

STATE OF MINNESOTA
COUNTY OF HENNEPIN

TAX COURT
REGULAR DIVISION

OCC, LLC,

Petitioner,

**ORDER GRANTING MOTION TO
QUASH NOTICE TO REMOVE
JUDICIAL OFFICER
(amended to add counsel for petitioner)**

vs.

County of Hennepin,

Respondent.

File Nos.: 27-CV-15-07711
27-CV-16-05401
27-CV-17-05394

Filed: March 23, 2018 ¹

These consolidated matters came before The Honorable Joanne H. Turner, Judge of the Minnesota Tax Court, on the motion of respondent Hennepin County to quash the notice to remove judicial officer filed by petitioner OCC, LLC.

Thomas R. Wilhelmy and Judy S. Engel, Fredrikson & Byron, P.A., Minneapolis, Minnesota, and Eric Magnuson, Robins Kaplan, Minneapolis, Minnesota, represent petitioner OCC, LLC.

Thomas R. Pursell and Jane N.B. Holzer, Assistant Hennepin County Attorneys, represent respondent Hennepin County.

Based upon all the files, records, and proceedings herein, the court now makes the following:

¹ The court first filed its decision in this matter on February 26, 2018. On March 22, 2018 we filed a substituted decision. On March 23, 2018, we amended the order only to add additional counsel for petitioner OCC, LLC.


ORDER

The motion of respondent Hennepin County to quash the notice to remove judicial officer filed by petitioner OCC, LLC, is granted.

IT IS SO ORDERED.

BY THE COURT:




Joanne H. Turner, Judge
MINNESOTA TAX COURT

DATED: March 23, 2018

MEMORANDUM

These cases concern the value of two multi-tenant office buildings in Edina. On August 30, 2017, counsel for petitioner OCC, LLC, filed a Notice to Remove Judge Turner “from hearing any further hearing or proceedings in the above-entitled matter,” citing Minn. R. Civ. P. 63.03.² Respondent Hennepin County moves to quash the notice to remove. We grant the motion to quash.

PROCEDURAL BACKGROUND

In May 2017, the parties filed a joint statement of the case, requesting that three property tax appeals, all involving the same property, be consolidated and governed by the scheduling order filed in July 2016 in file 27-CV-15-07711.³ The consolidation request was assigned to Judge

² Notice Remove Judicial Officer (filed Aug. 30, 2017).

³ Joint Statement 3 (May 8, 2017).

Turner; the court filed an Order for Consolidation on May 11, 2017, “concur[ring] with the request” to consolidate and ordering that the consolidated case proceed under the July 2016 scheduling order governing file 15-07711.⁴

In August 2017, counsel for OCC requested a hearing date and time for a motion in limine in the consolidated case.⁵ On Monday, August 21, 2017, the tax court administrator advised counsel by e-mail that Judge Turner was available for a telephonic motion on September 25, 26, or 27.⁶ Counsel for OCC reserved Tuesday, September 26, 2017, and the court administrator confirmed the hearing date and time by return e-mail.⁷

On Wednesday, August 30, 2017, counsel for OCC filed a Notice to Remove Judge Turner “from hearing any further hearings or proceedings in the above-entitled matter,” citing Minn. R. Civ. P. 63.03.⁸ Counsel for Hennepin County objected by e-mail to Judge Turner’s removal on the basis that the notice of removal was not timely filed.⁹ Counsel for OCC responded, also by

⁴ Order Consol. 2 (filed May 11, 2017).

⁵ E-mail from Judy S. Engel to Lisa Pister (Aug. 18, 2017) (on file with the Minnesota Tax Court).

⁶ E-mail from Lisa Pister to Judy S. Engel (Aug. 21, 2017) (on file with the Minnesota Tax Court).

⁷ E-mail from Judy S. Engel to Lisa Pister (Aug. 21, 2017) (on file with the Minnesota Tax Court).

⁸ Notice Remove Judicial Officer.

⁹ E-mail from Jane Holzer to Lisa Pister (Sept. 6, 2017) (on file with the Minnesota Tax Court).

e-mail that in the absence of a motion before the court, the County's objection was not "a proper request for relief."¹⁰

On September 13, 2017, the court set a deadline for the County to bring a motion to quash OCC's notice of removal and established a briefing schedule for any such motion.¹¹ On October 16, 2017, the County filed and served a motion to quash OCC's notice to remove Judge Turner.¹² On October 30, 2017, OCC filed and served its response to the County's motion to quash.¹³

GOVERNING LAW

OCC's notice to remove Judge Turner was filed under Rule 63.03, Minn. R. Civ. P., which provides:

Any party or attorney may make and serve on the opposing party and file with the administrator a notice to remove. The notice shall be served and filed within ten days after the party receives notice of which judge or judicial officer is to preside at the trial or hearing, but not later than the commencement of the trial or hearing.

No such notice may be filed by a party or party's attorney against a judge or judicial officer who has presided at a motion or any other proceeding of which the party had notice, or who is assigned by the Chief Justice of the Minnesota Supreme Court. A judge or judicial officer who has presided at a motion or other proceeding or who is assigned by the Chief Justice of the Minnesota Supreme Court

¹⁰ E-mail from Judy S. Engel to Lisa Pister (Sept. 6, 2017) (on file with the Minnesota Tax Court).

¹¹ Order Briefing (filed Sept. 13, 2017).

¹² Notice Mot. Mot. Quash Notice Remove Judicial Officer (filed Oct. 16, 2017).

¹³ Pet'r's Responsive Mem. Regarding Resp't's Mot. Quash Notice Remove Judicial Officer Supp. Mot. *En Banc* Hearing Erie Shuffle (filed Oct. 30, 2017). OCC's response to the County's motion to quash included a motion for an "Erie shuffle." *See Erie Mining Co. v. Comm'r of Revenue*, 343 N.W.2d 261 (Minn. 1984). After further briefing, and by order filed on December 6, 2017, the court granted OCC's motion. The *Erie* transfer was completed on December 29, 2017.

may not be removed except upon an affirmative showing of prejudice on the part of the judge or judicial officer.

After a party has once disqualified a presiding judge or judicial officer as a matter of right that party may disqualify the substitute judge or judicial officer, but only by making an affirmative showing of prejudice. A showing that the judge or judicial officer might be excluded for bias from acting as a juror in the matter constitutes an affirmative showing of prejudice.

Upon the filing of a notice to remove or if the litigant makes an affirmative showing of prejudice against a substitute judge or judicial officer, the chief judge of the judicial district shall assign any other judge of any court within the district, or a judicial officer in the case of a substitute judicial officer, to hear the cause.

The Minnesota Tax Court is subject to the Minnesota Rules of Civil Procedure “where practicable.” Minn. Stat. § 271.06, subd. 7 (2016). The chief judge of the tax court “make[s] hearing assignments,” although the chief judge may delegate administrative duties to employees of the court. Minn. Stat. § 271.02 (2016).

THE PARTIES’ ARGUMENTS

The County moves to quash OCC’s notice of removal on both procedural and substantive grounds. Procedurally, the County contends that OCC’s notice of removal is untimely.¹⁴ Under Rule 63.03, a judge “who has presided at a motion or any other proceeding of which the party had notice” cannot be removed “except upon an affirmative showing of prejudice on the part of the judge.” Minn. R. Civ. P. 63.03. The County contends that Judge Turner “presided over” the parties’ joint request for consolidation and that the May 11, 2017 order granting consolidation “reflected her assignment to and exercise of control over the consolidated litigation.”¹⁵ Citing Minn. R. Civ. P. 42.01, the County argues that the May 11 order consolidating three cases “was, in fact, an act of discretion on an important issue concerning the litigation of the consolidated cases

¹⁴ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 3-5 (filed Oct. 16, 2017).

¹⁵ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 3.

on a timeline that would necessarily impact the Court's work flow as well as the litigants.' ”¹⁶ Nor, according to the County, is it significant that both parties requested consolidation, noting that the Minnesota Court of Appeals has affirmed the refusal to remove a judge who previously signed an order to which the parties had stipulated. *See Zweber v. Zweber*, 435 N.W.2d 593 (Minn. App. 1989).¹⁷ Thus, according to the County, the May 11, 2017 order granting consolidation was

¹⁶ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 3; *see id.* at 4 (calling the May 11 order “a decision which addressed the merits of a fundamental issue regarding the course of the litigation and placed the parties on notice that Judge Turner was substantively engaged in and handling the matter.”). Rule 42.01, Minn. R. Civ. P., provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Compare Sept. 6, 2017 e-mail from Judy S. Engel to Lisa Pister (characterizing the order consolidating cases as “a pure ministerial action by the then Chief Judge which was in no way connected to the substance of the case.”).

¹⁷ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 4.

In *Zweber*, the court of appeals denied a petition writ of prohibition to bar a trial judge from hearing a marital dissolution case. 435 N.W.2d at 594. The parties had stipulated to a temporary order and submitted it “to the court administrator for reference to a judge for signature.” *Id.* “The trial judge reviewed the documents and wrote to counsel, directing them to revise the submissions to include financial information supporting the award of child support and additional information of the propriety of joint physical custody.” *Id.* It was after receiving the trial judge’s correspondence that Mr. Zweber sought to remove the judge. *Id.*

According to the court of appeals, “the agreed upon submission of the stipulation and proposed order for approval by a judge constituted a motion, hearing, or proceeding within the meaning of Rule 63.03, and the right to remove the judge thus ended absolutely once the judge considered the submissions on the merits.” *Id.* at 594. The court of appeals so held even though, under the facts of the case, neither party knew the identity of the judge to whom the stipulation and order had been referred.

the first time Judge Turner “ ‘presided’ in the case,” giving OCC notice of the judicial assignment and 10 days thereafter to remove her.¹⁸

Substantively, the County argues that honoring OCC’s notice to remove Judge Turner is not practicable within the meaning of Minn. Stat § 271.06, subd. 7.¹⁹ Specifically, the County argues that it is not practicable to honor an apparent blanket policy among clients also represented by counsel for OCC to strike Judge Turner in every case in which counsel for OCC receives notice of her assignment.²⁰ The County argues that the undesirable effects of a blanket policy are magnified here by two additional facts. First, the County notes, counsel for OCC “represents a disproportionate number of property tax petitioners,” at least with respect to property located (as

¹⁸ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 4.

¹⁹ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 5.

²⁰ As we have indicated, the court filed its decision in this matter and transmitted it to the parties on February 26, 2018.

On February 28, 2018, Judge Turner received a letter from the president and the general counsel of the Fredrikson firm, asking that the February 26, 2018 order be withdrawn and reissued without its “general references” to the Fredrikson firm and “mak[ing] clear that Fredrikson & Byron does not have a practice of filing notices of removal whenever [Judge Turner] are assigned to one of [the firm’s] cases.” Feb. 28, 2018 letter from John M. Koneck and John W. Lundquist to Hon. Joanne H. Turner (on file with the Minnesota Tax Court).

On March 5, 2018, the attorney for Hennepin County responded, indicating that it “would not object to an amended order with a narrower reference to the removals, such as a reference to ‘counsel for OCC.’ ” Mar. 5, 2018 letter from Thomas F. Pursell to Hon. Joanne H. Turner (on file with the Minnesota Tax Court). Mssrs. Koneck and Lundquist responded in a March 7, 2018 letter, clarifying that neither of them “has ever represented OCC,” and their February 28 letter “was sent solely on behalf of Fredrikson & Byron P.A. and not OCC, LLC.” Mar. 7, 2018 letter from John M. Koneck and John W. Lundquist to Hon. Joanne H. Turner (on file with the Minnesota Tax Court). Mssrs. Koneck and Lundquist did not object to the County’s suggested change.

We have generally adopted the County’s suggestion, with linguistic adaptations where necessary. In addition, we have updated the list of cases in which counsel representing OCC in this matter has filed notices to remove Judge Turner.

the property at issue here is) in Edina. As of October 2017, according to the County, there were 87 active cases involving property located in Edina; in 15 of those cases, counsel for OCC also represented the petitioner.²¹

Second, “and more significantly,” according to the County, cases in which counsel representing OCC in this matter also represents the petitioner “involve disproportionately more work than those brought by other taxpayer counsel,” in that they are far more likely to go to trial.²² Specifically, according to the County, between 2012 and 2016, there were merit decisions in 37 property tax cases; the counsel representing OCC in this matter appeared in 11 of those cases.²³ By comparison, according to the County, no other firm was counsel of record in more than one such case.²⁴ In Hennepin County alone, again according to the County, between September 8, 2014, and March 20, 2017, counsel representing OCC in this matter represented the petitioners in half (7 of 14) of the cases tried.²⁵ The County summarizes its impracticability argument this way:

These measures indicate that the automatic removal of any Tax Court judge by the Fredrikson firm will require an unnecessary, disproportionate and unworkable redistribution of the Court’s property tax workload to the other two judges. Hennepin County submits that such a redistribution could diminish the efficiency and effectiveness of the property tax system, to the ultimate disadvantage of assessors and taxpayers alike. Therefore, whether or not the Court agrees with the County’s position that the notice of removal in this case—filed months after a discretionary decision by Judge Turner, and practically on the eve of the trial ready date—was untimely, the Court would be well within its discretion to find this

²¹ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 6; *see* Affidavit of Thomas F. Pursell at ¶5 (filed Oct. 16, 2017).

²² Mem. Supp. Mot. Quash Notice Remove Judicial Officer 6.

²³ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 6; Pursell Aff. ¶ 6 & Ex. 3.

²⁴ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 6; Pursell Aff. Ex. 4.

²⁵ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 6; Pursell Aff. Ex. 5.

removal to reflect a policy that would render the Rule 63 right to remove “impracticable.”²⁶

For its part, OCC contends that granting the County’s motion to quash its notice of removal has four flaws: “(i) it will disregard the plain meaning of the written requirements of Rule 63.03; (ii) it will disregard Petitioner’s constitutional rights of due process; (iii) it will disregard the clear and unambiguous provisions of the Scheduling Order; and (iv) it will disregard the guidance and direction of the Minnesota Supreme Court.”²⁷

Elaborating, OCC first contends that granting the County’s motion to quash the notice of removal “will disregard the plain meaning of the written requirements of Rule 63.03.”²⁸ Rule 63.03 requires that a notice of removal “be served and filed within ten days after the party receives notice of which judge or judicial officer is to preside at the trial or hearing, but not later than the commencement of the trial or hearing.” Minn. R. Civ. P. 63.03. OCC contends that under the plain language of the rule, “[t]he ten day period to serve and file a notice to remove does not begin to run until a party actually receives notice of which judge is to preside at the trial or hearing.”²⁹ According to OCC, it did not receive that notice until August 21, 2017, and filed its notice to remove within ten days thereafter.³⁰

²⁶ Mem. Supp. Mot. Quash Notice Remove Judicial Officer 6-7.

²⁷ Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 6 (filed Oct. 30, 2017).

²⁸ Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 6.

²⁹ Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 4.

³⁰ Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 4.

Second, OCC contends that granting the County's motion to quash "will disregard Petitioner's constitutional rights of due process."³¹ According to OCC, due process requires that the court abide by the terms of the scheduling order issued in July 2016 in file 15-07711 and made applicable to all three cases by the order for consolidation: "For Petitioner's statutory and constitutional rights of due process to have any meaning at all, Petitioner must be able to rely upon the clear and unambiguous direction from the Tax Court in its Scheduling Order," namely (according to OCC), that a judge would not be assigned to the case until *after* the order for consolidation.³²

Third, OCC contends that granting the County's motion to quash would "disregard the clear and unambiguous provisions" of the Scheduling Order, namely, that no judge would be assigned until the trial itself was scheduled.³³ Citing the scheduling order filed in the case, OCC argues that it was to receive notice from the tax court administrator of "the judge assignment and the trial date" once the trial was scheduled.³⁴ Until the tax court administrator's August 21 e-mail, OCC contends, it had not been notified "of any judge assignment, hearing or trial."³⁵ In fact, OCC argues, "[t]he Order for Consolidation advised the parties to expect such a notice of

³¹ Pet'r's Responsive Mem. Regarding Resp't's Mot. Quash Notice Remove Judicial Officer 6.

³² Pet'r's Responsive Mem. Regarding Resp't's Mot. Quash Notice Remove Judicial Officer 4-5.

³³ Pet'r's Responsive Mem. Regarding Resp't's Mot. Quash Notice Remove Judicial Officer 6.

³⁴ Pet'r's Responsive Mem. Regarding Resp't's Mot. Quash Notice Remove Judicial Officer 3.

³⁵ Pet'r's Responsive Mem. Regarding Resp't's Mot. Quash Notice Remove Judicial Officer 3.

judge assignment from the Tax Court administrator subsequent to receipt of the Order for Consolidation,”³⁶ although OCC cites nothing in the order for consolidation that so advises. OCC rejects the Order for Consolidation as notice of the judicial officer assignment, asserting that Judge Turner signed it only “as then Chief Judge of the Tax Court.”³⁷ OCC characterizes the order for consolidation as “an administrative order issued without any notice, controversy, hearing, briefing or proceeding” and as “addressing a simple and undisputed scheduling matter.”³⁸

Finally, OCC contends that granting the County’s motion to quash would “disregard the guidance and direction of the Minnesota Supreme Court.”³⁹ According to OCC, the Minnesota Supreme Court has advised that “the right to peremptorily challenge a judge is to be liberally construed to *safeguard in both fact and appearance the constitutional right* to a fair and impartial trial.”⁴⁰ OCC contends that failure to remove Judge Turner would “punish” it “for adhering and relying upon the Scheduling Order,” and would “thereby deprive [it] of its constitutional rights of

³⁶ Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 4.

³⁷ Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 4.

³⁸ Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 5.

