

ATTACHMENT 3

Order

Michigan Supreme Court
Lansing, Michigan

November 25, 2009

Marilyn Kelly,
Chief Justice

ADM File No. 2009-04

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Justices

Amendment of Rule 2.003
of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rule 2.003 of the Michigan Court Rules are adopted, effective immediately.

[Additions are indicated by underline, and deletions by strikethrough.]

Rule 2.003. Disqualification of Judge

- (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.
- (BA) Who May Raise. A party may raise the issue of a judge's disqualification by motion; or the judge may raise it.
- (CB) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
- (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
- (a1) The judge is personally biased or prejudiced for or against a party or attorney.
- (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a

party as enunciated in *Caperton v Massey*, US ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

- (c2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
- (d3) The judge has been consulted or employed as an attorney in the matter in controversy.
- (e4) 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.
- (f5) 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 member of the judge's family residing in the judge's household, has an more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding. ~~or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.~~
- (g6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (ia) is a party to the proceeding, or an officer, director, or trustee of a party;
 - (iib) is acting as a lawyer in the proceeding;
 - (iiie) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or
 - (ivd) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification not warranted.

- (a) A judge is not disqualified 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.

- (b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action.

(D6) Procedure.

- (1) *Time for Filing.* To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. 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 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, ~~T~~ the challenged judge shall decide the motion. If the challenged judge denies the motion,
 - (ia) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;
 - (iib) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.
 - (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. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.

(4) ~~Motion-Granted-If Disqualification Motion is Granted.~~

- (a) For courts other than the Supreme Court, wWhen 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 underlying action will be decided by the remaining justices of the Court.

~~(ED) Remittal-Waiver 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. If, following disclosure of any basis for disqualification other than personal 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. Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.~~

KELLY, C.J. (*concurring*).

I voted for this recusal rule and write to discuss it and respond, in part, to the criticism leveled against it.

In adopting this rule, the Michigan Supreme Court has, for the first time in its long history, reduced to writing a rule to govern when a justice should not vote on a case. In the past, the justices wrote rules on recusal but applied them to other judges only, not to themselves.

Some of us have long believed that the interests of the legal community and of the general public are best served if a Supreme Court recusal rule is put in writing. In that