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Knowing the score about notices to remove

BRIEFLY

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One of the toughest decisions a lawyer has to make is whether to recommend to a client to a remove the sitting judge assigned to the case. Sure, you get rid of the assigned judge, but it's uncomfortable, and the substitute may be worse for you than the original judge. In giving advice to the client, it's important to explain how the notice to remove rule works and its potential consequences.

The Minnesota Supreme Court recently addressed the subject in an opinion, *OCC, LLCC v. Cty. of Hennepin (In re OCC, LLC)*, No. A18-0526, 2018 Minn. LEXIS 524 (Minn. Aug. 29, 2018) (per curiam), that reminds us all of how the rule is supposed to work, and what to do if it does not.

Up until 1985, if you wanted a different judge assigned to your case, Rule 63.03 of the Minnesota Rules of Civil Procedure required a litigant to file what was called an affidavit of prejudice, where the party attested that it had "good reason to believe" that the judge could not be fair in a particular case. If you think a notice to remove is uncomfortable, imagine what it was like back when you had to actually accuse the judge of bias. Not only did the old rule require a sometimes difficult-to-meet evidentiary standard, it involved challenges to otherwise competent judges often based on nothing more than the fit of the judge to the particular case.

To make the process more palatable for both lawyers and judges, the Supreme Court amended Rule 63.03 to replace the affidavit of prejudice procedure with a simple "notice to remove." *See* Minn. R. Civ. P. 63.03, advisory comm. Note—1985. Under either version of the rule, the result remained the same: removal was automatic upon the filing of a timely motion. *See McClelland v. Pierce*, 376 N.W.2d 217 (Minn. 1985). But the revised rule eliminated the requirement of asserting that a judge might be biased. Or at least that's how the rule is supposed to work. It's not always that simple.

Like any rule, in extreme circumstances, the letter of the rule may give way to some countervailing policy considerations. That's what happened when the Kandiyohi County Attorney's Office adopted a blanket policy to remove a particular Wilmar judge in every case because of one adverse ruling from that judge. *See State v. Erickson*, 589 N.W.2d 481, 483-84 (Minn. 1999). The county attorney's office filed notices to remove in hundreds of criminal cases assigned to that judge over a three-year period, seemingly for no other reason than because it wanted to send the judge a message. Two criminal defendants, who had their cases assigned to this particular judge, opposed notices to remove, but the district court honored the notices.

The Supreme Court granted review after the Court of Appeals refused to take the case on discretionary review. The Supreme Court, noting its dismay of the county attorney's office's abuse of the rule and its inherent power to "ensure the proper administration of justice," held that the judge be placed back on the two criminal cases on appeal and suspended the county attorney's office privilege to file notices to remove for a period of six months.

Recently, the Minnesota Tax Court used the rationale of *Erickson* to refuse to honor a notice to remove. In the view of the tax court judge, lawyers representing a particular litigant had filed too many notices to remove that particular judge. The tax court described it as a "blanket policy" of removal. Whether that description was true or not (unlike *Erickson*, in the tax cases, there were far fewer notices to remove, and the filings were not made in all cases), the court refused to honor a notice to remove that was, in all other respects, properly filed and timely. The filing party decided it had no recourse but to seek review in a higher court.

Tax court proceedings are a little different than district court proceedings. The tax court is part of the executive branch of government, and judicial review generally is through a writ of certiorari. Nonetheless, the statute creating the tax court specifically provides that tax court proceeding must be governed by the Rules of Civil Procedure "to the extent practicable." And because the Supreme Court can review tax court proceedings to make sure that they are procedurally fair, it's possible to seek an extraordinary writ to make sure the tax court follows the rules.

That's what happened in *In re OCC, LLC*. When the tax court refused to honor a notice to remove filed by OCC, citing lack of practicability and concerns with judicial independence, OCC petitioned the Supreme Court for a writ of mandamus to compel the court to honor the notice. After briefing and argument, the Supreme Court sided with OCC, directing the tax court to assign the case to another judge.

The Supreme Court's opinion contained several significant statements. The court brushed aside the argument that the notice to remove was untimely because the judge who OCC sought to remove had signed an order earlier in the case. Specifically, the county argued that OCC's notice to remove in August 2017 was untimely because the 10-day time limitation began in May 2017 when the tax court judge OCC sought to remove signed an order granting the parties' request to consolidate several appeals. The Supreme Court disagreed, noting that Rule 63.03 requires advance notice of which judge will preside at a future trial or hearing.

The Supreme Court pointed out that the rule requires the party filing the notice to remove to have notice of the judicial assignment and sufficient time to exercise its right under the rule. The court went on to note that the May 2017 order consolidating the appeals did not provide the parties the notice required under Rule 63.03 because, prior to the May 2017 order, they had no way of knowing which judge would sign the May 2017 order and had not been provided notice of which judge would preside over their hearing or trial.

The Supreme Court also made it abundantly clear that the right to remove belongs to the client, not the lawyer. The court found unpersuasive the fact that the lawyers representing OCC had filed other notices to remove the same judge in the past. In each case, they were acting on behalf of their clients, and the court emphasized that it is the right of the client, and not the lawyer, to invoke the rule.

Along those same lines, because the right to remove belongs to the client, the court held that the record contained no suggestion that granting the parties' notice to remove here would undermine judicial independence. In so doing, the court distinguished *Erickson*, noting that there, it was the same client — the State — that filed the repeated notices to remove.

So what is the scouting report? *First*, the notice to remove is a right, not something subject to the discretion of the court. *Second*, if the procedures set forth in the rule are followed, the court has to grant the request, no matter how it might feel about being removed. *Finally*, while there may be some circumstances where the right is forfeited because it is abused, they are few and far between, and the abuse likely has to lie with the client, not the lawyers. At the same time, knowing the technicalities of the rule is no substitute for making a wise decision on its use.

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