

# ORIGINAL

MINUTES  
MONTANA SUPREME COURT PUBLIC MEETING  
2015, March 17, 1:00pm  
Attorney's Lounge 4th Floor  
Justice Building, 215 North Sanders, Helena, MT

# FILED

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*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Chief Justice McGrath called the meeting to order at 1:00 pm. In attendance were Justices Rice, Baker, Cotter, Shea, Wheat, and McKinnon. Also present were Bruce Spencer, Chris Manos, and Randy Snyder on behalf of the State Bar of Montana, Jessica Walker-Keleher and Patricia Klanke, Law Clerks of the Montana Supreme Court, and Chris Wethern, Staff Attorney for the Montana Supreme Court.

**Item 1: Minutes for the February 3, 2015 Public Meeting**

The Court unanimously approved the Minutes of the February 3, 2019 Public Meeting.

**Item 2: AF 09-0289 In re Revised Rules on Substitution of District Judges**

- Chief Justice McGrath invited public comment on the proposed revisions to the rule on substitution of district judges and noted that a number of written comments had been received and considered.
- Justice McKinnon moved to repeal § 3-1-804. Justice McKinnon noted her experiences as counsel in front of bad or biased judges in a jurisdiction that did not allow for preemptory substitution of judges and her experience as a district judge in Montana where parties had moved for her substitution. Justice McKinnon noted the history and purpose of the substitution rule, which was to allow for the easy removal of a biased judge—particularly, automatic substitution was seen as a way to remedy an unwieldy disqualification process when a judge was biased. Justice McKinnon stated that the rule had outlived its original purpose given that it is being used primarily as a mechanism for selecting a more favorable forum for a particular client, rather than a mechanism to avoid a biased judge. Justice McKinnon stated that some judges are frequently incorrect in their application of the law, but that the appropriate remedy for that is an appeal; actually biased judges can be removed for cause under § 3-1-805. Justice McKinnon noted that the number of substitutions over the last decade exceeded several thousands, and it defied common sense to believe those substitutions were legitimately based on partiality or bias. Justice McKinnon went on to note that this Court is the keeper and protector of the Judicial Branch of the state. Sanctioning forum shopping undermines the long-recognized presumption that judges are professionals charged with the administration of impartial justice. Justice McKinnon

noted that Montana is at a crossroads regarding how judges are elected, retained, and removed, how allegations of partiality are examined, and the extent of judicial free speech and judicial codes of conduct. Justice McKinnon expressed concern that a rule that allows for peremptory challenges to a judge undermines the presumption that this state administers impartial justice; citizens' respect for the judgments of the courts depends on absolute probity and judicial integrity being of the highest importance. In order to increase judicial probity and transparency, especially in light of *Citizens United* and *Republican Party v. White*, Justice McKinnon would reexamine disqualification procedures and provide a more meaningful adjudicative process to try allegations of judicial bias and prejudice. Justice McKinnon advocated reexamining the Rules of Judicial Conduct, particularly the rules addressing recusal, and the disclosure requirements for judges, which would facilitate a more meaningful review of disqualification motions.

- Chief Justice McGrath asked if there was a second to Justice McKinnon's motion. There being no second, the motion died.
- Chief Justice McGrath then noted that Judge Sandefur had proposed alternative revisions to the rule, which had been circulated as a replacement for the original proposed revisions.
- Chief Justice McGrath moved to adopt Judge Sandefur's proposed changes. Justice Rice seconded the motion.
- Chief Justice McGrath noted that the Montana Defense Trial Lawyers had endorsed Sandefur's proposed revisions. The Montana Trial Lawyers Association was divided on the proposed revisions and took no position on them.
- Representatives of the State Bar indicated the Bar was not aware of Sandefur's proposed revisions.
- Chief Justice McGrath summarized and explained Judge Sandefur's proposed revisions. It was clarified that the current motion was to adopt the proposed rule revisions, not the proposed change to the fee for substitution, which must be changed by the legislature.
- Justice Baker expressed support for the fee increase, but noted that it will need to be addressed by the 2017 legislature given that it is too late for it to be addressed by the current legislature. Justice Baker expressed support for the proposed revisions to the substitution rule, but not for repeal of the rule, and noted that adopting the proposed revisions will allow the Court to see if the revisions address the problems identified with the current rule.
- Justice McKinnon proposed a stylistic change to the proposed revisions. A discussion about stylistic details followed.

