

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF CONSIDERING)
 PROPOSED CHANGES TO RULES FOR) **NOTICE OF**
 LAWYER DISCIPLINARY ENFORCEMENT) **PUBLIC MEETING**

For the purpose of considering proposed changes to the Rules For Lawyer Disciplinary Enforcement, this Court will consider the attached Proposed Rules submitted by Mike Meloy, Montana Press Association, on Tuesday, April 20, 2010 at 9:30 a.m. in the Attorney’s Lounge, 4th Floor, Justice Building, 215 North Sanders, Helena, Montana.

Notice of this public meeting is being given by posting on the Montana Courts Website at courts.mt.gov—and by delivering a copy of this Notice to the Office of the Clerk of this Court.

Additionally, a copy of this notice shall be served on the following:

Mike Meloy, meloylaw@qwestoffice.net; Shaun Thompson, srthompson@montanaodc.org; John Warren, warren@qwestoffice.net; Chris Manos, cmanos@montanabar.org; John Barrows, mtnews@mtnewspapers.com; Mike Dennison, mike.dennison@lee.net; