

MONTANA SUPREME COURT PUBLIC MEETING MINUTES

Tuesday, May 28, 2019, 1:00 p.m.

Joseph P. Mazurek Justice Building
215 North Sanders, Helena
Supreme Court Courtroom, 4th floor

FILED

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Boyan Gajic, Clerk
Clerk of Supreme Court
State of Montana

Chief Justice McGrath began the meeting by introducing himself and the other Justices of the Court. He notified the attendants that Justice Sandefur and Justice Gustafson would be attending the meeting via tele-conference.

Item 1: AF 19-0073, Changes to the Uniform Rules for the Justices and City Courts

- Justice Rice explained the process for the rule change and indicated that the Court has received some public input. He explained that legislation passed during the 2017 session which served as the impetus for this rule change. The goal was to align the rules with this new legislation. Concern about these changes arose through the Board of Limited Jurisdiction Courts.
- Justice Baker asked if these rule changes pass, would the Court still be able to entertain a challenge to the rules if it were to come on appeal. Justice Rice indicated that the Court would review such challenges in the same way it does any rule challenge.
- Justice Rice moved to adopt the rule change and Justice Shea seconded the motion.
- The Court unanimously voted to adopt the rule change.

Item 2: AF 06-0112, Appointments to the Criminal Jury Instructions Commission

- Chief Justice McGrath provided the introduction for this item and indicated that Tammy Hinderman, the Honorable Jeffrey Langton, and the Honorable Karen Townsend have resigned their membership on the Criminal Jury Instruction Commission.
- Chief Justice McGrath moved to appoint Mardell Ployhar, the Honorable Jessica Fehr, and the Honorable Michael Hayworth as new members of the commission as well as the Honorable Luke Berger, who will serve as Chair of the Commission. Justice Baker seconded the motion.
- The Court unanimously voted to make the proposed appointments.

Item 3: AF 16-0288, Appointments to the Drug Treatment Court Advisory Committee

- Chief Justice McGrath provided introduction for this item and listed the Committee members who have been serving since their appointments began in May 2016 and named those who do not wish to continue serving.

- Chief Justice McGrath moved to reappoint the Honorable Kurt Krueger who will serve as Committee Chair, as well as the Honorable Gregory Pinski, the Honorable Mary Jane Knisely, the Honorable John Larson, and the Honorable John Brown to serve as Committee members.
- Chief Justice McGrath also moved to appoint the Honorable Nickolas Murnion and the Honorable Brenda Gilbert to replace the Honorable James Manley and the Honorable Katherine Bidegaray respectively.
- Justice Gustafson seconded the motion.
- The Court unanimously voted to make the proposed appointments.

Item 4: AF 07-0300, Appointment to the Board of Bar Examiners

- Chief Justice McGrath provided introduction for this item, indicating that Loren O'Toole, a member of the Board of Bar Examiners, tendered his resignation from the Board.
- Chief Justice McGrath recommended the appointment of Peter Helland to the Board in the place of Loren O'Toole.
- Justice Rice indicated that a request had been made for the Court to issue a salutatory order thanking Loren O'Toole for his long service, and that he was drafting an order for the Court's consideration.
- Chief Justice McGrath moved for the appointment of Mr. Helland and the Court unanimously voted in favor of the motion.

Item 5: Appointment to the Montana Redistricting and Reapportionment Commission

- Chief Justice McGrath provided an introduction, explaining how Court appointments are made at public meetings and under what authority the Court appoints the 5th member of the Commission. He listed the informal criteria the Court looks for when making this appointment: non-partisan, considerable experience, known in the Montana community, possessing a strong awareness of Montana history and political history. Chief Justice McGrath explained that 10 years ago former Justice Regnier took this position and did an excellent job but is no longer interested in serving in this capacity. Chief Justice McGrath stated that he contacted other former Justices including Justices Cotter, Leaphart, and Wheat to inquire if any of them would be interested in serving in this position. None except Justice Wheat of them expressed an interest. The Court also spoke with a few District Court Judges who have or are nearing retirement. A few of these judges expressed interest in the position.
- Justice Baker thanked the Legislative Services Division staff for passing on applicants and she thanked those who expressed interest in serving.
- Justice McGrath opened the floor to public comment.
- Public commentary included:

- Jeff Essmann stated that he had submitted writing to the Court on the appointment process. He urged the Court to provide an opportunity for the public to meaningfully engage in the appointment process. He argued that when the Court engages in a short dialog in this public forum, while providing only limited notice to the public, the question raised is whether the public has had a meaningful opportunity to participate in the process. He urged the Court to adopt a four-step process that would provide the public sufficient opportunity to engage in this appointment process. In his view, the Court should: 1) accept all interested candidate applications; 2) release a short list of the candidates the Court is most interested in appointing; 3) allow the public to comment on pros and cons of those on the shortlist; and 4) provide a recorded roll call vote when making the final appointment. He argued that a rigorous procedure is warranted here. He said that a careful and prudent approach is necessary, given the importance of this position due to the upcoming 2020 census. Chief Justice McGrath asked Mr. Essmann if his Legislative appointment was subject to the same kind of process that he urges the Court to adopt here. Mr. Essmann said that he did not know because he was out of town at the time of his appointment.
- Dan Stusek noted that Montana is one of only a handful of states with a redistricting commission, and one of few with a commission this small. He echoed Mr. Essmann's emphasis on the importance of this position and the need for a careful and transparent appointment process.
- Jamie McNaughton stated that she is an attorney who works for the State and that she submitted a letter of interest to the Legislature regarding serving in this position. She agreed with the earlier comments and expressed her belief that the Court should offer more public engagement and transparency in the appointment process. She expressed frustration to learn that there were so many interested candidates that the public was not made aware of.
- Tim Ravndal also indicated that he applied to serve on this Commission. He argued that a more transparent process should be provided for those who are willing to "step up and serve." He expressed frustration in having learned about this public meeting yesterday from social media, despite his candidacy.
- Chief Justice McGrath stated this application process has been and remains informal. The Legislature manages its own application process and submits candidates for the Court's review but the Court does not use a formal application process of its own. The Court has the responsibility to make the appointment.
- Justice Baker stated that, like the Chief Justice, she has been thinking about what makes a strong candidate for this position. She expressed her belief that it would be appropriate to appoint a woman to this Commission for the sake of gender diversity, as 3 of the 4 legislative appointments are men. Justice Baker said that she contacted former U.S. Magistrate Judge Carolyn Ostby to inquire whether she would be interested in this position. Judge Ostby expressed interest. Justice Baker listed reasons Judge Ostby is an ideal candidate for this appointment including her