³⁹ Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 6.

⁴⁰ Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 6 (*quoting Ellis v. Minneapolis Comm. on Civil Rights*, 295 N.W.2d 523, 524-25 (Minn. 1980) (emphasis added)).

due process in proceedings before the Tax Court.”⁴¹ OCC posits that “[t]he constitutional implications are particularly important in the context of the peremptory removal of [a] judge.”⁴²

ANALYSIS

A. **There is no constitutional right to the peremptory removal of a judge, that is, removal without cause.**

At the heart of OCC’s argument is the assertion that its constitutional rights to due process and a fair trial will be violated if Judge Turner is not removed from the case. We disagree. As the County ably explains,⁴³ the case upon which OCC relies for the proposition that there is a constitutional right to “peremptorily” remove a judge—*Ellis v. Minneapolis Commission on Civil Rights*—stands for the proposition that a litigant’s right to remove a judge upon a showing of actual prejudice or bias is absolute or conclusive, not for the proposition advanced by OCC, namely, that a litigant enjoys a constitutional right to remove a judge arbitrarily or without any cause.

Ellis was decided under an earlier version of Minn. R. Civ. P. 63.03, one that allowed for the removal of a trial judge *only* upon a showing of actual prejudice or bias:

Any party or his attorney may make and serve on the opposing party and file with the clerk *an affidavit stating that, on account of prejudice or bias on the part of the judge who is to preside at the trial or at the hearing of any motion, he has good reason to believe and does believe that he cannot have a fair trial or hearing before such judge.* The affidavit shall be served and filed not less than 10 days prior to the first day of a general term, or 5 days prior to a special term or a day fixed by notice of motion, at which the trial or hearing is to be had, or, in any district having two or more judges, within one day after it is ascertained which judge is to preside at the trial or hearing. Upon the filing of such affidavit, with proof of service, the clerk shall forthwith assign the cause to another judge of the

⁴¹ Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 5.

⁴² Pet’r’s Responsive Mem. Regarding Resp’t’s Mot. Quash Notice Remove Judicial Officer 6.

⁴³ Resp’t’s Reply Mem. Supp. Mot. Quash Notice Remove Judicial Officer 3 (filed Nov. 6, 2017).

same district, and if there be no other judge of the district who is qualified, or if there be only one judge of the district, he shall forthwith notify the chief justice of the supreme court.

Ellis v. Minneapolis Comm'n on Civil Rights, 295 N.W.2d 523, 524 (Minn. 1980) (emphasis added). It was the right to remove a trial judge specifically “on account of prejudice or bias” that the *Ellis* court characterized as “peremptory.”⁴⁴ In contrast, Rule 63.03 now allows, and has since 1991 allowed, for the removal of a trial judge both *with and without* “an affirmative showing of prejudice on the part of the judge or judicial officer.” Put another way, OCC’s constitutional argument relies on a procedural rule that has not been in effect for nearly three decades.

As the County points out, OCC “cites no authority . . . holding that refusal to honor a removal filed under the current Rule 63.03 violates due process, or has any constitutional dimension.”⁴⁵ OCC cites no authority because there is none. There is no without-cause right to remove a *federal* judge from hearing a case: federal law allows for the removal of a judge only for “personal bias or prejudice.” 28 U.S.C. § 144. Similarly, the United States Supreme Court has repeatedly held that there is “no freestanding constitutional right” to remove a potential juror without cause. *Rivera v. Illinois*, 556 U.S. 148, 157 (2009); *see also, e.g., United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (“peremptory challenges are not of federal constitutional dimension”). Rather, without-cause challenges to potential jurors are entirely “a creature of statute.” *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988). As a result, a state may deny

⁴⁴ “Peremptory” can mean both “[f]inal; absolute; conclusive; incontrovertible” and “[n]ot requiring any shown cause; arbitrary.” PEREMPTORY, Black’s Law Dictionary (10th ed. 2014). In *Ellis*, the supreme court used the word in the first sense, that is, meaning “final” or “conclusive.” *Ellis* therefore remains good law for the proposition that a litigant has an absolute right to remove for cause. Although the right, now present in Rule 63.03, to remove a judge without any showing of cause is properly characterized as “peremptory,” *Ellis* simply does not bear on the status of that right.

⁴⁵ Resp’t’s Reply Mem. Supp. Mot. Quash Notice Remove Judicial Officer 7.

peremptory challenges “altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.” *Georgia v. McCollum*, 505 U.S. 42, 57 (1992).