- Justice Wheat clarified that the current motion was about the general substance of the proposed revisions, and the stylistic details could be addressed later.
- Justice Cotter expressed approval of the proposed revisions and asked if the fee increase should be included as a recommendation to the 2017 legislature in the order adopting the revisions. Justice Baker and Chief Justice McGrath responded that yes, the fee increase should be included as a recommendation to the legislature.
- Justice Wheat asked for the State Bar's position on the proposed changes.
- Chris Manos stated that a broad cross section of the Bar, including district judges, had been involved in the discussion about the proposed revisions. He then asked about the conditions under which fees could be waived. The Justices clarified.
- Randy Snyder stated that his perception is that a majority of the Bar would not oppose the proposed revisions. Snyder noted that lawyers strongly support greater consistency in deadlines for motions to substitute.
- Snyder further stated that the State Office of the Public Defender objected to substitution not being allowed in certain types of cases. Chris Manos noted that the Public Defender's Office was also concerned about fees charged for substitutions. Chief Justice McGrath noted that the Public Defender's Office had submitted written comments which had been considered.
- Manos noted that the PD's Office handles most of the involuntary mental health commitment cases. Justice Baker asked if there are many substitutions in such cases. Chief Justice McGrath said no, most substitutions happen in criminal cases.
- Justice Baker expressed concern about excluding certain types of cases from the substitution rule, but noted that there were good reasons for the change and that the revisions could be tried and the results analyzed.
- A vote was then taken on adopting the proposed revisions to the substitution rule. All seven Justices voted in favor of adoption.
- Justice Baker then moved to include a recommendation to the 2017 legislature that the fee for substitution be increased from one hundred dollars to two hundred dollars. Justice Cotter seconded the motion, and all seven Justices voted in favor.
- Snyder then noted that a mediation between various parties concerned about the substitution rule had been immensely helpful in getting the parties to understand each other's concerns. He stated that the problem is not with the number of substitutions, but with particular lawyers and particular judges in particular districts. He noted that the State Bar has a judicial relations committee that exists to address such concerns.

**Item 3: AF 06-0632 Proposed Revisions to Internal Operating Rules**

- Justice Baker moved to adopt the proposed revisions as circulated. Justice Rice seconded the motion in order to allow discussion.
- Justice Rice expressed concern about subsection (3)(e) regarding publication of which Justices are on which panels. Justice Wheat and Chief Justice McGrath also expressed concern about that provision, noting that the Justices on the panel can change, and it's not clear why publication of those details was important.
- Justice Cotter noted that the proposed changes to Section VII would publish the Court's conference agendas with panel numbers, which may cause confusion.
- Justice Baker clarified that the conference agendas as published would not include panel numbers. Justice Baker further stated that the purpose of (3)(e) is to make the Court's process more transparent and that published panel assignments should include any changes to the Justices on those panels. Justice Baker noted that the Ninth Circuit publishes such information about its own cases.
- Justice Shea noted that, unlike the Ninth Circuit, decisions made by a panel on this Court still require four votes, which represents a majority of the Court, meaning panel designation in this Court will never affect outcome while panel designation can affect the outcome in the Ninth Circuit.
- Justice Baker disagreed, noting that most high courts have intermediate appellate courts below them. Justice Baker stated that (3)(e) is important because there is a lot of speculation about the panel assignment affecting outcome.
- Justice Rice stated that he wasn't clear on what (3)(e) accomplishes and noted that it invites speculation and possibly inappropriate conduct such as an attorney with an appeal in front of the Court attempting to communicate ex parte with a Justice on the panel assigned to his case.
- Justice McKinnon noted that knowing which judges are assigned to which cases is already what happens in district court and that the Court should provide as much information to the public as possible about the Court's process.
- Justice Cotter noted Justice Baker's clarification that publication of conference agendas under VII(2) wouldn't include which panel cases were assigned to, but observed that when a case gets passed from the agenda for one week to the agenda for the next week it would be noted, which could invite speculation and consternation.
- Justice Wheat stated that he saw no reason for VII(2) and couldn't support it.
- Justice McKinnon stated that the public needs to know what the Court is and is not doing.
- Chief Justice McGrath stated that he would entertain motions to delete specific provisions.

- Justice Rice moved to substitute Justice Baker's motion with a new motion to adopt the proposed revisions with 3(e) deleted. Justice Wheat seconded the motion.
- A vote was taken. Justices Wheat, Shea, Cotter, Rice, and Chief Justice McGrath voted in favor. Justices Baker and McKinnon voted against. The motion passed.
- Wheat moved to delete VII(2). Rice seconded the motion.
- Justice Baker stated that the provision is innocuous at worst.
- Justice Shea stated that he had no objection to VII(2) and compared it to publishing a district court docket. Chief Justice McGrath stated that he felt the same.
- Justice Rice stated that the provision promotes misunderstanding of the Court's process. Justice Baker asked if understanding was better served by keeping the conference agenda secret.
- Chief Justice McGrath clarified the scope of the rule.
- Justice McKinnon state that it is hard to know how the public will interpret what the Court does, and it is better to give as much info as possible.
- Justice Wheat stated that he had misunderstood the provision and withdrew his motion.
- A discussion ensued and it was resolved that a proposed order with the amended revisions would be circulated and signed by the Justices.

**Item 4: AF 06-0112 Appointment to the Criminal Jury Instructions Commission**

The Court unanimously voted to reappoint Jed Fitch to the Commission.

**Item 5: AF 07-0018 Appointments to the Commission on Rules of Evidence**

The Court unanimously voted to reappoint Elizabeth Best and Brant Light to the Commission.

Chief Justice McGrath adjourned the meeting at 2:15.

Duly Submitted  
Paul Leisher  
Law Clerk