

ORIGINAL

FILED

MONTANA SUPREME COURT PUBLIC MEETING

Tuesday, September 15, 2015, 1:00 p.m.

Joseph P. Mazurek Justice Building

215 North Sanders, Helena

Attorney's Lounge, 4th floor

DEC 15 2015

Ed Smith

MERK OF THE SUPREME COURT
STATE OF MONTANA

Chief Justice McGrath called the meeting to order at 1:00 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; Dan McLean, Commission on Practice; Gene Huntington, Commission on Practice; Attorney Michael McMahon; Chris Wethern, Staff Attorney for the Montana Supreme Court; and Colin Phelps, Law Clerk for the Montana Supreme Court.

Item 1: Minutes for the July 21, 2015 Public Meeting

- The Court unanimously approved the Minutes for the July 21, 2015 Public Meeting.

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

- Chief Justice McGrath gave a synopsis of the process thus far on the proposed rule changes. Chief Justice McGrath recommended the Court go through rule by rule to discuss the proposed changes. Justice Baker offered to point out where she suggests additional changes to the proposed rules in the draft distributed prior to the meeting.
- Rule 7: Jurisdiction
 - **Comments/Concerns:**
 - Justice Baker indicated she only cleaned up the wording in Subsection C.
- Rule 11: Limitations on Time to Bring Formal Complaint
 - No discussion
- Rule 12: Filing, Service and Formal Case Procedures
 - No discussion
- Rule 14: Request for Review of a Review Panel's Decision by the Supreme Court
 - **Comments/Concerns**
 - Justice Baker began discussion by indicating her proposed revisions were based on suggestions to reconcile the disputed points of view from the last Public Meeting.
 - Justice McKinnon indicated she had a few questions and concerns with Subsection C dealing with the Court's discretionary review. Justice McKinnon felt the public was getting two bites at the apple under the proposed rule and felt

that the old rule at least included another level of review. Justice McKinnon felt it should go to the Commission for review.

- Chief Justice McGrath agreed with Justice McKinnon.
- Justices Rice and Baker discussed the purpose and substance of the proposed changes. Justice Baker noted that her purpose was to take out Sub B and incorporate Sub C into what is now Sub A. Justice Rice commented on the review of the Panel's disposition by the Court instead of the Commission.
- Mr. McMahon offered an explanation of how the process will work, that if a complaint is filed against an attorney and there is no real basis for the complaint, the ODC just sends the attorney a letter. At that juncture, the complaining party can seek the Court's review and it would be at the Court's discretion.
- Justice Rice made a motion to adopt the changes to Rule 14 with an additional amendment—"in the event the ODC's complaint is dismissed by the Review Panel ODC can take it to the full Commission."
- Justice McKinnon seconded the motion.
- Justices Wheat and Shea then asked questions regarding the Court's review of the proceedings under the Rule.
- Mr. Thompson and Mr. McLean then offered their take on the proposed rule and Mr. McMahon offered additional comments on Justice Rice's motion
- Chief Justice McGrath and Justices Baker, Shea, Rice, and Wheat further discussed the proposed rule changes. The discussion centered on the review process called for by the rule.
- Justice Baker then called for the question
- Chief Justice McGrath put Justice Rice's Motion to a vote.
- Justices Shea, McKinnon voted aye.
- Chief Justice McGrath and Justices Baker, Wheat, Rice and Cotter voted nay.
- Justice Baker then moved to adopt Rule 14 as proposed except striking "Review Discretionary" in the caption of what is now Sub C.
- Justice Cotter seconded.
- Chief Justice McGrath called the vote, which was unanimous to approve.

- Rule 16: Review by the Supreme Court After Contested Case Hearing

- **Comments/Concerns**

- Justice Baker pointed out that there were no substantive changes to the rule and that the highlighted language was meant to fix awkward wording.
 - Justice McKinnon had some questions and concerns about the phrase "objections not filed."
 - Justice Baker and Mr. Thompson addressed Justice McKinnon's questions.