We therefore decline to honor, on constitutional grounds, OCC’s notice to remove Judge Turner. To the extent that a litigant has the right to remove an assigned judge without cause, that right arises only under state law. We turn, therefore, to Minnesota law.

As we have noted, Minn. R. Civ. P. 63.03 allows a party to a civil action to file, within a prescribed time period, a notice of removal without cause.⁴⁶ The tax court is subject to the rules of civil procedure only, however, “where practicable.” Minn. Stat. § 271.06, subd. 8 (2016). Whether it is “practicable” to honor a notice to remove necessarily depends upon circumstance. It is not “practicable” to honor the blanket removal of one judge on a three-judge court. Likewise, it is not “practicable” to honor every notice of removal filed in every case.

B. Honoring the blanket removal of a particular judge, whether by a law firm or by that firm’s clients, impairs the court’s independence.

As we have noted, since Judge Turner’s appointment to the tax court in December 2012, litigants represented by counsel representing OCC in this matter have filed notices to remove her in at least a dozen cases. In fact, the records of the court suggest that since the summer of 2014, counsel representing OCC in this matter has filed notices to remove Judge Turner from virtually every case in which they represented the taxpayer and as to which they were notified of her assignment.⁴⁷

⁴⁶ The without-cause of a Rule 63.03 notice to remove is clear from the text of the rule: “After . . . prejudice.” Plainly, a litigant’s removal “as a matter of right” is contrasted with removal upon “an affirmative showing of prejudice.”

⁴⁷ See, e.g., *Inland Bergen Plaza v. Cty. of Washington*, File Nos. 82-CV-15-2099 & 82-CV-15-2104; *Inland Shannon Square Shoppes LLC v. Cty. of Ramsey*, File No. 62-CV-15-2975; *Kohl’s Dep’t. Stores v. Cty. of Washington*, File No. 82-CV-11-1089; *Macy’s Retail Holdings, Inc. v. Cty. of Hennepin*, File Nos. 27-CV-13-06683 & 27-CV-14-06579; *Macy’s Retail Holdings, Inc. v. Cty. of Hennepin*, File Nos. 27-CV-15-06880 & 27-CV-16-04584; and

The Minnesota Supreme Court has rejected blanket removals of Minnesota judges as an “abuse” of Minn. R. Civ. P. 63. In *State v. Erickson*, the court confronted the Kandiyohi County Attorney’s Office’s practice of removing Judge John C. Lindstrom from “a vast majority of criminal cases . . . assigned to Judge Lindstrom.” 589 N.W.2d 481, 482 (Minn. 1999). More specifically, between January 1, 1994, and August 20, 1997, the Kandiyohi County Attorney’s Office removed Judge Lindstrom from 161 of the 254 felony and gross misdemeanor cases to which he was assigned; the Willmar City Attorney removed Judge Lindstrom in another 27 felony and gross misdemeanor cases. *Id.* at 482. Over the same time period, the County Attorney’s Office also removed Judge Lindstrom from 73 of 334 misdemeanor cases to which he was assigned; the Willmar City Attorney removed Judge Lindstrom in another 167 misdemeanor cases. *Id.* In all,

Macy’s Retail Holdings, Inc. v. Cty. of Hennepin, File Nos. 27-CV-15-06881 & 27-CV-16-04588. We honored the notice of removal in files 82-CV-11-1089, 27-CV-13-06683, 27-CV-14-06579, 27-CV-15-06880, 27-CV-16-04584, 27-CV-15-06881, and 27-CV-16-04584. File 62-CV-15-2975 was resolved before any judicial reassignment was made. A decision in judicial reassignment is pending in files 82-CV-15-2099 and 82-CV-15-2104.

Since our October 2017 order for briefing, counsel representing OCC in this matter has continued to file notices to remove Judge Turner. *See, e.g., Otsego Land LLC v. Cty. of Wright*, File Nos. 86-CV-16-2010 & 86-CV-17-1879; *Target Land Holdings, LLC v. Cty. of Scott*, File Nos. 70-CV-16-8145 & 70-CV-17-7274. On March 20, 2018, counsel representing OCC in this matter filed a notice to remove Judge Turner in *Lowes Home Centers, LLC v. Cty. of Dakota*, File No. 19HA-CV-16-944. Files 86-CV-16-2010 and 86-CV-17-1879 were resolved before any judicial reassignment was made. A decision on judicial reassignment is pending in files 70-CV-16-8145, 70-CV-17-7274, and 19HA-CV-16-944.

