

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. AF-0600628

FILED

MAY 20 2015

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

In the Matter of Proposed)
Amendments to the Rules for) COMMENTS OF
Lawyer Disciplinary Enforcement) David W. Harman
Order of March 17, 2015)

I am an Active Member of the State Bar of Montana. Thank you for the opportunity to comment on the proposed amendments to the Montana Disciplinary Rules. While my comments are primarily directed to the Expungement provisions of Rule 22(I) there are a couple of other comments I would like to add.

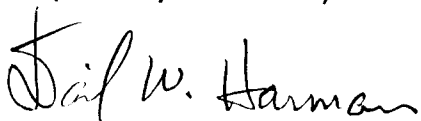
1. EXPUNGEMENT. When ODC petitioned for its proposed amendments, it stated it commented on the proposed changes. It did not comment on its proposed change to Rule 22(I) regarding expungement. The proposed change states only informal complaints which have been dismissed are subject to expungement; meaning among other things, it never happened, and never existed. Formal complaints, proceedings and associated documents would remain of public record.

ODC should be required to comment on its proposed change and not simply let it slide by. The present Rule 22(I) should remain as is. To allow the record to exist when the charge has been dismissed is simply unfair to the attorney charged with the misconduct. A permanent record could be made on the whim of a Review Committee or Prosecutor by simply determining whether the case is to be charged on a formal or informal basis. Even if the formal charge is dismissed, whether or not there is a hearing, there is a cloud surrounding the attorney. This could become important in a job application or an application to be admitted to practice in another state. Upon investigation and a call to ODC the comment can always be made: "well he did it, but we just couldn't prove it by clear and convincing evidence". While there is no control over any media publicity surrounding a formal disciplinary prosecution, an expungement from the public records will almost always effectively eliminate the potential for adverse consequences. It is urged Rule 22(I) not be amended.

2. PROSPECTIVE APPLICATION. Any Amendment to the rules should be applied prospectively and that should be so stated so as not to allow room for an argument for retrospective application. In other words, unless there is ongoing conduct that bridges the old and new rules, the rules in effect at the time of the conduct complained of should govern.

2. DISCIPLINED ATTORNEYS LIST. It is timely this matter be discussed. There is a list of disciplined attorneys available to the public. Some of those attorneys have otherwise served the profession very well for years, regardless of an incident of poor judgment or misconduct. Quite a number of those attorneys are dead. It is difficult to imagine a public purpose served to continue to list them. Concerning those living attorneys and those who are no longer attorneys who are on the list, given time those names should be deleted. The State Bar, in determining eligibility for Emeritus status requires fifteen (15) years of discipline free conduct. It would seem that after fifteen (15) years of discipline free conduct it is fair an attorney's name should be removed from the list. This could be accomplished by way of an attorney submitting an affidavit in support of removal, In the case of a deceased attorney a copy of the death certificate could be supplied. An amendment to the rules to allow for such removal from the list should be considered along with the other proposed amendments.

Respectfully submitted,


David W. Harman