

LEGAL REVIEW NOTE

Bill No.: HB 772

LC#: LC 3954, To Legal Review Copy, as
of February 17, 2023

Short Title: Revising law related to judicial
disqualification and recusal

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Date: February 23, 2023

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See *Alexander v. Bozeman Motors, Inc.*, 356 Mont. 439, 234 P.3d 880 (2010); *Eklund v. Wheatland County*, 351 Mont. 370, 212 P.3d 297 (2009); *St. v. Pyette*, 337 Mont. 265, 159 P.3d 232 (2007); and *Elliott v. Dept. of Revenue*, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

HB 772, as drafted, may raise potential constitutional issues associated with Article VII, section 1, of the Montana Constitution and the separation of powers doctrine.

HB 772 provides in section 1(2) that under certain circumstances all of the justices of the Supreme Court may be disqualified if the Legislature is a party to the suit. Section 1(2)(b) allows for the Attorney General to appoint a District Court judge to sit in place of the Chief

Justice of the Supreme court.

New section 1(2)(d) of HB 772 also provides:

(d) (i) If one or more of the supreme court justices refuse to disqualify, the chief justice shall negotiate with the speaker of the house, the president of the senate, and the attorney general to reach a resolution. If one party to the conflict is unable to negotiate, that party may appoint a replacement to conduct the negotiations. The first priority of all parties in the negotiation must be the Montana constitution. Once alternate solutions are proposed, the four parties or their designees shall vote to resolve the conflict. If an unbreakable tie occurs, the majority leader of the house of representatives shall break the tie.

(ii) The supreme court is bound by the alternate solution chosen by the parties as provided in subsection (2)(d)(i).

Art. III, sec. 1, of the Montana Constitution provides:

Section 1. Separation of powers. The power of the government of this state is divided into three distinct branches -- legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Judicial power is vested in the judicial branch. Article VII, secs. 1 and 2, provide:

Section 1. Judicial power. The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law.

The Attorney General is part of the executive branch, and is not a part of the judicial branch. Article VI of the Montana Constitution is entitled "The Executive", and Art. VI, sec. 1(1), provides:

Officers. (1) The executive branch includes a governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor.

By allowing the Attorney General to appoint a District Court judge to sit in place of the Chief Justice of the Supreme Court, any by allowing legislators to make a final determination on whether a justice is disqualified, HB 772 may potentially conflict with the separation of powers doctrine and Article VII, sec. 1, of the Montana Constitution.

Requester Comments:

RE: Legal Note of HB 772 prepared by Julie Johnson of Legal Services.
From: Lyn Hellegaard (R) HD 97 and sponsor of HB 772: Feb. 20, 2023

I appreciated the feedback from legal review about this proposed bill. However, I must disagree with much of the legal analysis and conclusions of your legal note. I realize that the legal note does not represent, as you state, a formal legal opinion. I will respond sequentially paragraph by paragraph, starting with page one.

Constitutional Issues

On page 2, you quote from Art III, sec. 1 and Article VII, secs. 1 and 2. I fail to see how this bill would violate the Section 1 and 2 of Article VII. The selection of a judge by appointment is NOT a breach of the judicial power. The governor can appoint a judge, the people can elect a judge, and the Legislature can impeach or remove for cause a judge. Regarding the Supreme Court Jurisdiction of Section 2 of Article VII, this bill has nothing to do with determining writs. This bill does NOT make any rules concerning appellate procedure and practice, nor admission to the bar, nor conduct. This bill does not impact any direct rules of any court. There is one rule put out by the Supreme Court which was codified concerning the disqualification of a judge. That is 3-1-805. However there is no rule and no statute concerning the disqualification of a Supreme Court Justice. None! 3-1-805 MCA **noticeably** excludes a Supreme Court Justice from disqualification but includes district courts and lesser courts. It is also noticeable that 3-1-804 also excludes any Supreme Court Justice. It appears that Court rules apply to lower courts but not to themselves which shows discrimination and violates the 14th amendment of the U.S. Constitution. How convenient! The Legislature as per Article XIII, Section 4 has given authorization to the Legislature to develop code of ethics for “all **state and local officers**” which would include judicial officers. So the Legislature has 2-2-121 MCA which does not interfere with judicial power.

Certain Court Rules and Decisions are not Law.

Court rules and decisions are not law unless they have been codified. I read your legal review with sadness as you appear to equate Supreme Court decisions as “law”. Court orders to an individual case are (particularly criminal) are to be followed but decisions addressing legislative acts or executive actions are not law. At best they are advisory. What is a law? Article V, Section 11, (1) states that the law is established by a bill NOT by court rules and decisions.

Definitions

This bill gives definitions to the terms “personal bias”; prejudice; conflict of interest, etc., which the current statutes do not define even though those terms are used. The legislature is within its legislative power to define these terms.

Art VII, Section 3 (2) A district judge shall be substituted for the chief justice or a justice in the event of disqualification or disability.

The problem here is that there are no statutes or rules or procedures outlining how a Justice should be disqualified (silent) - only district and lesser courts. While the Supreme Court has GENERAL supervisory control over all other courts, Article VII, Sec. (2) does not say that ONLY the Supreme Court can substitute a chief justice or a justice. Who appoints the replacement for the Chief Justice? The inference, which is all it is, which will be suggested is the Court (which they will interpret). This bill answers that. Finally procedures are given by the Legislature for impeachments. Procedures are also allowed for removal for cause. It stands to reason they can do so for disqualification of Supreme Court Justices.

U.S. Supreme Court Case, *Caperton v A.T. Massy Coal Co*, 556, U.S. 2009

This **advisory opinion** is very germane to this bill. In this case, the Court dealt with the issue of recusal for a judge concerning bias or prejudice. The judge in **Caperton** failed to recuse himself even though the West Virginia Code of Judicial Conduct was used against him. While the Court stated the old common law dictum of “*no man is permitted to try cases where he has an interest in the outcome*”, it further stated that “*the disqualifying criteria cannot be defined with precision*”. The Court went on to state that there was a need for “**objective rules**”. The Court also postulated this keen observation - which the Supreme Court of Montana refused to follow in *McLaughlin I* and *II* of 2021; **Caperton** stated, “*The **probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable***”. In *McLaughlin I*, the Montana Supreme Court ignored **Caperton’s** dictum of “**probability of actual bias**” and “**objective rules**”. As seen by the several statutes in Montana, the Supreme Court of Montana has a difficult time recusing themselves by using objective standards or by excluding themselves from disqualification. Both in 3-1-804 and 3-1-805, the Supreme Court has excluded themselves in any disqualification case. In **McLaughlin**, the Montana Supreme Court also cleverly used the Rule of Necessity to justify staying on a case despite the perceived self-interest and conflict of interest of all the Justices by the Legislature. It is illogical to believe that judges will not use the principle (concerning recusal) stated by **Caperton**, “*the disqualifying criteria cannot be defined with precision*” for their own interest. Near the end of *McLaughlin*, we see the profound

arrogance by the Court where they even opined on what the people would think if they recused themselves. They stated:

Were the Court to succumb to the Legislature's request and evade our responsibilities and obligations as a Court, we are convinced that public confidence in our integrity, honesty, leadership, and ability to function as the highest court of this State would be compromised.

Perhaps the people would be proud that you would be willing to humble yourselves by taking personal responsibility of the perceived conflict of interest and accepting the Legislature's contention there was a **probability of actual bias**.

This bill provides objective standards and guidelines with more precision as to when and how a Supreme Court Justice should be disqualified.