In January 2018, counsel representing OCC in this matter filed notices to remove Judge Turner in two cases—*Inland Edinburgh Festival LLC v. Cty. of Hennepin*, File No. 27-CV-16-3081 and *Inland Edinburgh Festival LLC v. Cty. of Hennepin*, File No. 27-CV-16-3083—claiming that its attorneys had not received notice of her assignment until January 9, 2018. Notice Remove Judicial Officer (filed Jan. 9, 2018). Judge Turner had, however, already presided over a motion in those cases. Accordingly, Judge Turner denied Inland’s notice to remove her. *See Order Denying Notice Remove Judicial Officer* (filed Jan. 10, 2018). Nevertheless, and the language of Rule 63.03 notwithstanding, counsel representing OCC in this matter “renewed” their motion to remove Judge Turner *at the conclusion of a hearing* in the case a day later. *See* Tr. 7-8 (Jan. 11, 2018).

Judge Lindstrom was removed from 188 of 254 felony and gross misdemeanor cases and from 240 of 334 misdemeanor cases over a 2-1/2 year period. *Id.* at 482-83.

The Kandiyohi County Attorney conceded that the practice of striking Judge Lindstrom arose “not because of any claimed misconduct, but in response to an adverse ruling by Judge Lindstrom.” *Id.* at 484; *id.* at 482 (“The practice resulted from the County Attorney’s Office’s dissatisfaction with Judge Lindstrom’s ruling in a juvenile criminal case, which ruling was the result of a credibility determination. . . . The issue of blanket filings arose only after Judge Lindstrom made an adverse ruling on the above juvenile case.”). To routinely strike a judge because of a ruling adverse to the party, the supreme court concluded, “sends the clear message that dissatisfaction with a judge’s rulings will result in removal of that judge from virtually all similar cases.” *Id.* at 485. That in turn, according to the court, “strikes at the very heart of judicial independence, which is so essential in a free society.” *Id.*

We conclude that the practice of routinely removing a judge of this court similarly strikes at the court’s independence. *See* Minn. Stat. § 271.01, subd. 1 (2016) (“There is hereby created a Tax Court as an independent agency of the executive branch of the government.”). Counsel’s practice of striking Judge Turner began after Judge Turner found that counsel representing OCC in this matter had, in another matter, “deliberately and not inadvertently withheld” documents from Ramsey County and this court that were relevant to the matter, responsive to the County’s discovery requests, and contrary to the opinion of the taxpayer’s expert appraiser. *J.C. Penney Properties, Inc. v. Cty. of Ramsey*, File No. 62-CV-09-6316 et al., 2014 WL 3749300, at *2-3 (Minn. T.C. July 18, 2014). Although Judge Turner denied the County’s request to dismiss the matter entirely as a sanction for counsel’s actions, *id.*, the matter was eventually resolved out-of-court.

The Fredrikson firm has not appeared here on behalf of J.C. Penney since. It was shortly after that decision that counsel representing OCC in this matter began filing notices to peremptorily strike Judge Turner. We can conclude only that counsel's practice relates directly to Judge Turner's ruling in the *J.C. Penney Properties* case and is intended to signal counsel's displeasure with that ruling.

C. It is not practicable for a court with only three judges to honor a notice of removal in every case.

Nor is it practicable for a court with only three judges to honor every notice of removal filed in every case. There may be cases in which one judge is already disqualified because of some conflict of interest. *See* Minn. Code Judicial Conduct 2.11(A) (requiring self-disqualification). If both parties file notices of removal, there may be no judge left on the court to hear the case.⁴⁸ The tax court is authorized by statute to hire a retired judge (of either the district court or the tax court) to hear the matter. *See* Minn. Stat. § 271.01, subd. 1a (2016). The court's ability to do so is constrained, however, by the availability of qualified judges and its available funds. *See id.* ("A retired judge performing this service shall receive pay and expenses in the amount and manner provided by law for judges serving on the court, less the amount of retirement pay the judge is receiving . . .").

Furthermore, honoring both parties' notices to remove could allow the parties to litigation in this court to choose the judge who will hear the case.⁴⁹ "Litigants are entitled to an unbiased

⁴⁸ Such a situation is unlikely to arise in the district courts. In smaller counties, a judge from outside the county but within the same judicial district can be assigned. Minn. R. Civ. P. 63.03 ("the chief judge of the judicial district shall assign any other judge of any court within the district"). The larger counties—Hennepin and Ramsey—are themselves judicial districts, but each has far more than three judges.

