

ORIGINAL

MINUTES MONTANA SUPREME COURT PUBLIC MEETING

2015, July 21, 1:15 p.m.
Attorney's Lounge, 4th floor
Joseph P. Mazurek Justice Building
215 North Sanders, Helena

FILED

SEP 15 2015

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Chief Justice McGrath called the meeting to order at 1:15 p.m. In attendance were Justices Baker, Cotter, McKinnon, Rice, Shea, and Wheat.

Also present were the following: Shaun Thompson, Chief Disciplinary Counsel for the Office of Disciplinary Counsel; Jon Moog, Deputy Disciplinary Counsel for the Office of Disciplinary Counsel; Ward "Mick" Taleff, Chairman of the Commission on Practice; Jim Jacobsen, Member Commission on Practice; Shelly Smith, Office Administrator for the Commission on Practice; Georgia Lovelady, Administrative Assistant for the Commission on Practice; Attorney Tim Strauch; Attorney Michael McMahon; Chris Wethern, Staff Attorney for the Montana Supreme Court; Kevin Downs, Law Clerk for the Montana Supreme Court; and Melanie D'Isidoro, intern at the Montana Supreme Court.

Item 1: Minutes for the June 9, 2015 Public Meeting

- The Court unanimously approved the Minutes of the June 9, 2015 Public Meeting.

Item 2: AF 06-0628 Amendments to Rules for Lawyer Disciplinary Enforcement

On February 26, 2015, ODC filed a petition to amend the Rules for Lawyer Disciplinary Enforcement. Public comment was invited and received. The court convened to address the proposed amendments and the public comment.

Chief Justice McGrath stated that the Court had not circulated a proposed order addressing the rule amendments. Chief Justice McGrath, the Justices, and the individuals present addressed the proposed amendments in turn:

- Rule 7: Jurisdiction
 - **Amendment Summary:**
 - Any lawyer who is a member of the State Bar of Montana is subject to disciplinary jurisdiction of the Court.
 - **Comments/Concerns:**
 - **Attorney Jon Beal's proposed modification of Rule 7(A) unnecessary:** Following up on Justice Baker's question, ODC representative Shaun Thompson stated that Beal's proposed modification of Rule 7(A) stating

“including a lawyer on disability/inactive status,” was unnecessary because such lawyers already are subject to the rules.

- **Disposition:**
 - The Court passed on ruling on the proposed amendment.
- Rule 11: Limitations on Time to Bring Formal Complaint
 - **Amendment Summary:**
 - A formal complaint must be filed within six years; tolling.
 - **Comments/Concerns:**
 - None
 - **Disposition:**
 - The Court passed on ruling on the proposed amendment.
- Rule 12: Adjudicatory Panel Filing, Service and Formal Case Procedures
 - **Amendment Summary:**
 - Filing a complaint; Service.
 - **Comments/Concerns:**
 - **(In)consistency with M. R. Civ. P. Rule 4:** Justice Baker inquired as to whether Rule 12(B) regarding completion of service through certified mail was inconsistent with M. R. Civ. P. Rule 4. Thompson explained that Rule 12(B) allows service to be complete upon mailing “to the last address that the lawyer provided to the State Bar of Montana,” which addresses situations when the ODC encounters difficulty contacting an attorney.
 - **Disposition:**
 - The Court passed on ruling on the proposed amendment.
- **Rule 14: Request for Reconsideration Review by Complainant of a Review Panel’s Decision by the Supreme Court**
 - **Amendment Summary:**
 - Allowing ODC to seek review of a Panel decision refusing ODC’s request for dismissal of a grievance or its request to file a formal complaint.
 - **Comments/Concerns** (focused primarily on proposed Rule 14(B)):
 - **Confidentiality:** Michael McMahon raised concerns regarding requests for review by ODC contemplated in section (B) and the confidentiality of responding attorneys who have yet to be involved in the process. ODC representatives Thompson and Moog stated that the file does not necessarily become a public matter if review is sought, because the ODC gives the file to Shelly Smith, who then provides it to the Court for review as is currently done when a complainant requests this Court to review a dismissal. Additionally, Thompson and Moog stated that the attorney’s response would already be included within the file that is delivered to the Court.

