutes has always said we should be able to do. If two people get arrested, an attorney wants to try the bad actor first. The accomplice decides to refuse to testify by standing on his fifth amendment rights because he knows what ever he says can and will be used against him. An attorney will give immunity to the small fish so he can compel him to testify against the big fish. By giving immunity for anything they say they no longer have a right against self incrimination and they can be compelled to testify. If they refuse to testify, this bill provides the procedure to be followed so they can be held in contempt of court.

SUPPORTERS:

Mike McGraff, County of Lewis and Clark Attorney and Chairman for the Legislative Committee for the Montana County Attorneys Association, stated this bill was submitted at our request by Rep. Addy and it provides a procedure when a witness refuses to testify after having been granted immunity. There are two types of immunity granted in the state of Montana. One is called use-immunity, which is immunity that a prosecutor will not use any statements given against you. The second immunity is called transactual immunity. It says the prosecutor will not prosecute you for anything having to do with this transaction. Procedures

following a grant of immunity have been non existent so this bill gives the procedures. There are two types of contempt, civil and criminal. This procedure deals with civil contempt.

NO OPPONENTS

Rep. Bulger asked Mr. McGraff if immunity is granted to this person and then they decide not to testify, do they still have immunity? Mr. McGraff stated that that is a condition for immunity, the information must be supplied.

Rep. Addy closed the hearing.

HOUSE BILL NO. 236

Rep. Addy, District #94, Sponsor. This bill allows the Judicial Nominating Commission to begin its' work as soon as a judge announces he or she will resign.

Pat Melby, representing the Montana State Bar, supports this bill because as soon as a vacancy can be filled, the sooner the cases can be moved.

No other proponents or opponents.

QUESTIONS ON HB NO. 236

Rep. Eudaily questions the language of the bill. He used as an example, section 2, line 6, changing appoint to nominate. The original language was that the nominees come from the commission but the Governor does appoint and you have changed everything to nominees. Rep. Addy stated that the new judge would be the Governor's nominee until the actual retirement date where the incumbent comes to pass and then they would become the appointee of the Governor. Rep. Eudaily does not see any place in the bill that the Governor makes the appointment.

Rep. Cobb questioned Rep. Addy in regard to a judge who states he is resigning. If after nomination of another judge, the resigning judge decides to restake his position, what would happen? Rep. Addy answered that after a submitted written resignation and it is accepted, it is beyond his control to revoke it. He stated he would do more research on this statute.

Judiciary Committee
January 23, 1987
Page Five

Rep. Addy closes this hearing.

ADJOURNMENT: There being no further business, the meeting was adjourned at 11:00 a.m.



REP. EARL LORY, Chairman

DAILY ROLL CALL
 JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Jan 26 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)		✓	✓
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

EXHIBIT H
DATE 1-26-87
HB# 141

WITNESS STATEMENT

NAME District Judge Henry Noble BILL NO. 141
ADDRESS County Courthouse Helena DATE 1-26-87
WHOM DO YOU REPRESENT? MT Judges' Ass'n
SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: H B 141 would raise money to meet expenses caused by the filing of motions for substitution which are frequently District judges. This often necessitates calling in an outside judge with resulting travel & other expenses. The bill would require a filing fee of 100 for each a motion. Probably the bill would also discourage the filing of frivolous motions.

(2) collect, compile, and report statistical and other data relating to the business transacted by the courts and provide such information to the legislature upon request;

(3) recommend to the supreme court improvements in the judiciary; and

(4) perform such other duties as the supreme court may assign.

History: En. 82-512 by Sec. 3, Ch. 396, L. 1977; R.C.M. 1947, 82-512.

3-1-703. Cooperation of court officers. All court officers, including clerks of district courts, shall comply with requests made by the court administrator for information and statistical and financial data bearing on the business transacted by the courts.

History: En. 82-513 by Sec. 4, Ch. 396, L. 1977; R.C.M. 1947, 82-513.

Part 8

**Disqualification and Substitution of Judges
Supreme Court Rule**

3-1-801. Superseded. Sup. Ct. Order dated June 29, 1981.

History: En. Sup. Ct. Ord. dated Dec. 29, 1976; 34 St. Rep. 26; superseded, Sup. Ct. Ord. dated June 29, 1981.

