

**State Bar of Michigan
Criminal Jurisprudence and Practice Committee**

**June 30, 2009 at 4:00 P.M.
Teleconference 1-800-270-1153, Passcode is 134891#.**

AGENDA

Committee Members: Michael Howard Gordner, Abed Hammoud, Hon. David Hoort, Martin Krohner, J. Kevin McKay, Valerie Newman,
SBM Staff: Nicholas Galea, Elizabeth Lyon, Carrie Sharlow

Item for Discussion

[Admin File No. 2009-04 Proposals Regarding Procedure for Disqualification of Supreme Court Justices](#)

These three proposals would establish specific rules for disqualification of Supreme Court justices. The proposals vary considerably with regard to the procedure for disqualification, the grounds for determining whether disqualification is warranted, and the ability to review another justice's decision to recuse.

Issued: March 18, 2009

Comment Period Expires: August 1, 2009

Public Hearing: To be scheduled

The committee supports and amends Alternative C.

The following amendments are:

- (A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word 'judge' includes a justice of the Michigan Supreme Court. Unless one of the conditions specified below is met, it is the duty of a judge to serve in every case and a judge is not mandatorily required to withdraw from serving on a case.
- (B) Who May Raise. Each judge shall, on motion or sua sponte, decide whether grounds exist for his or her disqualification in a particular case. A party may raise the issue of a judge's disqualification by motion or the judge may raise it.
- (C) Grounds.
 - 1. Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
 - a. The judge is actually biased or prejudiced for or against a party or attorney.

- b. If there is a serious objective risk of actual bias or prejudgment that requires the judge's recusal. The judge's impartiality might objectively and reasonably be questioned.
 - c. The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
 - d. The judge has been consulted or employed as an attorney in the matter in controversy.
 - e. The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.
 - f. The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other person or persons member of the judge's family residing in the judge's household, has an more than de minimis economic or other interest in the subject matter in controversy.
 - g. The judge or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
 - or
 - (iv) is to the judge's knowledge likely to be a material witness in the proceeding.
2. Disqualification of a judge is not warranted merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(D) Procedure.

1. *Time for Filing.* To avoid delaying trial and inconveniencing the witnesses or delaying the appellate process, a motion to disqualify must be filed within 14 days after the moving party discovers or should have discovered the ground for disqualification. In the trial court, if the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including, in the trial court, delay in waiving jury trial, is a factor in deciding whether the motion should be granted.
2. *All Grounds to be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.
3. *Ruling.*
 - a. For courts other than the Supreme Court, the challenged judge shall promptly decide the motion. If the challenged judge denies the motion, the party has three days to request review by another judge,

(i) in a court having two or more judges, the challenged judge shall immediately refer the motion to the chief judge, who shall promptly decide the motion de novo;

(ii) in a single-judge court, or if the challenged judge is the chief judge, the challenged judge shall immediately refer the motion to the state court administrator for assignment to another judge, who shall promptly decide the motion de novo.

(iii) to the extent allowed by law the court may conduct the hearing by a review of the record of the prior hearing. The court may, in its discretion, allow additional evidence if the evidence was not available at the prior hearing.

- b. In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

~~If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification.~~

4. *Motion Granted.*

- a. For courts other than the Supreme Court, when a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.
- b. In the Supreme Court, when a justice is disqualified, the proceeding will be decided by the remaining justices of the Court.

(E) Remittal of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. In the Court of Appeals and the Supreme Court, the clerk of the court may contact the parties with a written explanation of the possible grounds for disqualification. If, following disclosure of any basis for disqualification other than actual bias or prejudice concerning a party, the parties, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record.

Judge David Hoort will speak with the Michigan Judge's Association regarding their comments on the Supreme Court website.

- a. The Michigan Judge's Association appreciated Judge Hoort's input; however, they noted that it would take a long time to get information through the committee.
2. Angela Povilaitis will meet with Rob Moran from the Wayne County Prosecuting Attorney's Office.
 - a. Angela spoke with Rob Moran, who can live with Alternative C.
3. Committee members requested additional time to think about whether D(3)(b) was needed or is sufficient to have just (a) which would allow the individual Justice(s) decide the disqualification motion relating to him/her/them but mandate and explanation of the decision.