⁴⁹ The parties may collude on judicial assignment as follows. If Judge A is initially assigned, and both parties are satisfied with Judge A, they agree not to file notices to remove. If Judge A is initially assigned and the parties prefer, say, Judge C, one party files a notice to remove. If the

judge; not to a judge of their choosing.” *In re Jacobs*, 802 N.W.2d 748, 755 (Minn. 2011) (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988)). The supreme court echoed this concern in *Erickson*, noting that for a time the Kandiyohi District Court Administrator simply did not assign Judge Lindstrom to criminal cases, effectively giving the County Attorney’s Office the ability to remove both Judge Lindstrom and the judge assigned by the court administrator. 589 N.W.2d at 483.

Moreover, and as the foregoing suggests, honoring every notice of removal filed in every case may prevent the court from effectively and efficiently managing its caseload and calendar. *See id.* at 484 (“Where, as in Kandiyohi County, only three judges are generally assigned to handle the continually increasing volume of cases, the efficient utilization of judicial resources is greatly impacted by blanket filings.”). The present circumstances prove the point: counsel representing OCC in this matter has filed notices to remove Judge Turner in at least a dozen property tax valuation cases venued in Hennepin, Ramsey, and Washington Counties. Reassigning each of those cases to one of the two other judges on the court would create a serious workload imbalance unless a similar number of property tax valuation cases are transferred from each of those judge’s dockets to Judge Turner, or unless Judge Turner takes a greatly disproportionate share of appeals from orders of the Commissioner of Revenue. In addition, all of the cases in which counsel representing OCC in this matter seeks to remove Judge Turner are venued in the Twin Cities metropolitan area. Balancing workloads would likely mean assigning Judge Turner to a disproportionate number of cases venued outside of the Twin Cities.⁵⁰

matter is reassigned to Judge C, the other party does nothing. If the matter is reassigned to Judge B, the other party files its notice to remove, forcing reassignment to the parties’ preferred Judge C.

⁵⁰ OCC cites our decision in *Kimberly-Clark* as proof that notices of removal are always “practicable” in tax court proceedings. *Kimberly-Clark Corp. & Subs. v. Comm’r of Revenue*, Docket No. 8670-R, 2016 WL 234718 (Minn. T.C. Jan. 16, 2015). In *Kimberly-Clark*, we

We conclude that removing Judge Turner from this case is not practicable. We therefore grant the County's motion to quash OCC's notice of removal of Judge Turner.⁵¹ Nor is it practicable to honor each and every notice of removal filed with the court, for the reasons we have explained. Although we expect to honor notices to remove as a matter of course, to preserve the court's ability to manage its docket we must reserve the discretion to reject a notice of removal without cause based upon the court's calendar and judicial workloads.

J.H.T.

overruled the Commissioner's objection to our *en banc* consideration of the parties' cross-motions for summary judgment, Kimberly-Clark having previously filed a notice to remove Judge Turner from hearing the case. *Id.* at *1-2. It was in that context that we observed in *dicta*: "Like district court matters, most tax court cases are heard and decided by a single judge. In such instances, Rule 63.03 notices of removal are 'practicable' in tax court proceedings because—upon the filing of such a notice—a case can simply be re-assigned to one of the court's remaining two judges." *Id.* at *2. The circumstances of *Kimberly-Clark* have no bearing on the situation presented by this case and the other property tax disputes in which counsel representing OCC in this matter has repeatedly attempted to remove Judge Turner.

⁵¹ Because we conclude that honoring OCC's notice of removal is not practicable, we need not and do not reach the question of whether OCC's notice to remove Judge Turner was timely filed. Again, OCC argues that its notice to remove is timely, even after Judge Turner's order granting consolidation, because OCC did not know the stipulated motion would be assigned to Judge Turner. We note, however, that in *Zweber*, the court of appeals denied a petition writ of prohibition to bar a trial judge from hearing a marital dissolution case. 435 N.W.2d at 594. The parties had stipulated to a temporary order and submitted it "to the court administrator for reference to a judge for signature." *Id.* "The trial judge reviewed the documents and wrote to counsel, directing them to revise the submissions to include financial information supporting the award of child support and additional information of the propriety of joint physical custody." *Id.* It was after receiving the trial judge's correspondence that Mr. Zweber sought to remove the judge. *Id.*

According to the court of appeals, "the agreed upon submission of the stipulation and proposed order for approval by a judge constituted a motion, hearing, or proceeding within the meaning of Rule 63.03, and the right to remove the judge thus ended absolutely once the judge considered the submissions on the merits." *Id.* at 594. The court of appeals so held even though, under the facts of the case, neither party initially knew the identity of the judge to whom the stipulation and order had been referred.