Compiler's Comments

Superseded Sections — Effective Date: Sub-section 9 of the Supreme Court's order dated Dec. 29, 1976, provided in part: "This rule supersedes and is to be used to the exclusion of

sections 93-901, 93-2906(4), 93-2907, 93-6602(2), 95-1709, and 95-2010, R.C.M. 1947.

This rule shall be effective on March 1, 1977, it to apply to all actions filed on or after that date."

3-1-802. Disqualification and substitution of judges — all courts.

DISQUALIFICATION OF JUDGES

Any justice, judge, or justice of the peace must not sit or act in any action or proceeding:

1. To which he is a party, or in which he is interested;
2. When he is related to either party by consanguinity or affinity within the sixth degree, computed according to the rules of law;
3. When he has been attorney or counsel in the action or proceeding for any party or when he rendered or made the judgment, order or decision appealed from.

SUBSTITUTION OF JUDGES — PEREMPTORY CHALLENGES

Peremptory challenges shall apply only to District Court proceedings.

A motion for a substitution of a judge may be made by any party to a District Court proceeding. In a civil case, each adverse party is entitled to two substitutions of a judge. In a criminal case, the state and each defendant is entitled to one substitution of a judge.

A motion for substitution of a judge shall be made by filing a written motion for substitution reading as follows:

"The undersigned hereby moves for substitution of another judge for Judge _____ in this cause." The clerk of court shall immediately give notice thereof to all parties and to the judge named in the motion. Upon filing this notice, the judge named in the motion shall have no further power to act in

the cause other than to call in another judge, which he shall do forthwith, and to set the calendar.

The first district judge disqualified shall have the duty of calling in all subsequent district judges.

When a case is filed in a multi-judge district, it shall be the duty of the clerk of court to stamp the name of the judge to which the case is assigned on the face of the summons, order to show cause, or information and all copies thereof.

Whenever a judge is assigned a case for ten consecutive days and the attorneys of record on both sides have knowledge of the assignment for that period of time, and if during this time no motion for substitution of a judge is filed against him, all rights to move for substitution of a judge shall be deemed waived by all parties, unless the presiding judge disqualifies himself thereafter in which case the right to move for substitution of a judge is reinstated and the ten-day period starts running anew.

Whenever an acceptance of jurisdiction is filed by a new judge, it shall be the duty of the clerk of court to mail a copy of the acceptance of jurisdiction to the original judge who first had jurisdiction of the case, and a copy by certified mail with return receipt requested to each attorney of record. Service to an attorney may be made by delivery of a copy personally to the attorney, or by obtaining a written receipt from the attorney. Proof of service shall be stapled to the acceptance of jurisdiction in the file. The clerk of court shall contact the new judge accepting jurisdiction and request that judge to communicate with the judge having jurisdiction in the first instance, so that calendaring can be expeditiously handled.

When a new trial is ordered in any case, whether by order of the District Court or the Supreme Court, each adverse party shall be entitled to file one motion for substitution of a judge in the manner provided herein, whether or not that party has previously filed motions for substitution of a judge. Such motions must be filed:

a. If the new trial has been ordered by the District Court, within ten days after the time for appealing the order has elapsed.

b. If the new trial has been ordered by the Supreme Court, within ten days after notice of receipt of the remittitur has been received by the respective parties from the clerk of the District Court.

DISQUALIFICATION FOR CAUSE

This section shall apply to all District Court judges, justices of the peace, municipal court judges and to all judges acting as a Small Claims Court. All references to judge are meant to include a District Court judge, a justice of the peace, a municipal judge and a judge presiding under the Small Claims Act.

Whenever a party to any proceeding in any court makes and files a timely and sufficient affidavit that a judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein.

In the case of a district judge, another district judge shall be assigned by the chief justice of the Supreme Court to hear such disqualification proceedings. If an affidavit is against a justice of the peace, municipal judge or a judge presiding under the Small Claims Act, any district judge may appoint

another justice of the peace or municipal judge to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than twenty days before the original date of trial, or good cause shall be shown for failure to file it within such time. It shall be accompanied by a certificate of counsel of record stating that it has been made in good faith.

DIRECT CONTEMPT OF COURT:

None of the provisions of this rule shall apply to any person in any cause involving a direct contempt of court.