strong character and vast experience. Judge Ostby indicated that she is currently on Magistrate recall status, which expires at the end of this year, but would resign immediately if she received this appointment. Justice Baker concluded by advancing Judge Ostby for consideration.

- Justice Sandefur nominated Dr. Sheila Stearns for this position. He indicated that she has a distinguished record of public service and discussed her accomplishments serving as the state Commissioner of Higher Education. Justice Sandefur argued that she would be an ideal non-partisan leader who is uniquely capable of serving the state. Chief Justice McGrath indicated that he spoke with Dr. Stearns who said she would be willing to serve.
- Justice McKinnon asked if Dr. Stearns has ever mediated disputes. Chief Justice McGrath indicated that as chairperson of the higher education committee, Dr. Stearns has ample experience resolving difficult disputes. Justice McKinnon indicated that she believes mediation skills are unique and comes only through training and experience.
- Justice Baker said that she spoke with a few people who indicated Dr. Stearns is a strong problem solver. She expressed support for both Dr. Stearns or Judge Ostby.
- Justice Rice stated Dr. Stearns was a lobbyist when he was in the Legislature. He noted that, by reputation, Dr. Stearns was very approachable and worked well in a bi-partisan fashion.
- Justice Shea said that he had appeared before Judge Ostby when he was in private practice and he knows her to be an excellent judge. Other than that, he knows both Judge Ostby and Dr. Stearns only by reputation, and they both have exemplary reputations. He indicated that three of the District Court judges who expressed interest would also be strong candidates. Justice Shea stated that he believes there should be discussion about whether further discussion and public notice should be provided before the Court makes its appointment. Justice McKinnon echoed this same concern and indicated her preference for public comments about the individuals who have been publicly mentioned thus far.
- Chief Justice McGrath said that the Court is following the same process that it has followed in the past, and he indicated that the Legislature nominated four people without any process whatsoever. He expressed his belief that extra time in the process is not needed.
- Justice Sandefur indicated that it is this Court's constitutional prerogative to make this appointment. He argued that because the Court is not a political body and this is not a political process, there is no need to make this appointment into something political. Justice Gustafson echoed Justice Sandefur's stance. She argued that if the framers wanted the public's involvement in this process, more than is already being provided, they would have required the public to vote. Instead, they intended this to be a non-political process.
- Justice McKinnon expressed not seeing any harm in seeking public comment on the five people that had been discussed thus far. Justice McKinnon moved to select 4

candidates that the Court is focused on and then provide an opportunity for the public to comment before finalizing the appointment.

- Justice Shea seconded the motion, stating that he understood the importance of balancing the public's faith in the process with protecting this process from becoming too politicized. Accordingly, Justice Shea expressed his view that the candidates under discussion are beyond reproach but offered support for Justice McKinnon's motion.
- Chief Justice McGrath opposed the motion. He argued that the nominees did not seek this appointment nor open themselves up to this type of public scrutiny. He also pointed out that the Court does not do this for other appointments, nor did the Legislature do this. Lastly, he expressed a concern that the applicants might drop out of consideration if they are subject to such public scrutiny. Justices Sandefur and Gustafson expressed their agreement with Chief Justice McGrath's arguments.
- Justice Baker said she felt strongly both ways but explained that she did not notify Judge Ostby that this would be a public comment process and as a result, would agree with Chief Justice McGrath and oppose Justice McKinnon's motion to extend the appointment process.
- Chief Justice McGrath called for a vote on extending the public hearing process. Justices McKinnon and Shea voted in support of the motion. All other Justices opposed the motion. The motion failed.
- Chief Justice McGrath called for a vote to appoint Dr. Stearns. Chief Justice McGrath and Justices Sandefur, Shea, Rice, and Gustafson voted in favor. Justices Baker and McKinnon voted for the appointment of Judge Ostby, but they both indicated that they would sign an order appointing Dr. Stearns.
- The Court appointed Dr. Stearns as Chair of the Commission.

Item 6: Establishment of a temporary committee known as The Standing Master Advisory Committee

- Justice Baker provided introduction. She moved to establish this Committee and appoint the following six individuals to serve as its members, each of whom had expressed willingness to serve: The Honorable Rienne McElyea, Standing Master Amy Rubin, Beth McLaughlin, P. Mars Scott, Christopher Gillette, and Jill LaRance. Justice Baker also moved to appoint Justice Dirk Sandefur to serve as chair of the Committee.
- Justice Gustafson seconded the motion and the Court unanimously voted to establish the Committee and appoint its members.

Chief Justice McGrath adjourned the meeting at 2:00 p.m.

Submitted by: Benjamin Hargrove on May 30, 2019