

MONTANA FIFTH JUDICIAL DISTRICT

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April 17, 2012

Senator Jim Shockley, Chairman
Law and Justice Interim Committee
P.O. Box 201706
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Brad Newman
District Judge

RE: Legislative Review of Supreme Court Rules of Procedure

Dear Chairman Shockley and Members of the Committee:

The Supreme Court rule codified at Section 3-1-804 of the Montana Code is one of procedure. It allows a litigant to substitute a District Judge arbitrarily without any reason. It does not affect the substance of any litigation.

Chief Justice McGrath has provided an illuminating and entertaining history of the rule in *James Patrick v. State of Montana*, 2011 MT 169 (July 19, 2011). According to that history, the legislature enacted the Fair Trial Act in the Second Extraordinary Session of 1903 (Chapter 3, section 1(4)). The law permitted substitution of the presiding judge upon the filing of an affidavit that "a fair trial and impartial hearing or trial was not possible before the presiding judge." *Supra*, p.11.

The opinion traces changes to the rule to the present day. We still have a rule providing for removal for cause in accord with the purpose of the 1903 Fair Trial Act. *See* Section 3-1-805 MCA. However, at some point the requirement of an affidavit that a fair and impartial hearing could not be obtained disappeared from a separate rule. Now, all that is necessary is an unsupported demand to oust the presiding judge. Section 3-1-804 MCA.

If a judge is biased, that Judge certainly should be removed. However, even when there is no cause at all, a litigant nonetheless is allowed to remove the presiding judge arbitrarily. Section 3-1-804 MCA. The only reason to do so without cause is to obtain a judge who is more receptive to the litigant's cause. In the most pernicious perception, that opportunity suggests corruption.

Regardless of arguments about illicit motives, there are important practical problems. Each substitution causes delay. Delay prevents speedy resolution of issues which litigants presumably desire and which the Constitution mandates for criminal cases. Extra expense is incurred when the rule is invoked in single judge districts. In such cases, a Judge must be located from some other district. Even if some issues can be handled by video, the video process itself causes unnecessary expense. Additional travel expense is almost always involved. Litigants may be forced to travel to locations where the substitute judge is located. An out of district judge likely is not as familiar with facts and circumstances involved. The inconvenience can not be over emphasized. It creates a cascading disarray of distraction and inefficiency which interferes with the resolution of other cases.

Some Judges in multi-judge districts perceive a lesser problem. They conclude that they need merely pass the case down the hall in the same courthouse. However, some Judges from multi-judge districts share these concerns.

As *Patrick v. State, supra*, points out, substitution is not allowed in post-conviction relief petitions. The reasons for not allowing substitution are applicable to all litigation. First, when arbitrary substitution is allowed, there is a greater burden on the District Court, that is, the tax payers of the State of Montana. Second, the costs to the participants are likely to be increased because most of the participants are likely to live near the presiding court or the events or circumstances or property involved are likely to be near the presiding court. Third, the presiding court is likely to possess greater familiarity with the facts and circumstances of the litigation involved in the District where the litigation is filed. Fourth, the goal of trial proceedings should be to give the presiding court an opportunity to rule properly. It is very difficult to understand why there should be two rules. It is even more difficult to understand why the more restrictive rule applies to personal liberty which is one of the most fundamental rights. The far better rule is to try all cases before the assigned judge unless there is a showing of bias.

The rule for arbitrary substitution creates delay, expense, and unpleasant ethical questions. The rule encourages arbitrary action which is the antithesis of our judicial system. The reasons to prohibit such a rule in some cases apply with equal force to all cases.

Please give the rule careful attention.

Sincerely,


Loren Tucker
District Judge

LT:dlk

c: Chief Justice Mike McGrath