- **Process:** Justice Baker also raised procedural concerns with section (B) noting that the attorney has not yet been afforded an opportunity to participate. Justice Baker explained that the role of the Court is confined to cases where both parties have previously responded to a tribunal. Justice Baker also questioned whether the process needs to be consistent with the process afforded to the responding attorney. Following up on Justice Cotter's question, ODC representatives indicated that this section would not be implicated on a frequent basis. Moog also explained that these situations typically involve a question of law rather than a question of fact, so the Court would be the appropriate venue.
- **(In)consistency with Existing Process (for complainant):** The ODC representatives stated that the proposed process replicates the process already afforded to a complainant who requests a review. Justices Wheat and Baker questioned whether the process needs to be consistent with the process afforded to the responding attorney – noting that it is the public whose rights are protected by the disciplinary rules.
- **Confusing Wording:** Members of the Court agreed that some of the provision language would require further clarification.
- **Whether the Court's Review Would Constitute an Advisory Opinion:** McMahon questioned whether this Court's review would constitute an advisory opinion. Moog indicated that the Court would determine whether there was probable cause to file formal charges.
- **The Court's Role:** Justice Baker asked whether it was the Court's role to determine whether there is probable cause to file formal charges.
- **Potential burden on the Court v. Potential burden on the Commission:** Justice Cotter questioned whether a new reviewing procedure would place an additional burden on the Commission. Mick Taleff stated that a burden on the commission would be better than a burden on the Court.
- **Initial Proposed Solutions:**
 - Striking and/or altering section (B).
 - Allow the review to first be presented to the entire Commission on Practice.
- **Disposition:**
 - The Court passed on ruling on the proposed amendment.

- Rule 16: Review by the Supreme Court **After Contested Case Hearing**
 - **Amendment Summary:**
 - Any party, including ODC, can file objections to the Commission's findings of fact, conclusions of law and recommendations.
 - **Comments/Concerns:**
 - **Allows the ODC the benefit of hindsight:** Tim Strauch expressed the concern that allowing ODC a second bite at the apple would prompt repeated attempts to prosecute by ODC. He also stated that this

amendment places the responding attorney in a difficult position. Thompson indicated that, like the Model Rules, the proposed rule allows the Court to review ODC's objections – emphasizing the decision in *In re Engel*, 2008 MT 215, 344 Mont. 219, 194 F.3d 613, in which the Court sought the opinion of ODC with respect to the Commission's recommended discipline.

- **Standard of Review:** The issue was raised as to what would be the appropriate standard of review.
- **Disposition:**
 - The Court passed on ruling on the proposed amendment.
- Rule 18: Service
 - **Amendment Summary:**
 - Abrogated
 - **Comments/Concerns:**
 - None
 - **Disposition:**
 - The Court passed on ruling on the proposed amendment.
- Rule 19(B): Investigatory Subpoenas
 - **Amendment Summary:**
 - Allow the ODC to issue a subpoena before a formal complaint has been filed. The attorney subject to the investigation need not be given notice.
 - **Comments/Concerns:**
 - **Current Process:** Thompson explained the current subpoena process, which does not permit the ODC to subpoena information until a formal complaint is filed. The ODC is often confronted with non-cooperative attorneys, in which the ODC's only option is to bring a Rule 24 (discovery request). Thompson noted, for example, that bank statements are critical for investigation purposes. Chief Justice McGrath stated that a refusal to cooperate provides grounds for getting an investigative subpoena from the commission.
 - **Attorney and/or Client interest:** It was suggested that the language of this provision be amended to provide that an investigative subpoena under this rule could be issued only in accordance with the provisions of § 46-4-301, MCA. It was also suggested that the rule be amended to provide that the subpoena may be issued only when the lawyer has refused to cooperate. Mick Taleff suggested that more than a simple allegation of failure to cooperate should be required before such a subpoena would issue, and said he would review such requests with a critical eye. Strauch urged the Court to consider the interests of the public, including other clients of the attorney under investigation, whose private finances and personal information would

