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August 3, 2009

Corbin R. Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

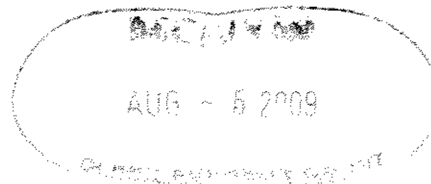
RE: ADM 2004-09

Dear Mr. Davis:

The Appellate Practice Section Council thanks the Court for the opportunity to comment on ADM 2009-04. The Council agrees that the questions of when a justice of the Supreme Court can or should be disqualified, and by what process, deserve, as Justice Young noted, "thoughtful comment from members of the bar." The court's July 21, 2009 order in *United States Fidelity & Guaranty Ass'n v Michigan Catastrophic Claims Ass'n* (docket nos. 133466, 133468) also illustrates the need for "comprehensive rules governing the recusal of Justices in Michigan."

Following the Council's initial discussion of ADM 2009-04, the United States Supreme Court released its opinion in *Caperton v A T Massey Coal Co, Inc*, ___ US ___ (2009). The Council, therefore, incorporated several points from the *Caperton* decision into its comment.

The Section Council carefully considered the three alternative proposal in ADM 2009-4. After considerable discussion, however, we concluded that we could not agree to recommend the adoption of any one of the proposed rules in its entirety. We have decided instead to provide the Court with a number of points it may want to consider in addressing this subject.



Adoption of a new rule or amendment of MCR 2.003

The Council did not see a significant distinction between adopting a new rule, as in Alternatives A and B, and amending MCR 2.003, as in Alternative C. We did feel strongly, however, that if a new rule is adopted, it should be conformed to the existing rule as far as possible and that the standards for disqualification of a justice of the Supreme Court should be consistent with those for disqualification of a judge of any other court.

It was also suggested that, if a new rule is adopted, it should be placed in subchapter 7.300, with the other rules of the Supreme Court.

Procedure for disqualification and review

It was generally agreed that provision should be made for disqualification initiated either by motion of a party or sua sponte by a justice. It was also agreed, however, that no formal, public, process should be provided by which one justice could attempt to disqualify a fellow justice.

There was extensive discussion of disqualification by motion, with particular reference to the appropriate time limitations, if any. It was ultimately agreed that no specific deadline should be included in the rule. Rather, the rule should provide for filing a motion to disqualify "within a reasonable time" and reference to the avoidance of "undue delay in the appellate process" should be included.

There was a division of opinion regarding whether the decision by an individual justice on a motion for disqualification should be subject to review by the rest of the Court. One suggestion made was to require a vote of four justices, with no abstentions permitted, in order to effect a disqualification.

Grounds for disqualification

There was some feeling that an express recitation of a "duty to serve" in Alternative A was unnecessary, because the matter is sufficiently clear from existing case law.

It was broadly agreed that any list of bases for disqualification should be explicitly identified as not exhaustive.

Alternative A provides that "disqualification of a justice is required" for the stated reasons and does not provide any additional grounds for disqualification. The Council, then, would oppose adoption of Alternative A as it stands now.

Alternative B provides that "disqualification is warranted if" any of seven conditions apply. The Council would recommend the addition of subsection (8), allowing, although not requiring, disqualification as provided for in Alternative C, i.e., where "[t]he judge's impartiality might objectively and reasonably be questioned." Alternatively, the Council directs the Court's attention to 28 USC 455(a), which requires disqualification "in any proceeding in which [the judge's] impartiality might reasonably be questioned" or the standard promulgated by the United States Supreme Court in *Liteky v US*, 510 US 540, 564; 114 SCt 1147; 127 LEd2d 474 (1994), i.e., "[d]isqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality."

The Council was puzzled about the substitution of the words "actually biased" for "personally biased" in Alternative C and the use of the phrase in Alternatives A and B. A majority of the Council members were unable to determine whether "actual bias" differs significantly from "personal bias."

"Actual bias" suggests an objective standard while "personal bias" implies a subjective one. Note, for example, that the Supreme Court makes reference to "actual bias - based on objective and reasonable perceptions" in *Caperton*. (Slip op, p 14; 2009 WL 1576573 at *8.) All three proposals, however, retain the grounds for disqualification based on personal involvement, former association, familial relationship and economic interest, i.e., observable factors that could be expected to create "bias" for or against a party. We appreciate that the Court may prefer to use the same language in the Michigan rule as the Supreme Court employed in *Caperton*. Because neither "actual bias" nor "personal bias" is readily provable, however, we would suggest that the appropriate standard should be whether the judge's impartiality "might objectively and reasonably be questioned."