- Rule 18: Service

- **Comments/Concerns**

- Chief Justice McGrath indicated the rule was abrogated.

- Rule 19: Oaths, Subpoena Power, and Discovery

- **Comments/Concerns**

- Justice Cotter began the discussion by pointing out that the language in Subsections B and B(1) was inconsistent. Justice Baker agreed.
- Mr. Thompson then noted that Sub B as proposed by ODC contained the first paragraph but that B(1) was proposed by Mr. McMahon. He stated that was why there was both civil and criminal language in the subsections.
- Justice McKinnon stated that the Rule deals with gathering information that is essentially private. Therefore, she asserted that it should track the language from § 46-4-301, MCA, dealing with the issuance of subpoenas under the rules of criminal procedure. She argued that the statute imposes a duty on the prosecutor to investigate and spoke of the administration of justice, which she felt was missing from the proposed Rule.
- Justice Shea remarked that Sub B(2) was just the good cause requirement.
- Justice McKinnon responded that there needed to be a corresponding duty and that “good cause” is not an appropriate standard.
- Justice Wheat then asked Justice McKinnon what standard she would suggest.
- Justice McKinnon responded that she liked the “compelling state interest” standard from Sub 3.
- Chief Justice McGrath recommended the Court pass on Rule 19 for the day.
- Mr Thompson then noted that the idea of having an investigative subpoena is not novel and that it is found in the model rules. He stated that he had real problems with how the suggested changes to the Rule are drafted because you have to deal both with Rule 45 of civil procedure and the rules of criminal procedure. He thought Rule 45 provides adequate protection for private information. He further noted that ODC would have a hard time getting probable cause for getting a lawyer’s bank accounts. Until ODC gets those records, he contended, the ODC may not be able to show that the lawyer committed a rule violation.
- Justice McKinnon then stated that in the instance the Rule contemplates, it is more of a criminal proceeding than a civil proceeding.
- Justice Baker then addressed Mr. Thompson and pointed out that he had proposed that the lawyer need not get notice of the subpoena, which is different from Rule 45. Justice Baker stated that she was trying to craft the rule in such a way that the lawyer would not have to have advance notice, but since they would not get notice, she tried to add more process to the Rule. She stated some showing of cause had to be built into the rule since the attorney would not get notice of the subpoena.
- Mr. Thompson replied that the language not providing notice had been struck out. He reiterated that he felt Rule 45 would be adequate to protect the lawyer. He also pointed out that the language regarding a compelling state interest is interesting because ODC is not a state agency. That language, he noted, was adopted in *State v. Nelson* saying that in criminal situations a subpoena requires a compelling state interest.
- Mr. McMahon respectfully disagreed with Mr. Thompson. He explained that most of the time when there is an investigation into one of his clients, he and his clients will respond to ODC. He stated that lawyers need to cooperate in that process under the Rules. He, however, could not imagine a bigger intrusion upon anybody than ODC walking through the door and saying “I have this subpoena, give me all your records.” He argued that there had to be some equal footing. He therefore thought the criminal statute language was perfect, not Rule 45—“There has to be some oversight over ODC’s activities.”

- Justice McKinnon then asked what Mr. McMahon would propose for Sub 2. Mr. McMahon responded that he did not have a problem with the lesser standard for Sub 2 but liked the higher standard in Sub 3.
- Justice Baker then noted that she had added the suggested language “if the lawyer has failed to cooperate” as a precondition to getting a subpoena.
- Mr. Thompson pointed out that the Rule attempted to address the problem of lawyers not cooperating. He further stated that if ODC cannot get the information from the lawyer, ODC may not have enough information to pursue the case.
- Justice Wheat replied to Mr. McMahon that he may have clients who follow the process when he is representing them, but that the problem is when there are unrepresented lawyers who refuse to follow the process.
- Justice Baker then suggested that Sub 2 could be revised to say that a subpoena may be issued upon an affidavit of ODC “showing good cause to believe that a violation of the Rules of Professional Conduct or these Rules has been committed; and the information relative to the commission of that violation is in the possession of the person or institution to whom the subpoena is directed.” She further suggested that the compelling state interest and probable cause and all the language in Sub 3 could be removed.
- Justice Rice noted that that would essentially be a probable cause standard.
- Justice Wheat then provided his understanding of the rule— “[Mr. Thompson] would go to the Chair and say here is what is happening in this case, the lawyer will not even get back to us, and we need to find out because there may be clients that have been stolen from and it is going to be difficult to help them.”
- Justice McKinnon stated she would change good cause to reason to suspect.
- Justice Wheat jokingly stated that they should go with a reasonable suspicion standard.
- Justice Baker responded to Justice McKinnon that the Court’s case law says good cause is already sufficient reason.
- Chief Justice McGrath again recommended passing on Rule 19 and everyone agreed.