INDIRECT CONTEMPT OF COURT:

When a person is charged in a District Court with indirect contempt of court, he shall be entitled to file one motion for substitution of a judge in the manner provided herein, whether or not that party has previously filed motions for substitution of a judge. Such a motion must be filed within ten days of the charge of indirect contempt of court. In that event, the judge of the court against which the contempt is alleged to have been committed shall notify the chief justice of the Supreme Court who shall appoint another district judge to hear and decide the charge.

History: En. Sup. Ct. Ord. dated June 29, 1981.

Compiler's Comments

Former Rule Superseded — Effective Date: Supreme Court Order dated June 29, 1981, provided, in part, as follows:

"By the authority of Article VII, Section 2, of the 1972 Montana Constitution, this rule supersedes and is to be used to the exclusion of the rule on disqualification and substitution of judges adopted by Supreme Court Order dated December 29, 1976, and published as section 3-7-901, MCA.

This rule shall take effect on July 1, 1981."

Effect of Publication: Section 2, Ch. 1, L. 1979, which adopted the MCA, provided that publication of a Supreme Court Rule is done for the benefit of code users. The publication of this

section should not be construed as a legislative attempt to readopt or promulgate the rule.

Cross-References

District Court presided over by Judge of other district, 3-5-111.

Multijudge districts, 3-5-403.

Municipal Court Judge pro tem, 3-6-204.

Disqualification of Water Judge or master, 3-7-402.

When Acting Justice called in, 3-10-231.

Expenses of Acting Justice, 3-10-234.

When substitute for City Judge called in, 3-11-203.

Procedure, Rule 12(b), M.R.Civ.P. (see Title 25, ch. 20).

Part 9 reserved

Part 10

Judicial Nomination Commission

3-1-1001. Creation, composition, and function of commission. (1) A judicial nomination commission for the state is created. Its function is to provide the governor with a list of candidates for appointment to fill any vacancy on the supreme court or any district court. The commission shall be composed of seven members as follows:

(a) four lay members who are neither judges nor attorneys, active or retired, who reside in different geographical areas of the state, and each of whom is representative of a different industry, business, or profession, whether actively so engaged or retired, who shall be appointed by the governor;

EXHIBIT C
DATE 1-26-87
HB # 141

WITNESS STATEMENT

NAME JUDGE THOMAS A. OLSON BILL NO. H-141
ADDRESS 615 S. 16th, Bozeman, MT 59715 DATE 1-26-87
WHOM DO YOU REPRESENT? Montana Judges Association
SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

This bill would impose a filing fee of \$100 for use of a procedure known in Montana. District courts called "substitution of judges." Within 10 days of assignment of a judge, a party may ask that a new judge be assigned to the case, no questions asked. In civil cases, any party may do this twice; in a criminal case there is only one substitution allowed.

The Montana Judges Association has petitioned the Supreme Court to streamline the procedure and to eliminate chances for abuse. We hope a \$100 filing fee would cut down on frivolous use of the procedure, and give the State

ROGER TIPPY

Attorney At Law

BOX 543
CAPITOL CENTER
208 N. MONTANA
HELENA, MONTANA 59624

(406) 442-4451

DATE 1-26-87
HB # 141

January 19, 1987

House Judiciary Committee
Montana Legislature

Re: House Bill 141

Dear Mr. Chairman and Committee Members:

As an attorney practicing primarily in the field of administrative law here in Helena, I frequently litigate against agencies of state government. I have never yet moved to substitute the district judge who draws a case I appear on in the district court. However, there are agencies of state government who substitute some of our judges regularly.

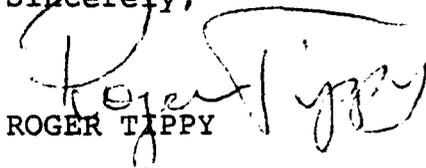
I would favor your bill if it went on to amend the section exempting state agencies from paying court fees, so that they were on an equal footing with private litigants. The section involved is 25-10-405, and the amendment would read as follows:

Section 3. Section 25-10-405 is amended to read:

25-10-405. Government entities not required to prepay fees. The state, a county, a municipality, or an subdivision thereof or any officer when prosecuting or defending an action on behalf of the state, a county, a municipality, or a subdivision thereof is not required to pay or deposit any fee or amount to or with any officer during the prosecution or defense of an action, except that the state or an officer of the state in prosecuting or defending a civil action must pay the fee for filing a motion to substitute a judge required under 25-1-201(q).

Thank you for considering this amendment.

Sincerely,


ROGER TIPPY