Canon 2(A) of the Code of Judicial Conduct requires that a judge "avoid all impropriety and appearance of impropriety." In addition, Canon 2(C) provides that a judge "should not allow family, social, or other relationships to influence judicial . . . judgment." The Council believes that incorporating the standard embodied in these provisions by reference into the list of grounds for disqualification would benefit the Court and the public. Indeed, the Supreme Court cited Canon 2 of the ABA Model Code of Judicial Conduct as additional support for its finding that disqualification was warranted in the *Caperton* case.

In short, if the intent of any of the proposals is to eliminate the "appearance of impropriety" as a basis for disqualification of a justice, the Council would oppose the change.

The Council generally agreed that bias against an attorney for a party should be a basis for disqualification of a justice. Thus, we would support retaining MCR 2.003(B)(1), as in Alternative C.

Publication of reasons for decision

There was broad agreement that when a justice makes a determination on whether to disqualify him- or herself, that he or she should be permitted, but not required, to provide a reason for the decision. The Council, then, would oppose the adoption of either proposed MCR 2.003-SC(C)(4) (Alternative B) or MCR 2.003(D)(3)(b) (Alternative C).

In Alternative A, therefore, we would recommend the adoption of language, in the first paragraph of proposed MCR 2.003-SC, that "the justice may publish the reasons for his or her decision." In Alternative B, we would recommend deleting the words "without elaboration" and "No other additional statements are permitted" from proposed MCR 2.003(C)(3). In Alternative C, we recommend that the provision in MCR 2.003-SC(3)(b) that "the challenged justice shall . . . publish his or her reasons about whether to participate" be revised to read "the challenged justice shall decide the issue and may publish his or her reasons about whether to participate." We would further recommend

that the final sentence of that subrule, "[t]he Court's decision shall include the reasons for its grant or denial of the motion for disqualification" be revised to read "[t]he Court's decision may include the reasons for its grant or denial of the motion for disqualification."

Effect of disqualification

The Council did not attempt to resolve the question of whether any other judge may substitute for a justice of the Michigan Supreme Court. The Council was generally opposed to any procedure under which a justice who is disqualified would be replaced by a judge of the Court of Appeals, regardless of the method of selection.

In general, the Council preferred the procedure by which the remaining justices would decide a case in the event one or more justices is disqualified.

The Appellate Practice Section recognizes that the Court may find it necessary to modify one or all of the proposals contained in ADM 2009-04 in light of the holding in *Caperton.* We will welcome the chance to provide another round of comments should that occur.

Please let me know if the Section can provide any additional assistance.

Very truly yours,

Barbara H. Goldman
Chair

Report on Public Policy Position

Name of section:
Appellate Practice Section

Contact person:
Barbara H. Goldman

E-mail:
bgoldman@michiganlegalresearch.com

Proposed Court Rule or Administrative Order Number:
2009-04 – Proposals Regarding Procedure for Disqualification of Supreme Court Judges
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.

Date position was adopted:
July 30, 2009

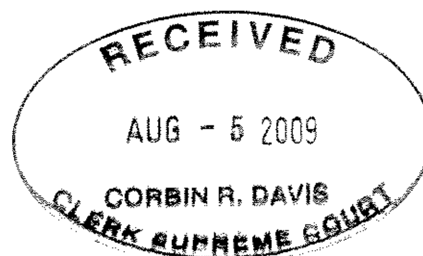
Process used to take the ideological position:
Position adopted after discussion and vote at a schedule meeting

Number of members in the decision-making body:
24

Number who voted in favor and opposed to the position:
16 Voted for position
0 Voted against position
0 Abstained from vote
8 Did not vote

Position:
Other

Explanation of the position, including any recommended amendments:
The Appellate Practice Section did not recommend or oppose any of the three proposed alternatives in its entirety, but offers the Court a number of suggestions regarding aspects of each of them.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AUG - 5 2009
CORBIN R. DAVIS
CLERK SUPREME COURT

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Please let me know if the Section can provide any additional assistance.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in
http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-DQ-Order.pdf

APPELLATE PRACTICE SECTION
Respectfully submits the following position on:

*

ADMN File No. 2009-04

*

The Appellate Practice Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Appellate Practice Section only and is not the position of the State Bar of Michigan.

The State Bar of Michigan has submitted a letter dated July 31, 2009.

The total membership of the Appellate Practice Section is 667.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 24. The number who voted in favor to this position was 16. The number who voted proposed to this position was 0.