- Rule 22: Dismissed Complaints
 - No Discussion
- Rule 25: Conduct Constituting Threat of Harm to Clients or the Public
 - No Discussion
- Rule 27: Reciprocal Discipline and Reciprocal Disability/Inactive Status
 - No Discussion
- Rule 28: Disability/Inactive Status
 - **Comments/Concerns:**
 - Justice Baker indicated that she proposed to change the wording under Subsection F due to discussion at the last Public Meeting. Justice Baker proposed the wording under F read “6 months or such other time period specified in the order of transfer.” Justice Baker reasoned that this change would provide discretion regarding the time period. Justice Baker also indicated that (F)(3) was added to express that it is the lawyer’s burden to show that the lawyer did in fact suffer from a condition that prevented the lawyer from assisting in his or her defense.

- Rule 29: Reinstatement Following Discipline
 - No Discussion
- Justice Baker asked if it would be appropriate to move for the adoption of all the Rules except Rule 19. Chief Justice McGrath indicated that it would be appropriate. Justice Baker so moved. Justice Cotter seconded the motion and it passed unanimously.

Item 3: AF 11-0765 Appointments to Access to Justice Commission

- **Order Summary:**
 - Reappoint Matthew Dale, Justice Beth Baker, and Melanie Reynolds to the Commission for a three-year term ending September 30, 2018.
 - Appoint for terms ending September 30, 2018: Hon. Greg Pinski, District Judge for the Eighth Judicial District; Paul F. Kirgis, Dean of the Alexander Blewett III, School of Law; and attorney Edward F. Bartlett.
 - Appoint Rep. Kimberly Dudik, to fill the term of Rep. Chuck Hunter, ending September 20, 2017
 - Strike the Clerk of a Court of Limited Jurisdiction from the Commission's membership
- Justice Baker began discussion by informing the Court that the Order would strike the Clerk of a Court of Limited Jurisdiction from the Commission's membership. Justice Baker stated the reason for getting rid of the position was that they were having a hard time keeping the position filled. Justice Baker further informed the Court that the proposed appointees consented to being members of the Commission.
- Chief Justice McGrath called for questions or comments. Upon hearing none, Chief Justice McGrath circulated the Order for signatures.

Item 4: AF 06-0090 Appointments to Commission on Practice

- **Order Summary:**
 - The terms of three of the non-attorney members—Patricia DeVries, Gene Huntington, and Lois Menzies—expired on August 31, 2015. All three members were reappointed to four-year terms ending August 31, 2019.
- Chief Justice McGrath gave a summary of the Order and circulated it for signatures.

Item 5: AF 06-0651 Appointments to Commission of Continuing Legal Education

- **Order Summary:**
 - The terms of three members—Darcy Crum, Steven Howard, and Mary Moe—expire on September 30, 2015. All three members were reappointed to terms expiring on September 30, 2018.

- Chief Justice McGrath gave a summary of the Order and also pointed out that Senator Moe will have served 20 years at the end of the new term. Chief Justice McGrath circulated the Order for signatures.

The meeting was adjourned at 2:04 p.m.

Duly Submitted,
Colin Phelps
Law Clerk