- be exposed to ODC through the production of the attorney's trust account and other banking statements.
- **Level of Review:** Strauch and McMahon indicated that there needs to be a defined level of review for purposes of screening potentially sensitive attorney and/or client information such as bank accounts.
- **Disposition:**
 - The Court passed on ruling on the proposed amendment.
- Rule 22(I): Dismissed Complaints
 - **Amendment Summary:**
 - Whereas previously any complaint that had been dismissed or upon which no disciplinary action was taken could be expunged from Commission and ODC records, the proposed amendment would allow expungement only for informal complaints that have been dismissed.
 - **Comments/Concerns:**
 - Attorney David Harman filed an objection, requesting that the rule remain as is, and that the existing practice of allowing dismissed formal complaints to be expunged should continue.
 - **Disposition:**
 - The Court passed on ruling on the proposed amendment.
- Rule 25: Conduct Constituting Threat of Harm to Clients **or the Public**
 - **Amendment Summary:**
 - Allow ODC to file a petition with the Court to suspend an attorney pending proceedings.
 - **Comments/Concerns:**
 - Amendment allows the ODC to expedite the process, particularly in emergency situations.
 - **Disposition:**
 - The Court passed on ruling on the proposed amendment.
- Rule 27: Reciprocal Discipline and Reciprocal Disability/Inactive Status
 - **Amendment Summary:**
 - Allows ODC to impose reciprocal orders with respect to lawyers who have been transferred to disability/inactive status in other jurisdictions.
 - **Comments/Concerns:**
 - Attorneys Strauch and McMahon seek an amendment to Rule 27, so as to provide the respondent attorney who is the subject of a potential order of reciprocal discipline the right to a hearing before the Commission on request, as a matter of due process. Justice Baker noted that Rule 27(D) already provides a level of due process by permitting the attorney to establish factors that the attorney contends should relieve him or her from

the reciprocal discipline sought, and that the Court had required a hearing under that rule in at least one recent case.

- **Disposition:**
 - The Court passed on ruling on the proposed amendment.
- Rule 28: Disability/Inactive Status
 - **Amendment Summary:**
 - Transfers to disability/inactive status; Petition for active status after one year (or such other time period specified in the order)
 - **Comments/Concerns:**
 - ODC proposes to revise the rule to comport with the ABA Model Rule, so as to allow an attorney to assert an inability to assist in his or her defense due to some condition, but require the attorney to demonstrate that the assertion of inability to assist in one's defense is valid. If the assertion proves to be invalid, the disciplinary proceedings would continue and the lawyer would be placed on interim suspension. In the alternative, ODC proposes to strengthen the requirements for reinstatement to active status, requiring the attorney to wait one year instead of 6 months before being allowed to petition for reinstatement to active status. Thompson maintains that the attorney should be required to prove by clear and convincing evidence that the disability/inactive status is warranted.
 - Several of the justices expressed concern with the imposition of a one-year waiting period before the attorney could petition for reinstatement to active status. The observation was made that any specific time limitation would be arbitrary, and that the burden still remains on the attorney to demonstrate entitlement to active status, regardless of the timeframe.
 - **Disposition:**
 - The Court passed on ruling on the proposed amendment.
- Rule 29: Reinstate Following Discipline
 - **Amendment Summary:** Reinstate after discipline.
 - **Comments/Concerns:**
 - None
 - **Disposition:**
 - The Court passed on ruling on the proposed amendment.

The Court unanimously agreed to schedule another meeting to further discuss the proposed amendments. Justice Baker offered to coordinate with the interested parties to clarify some of the proposed amendment language. No action was taken on any of the above rules.

Item 3: Judicial Standard Commission Rules Update

Chief Justice McGrath stated that the proposed revised rules for the Judicial Standards Commission have been circulated and he will sign an order in the next few days directing the clerk to file them unless he hears otherwise from a member of the Court as he does not believe the Commission's rules require Court approval.

The meeting was adjourned at 2:39 p.m.

Duly Submitted,
Kevin Downs
Law Clerk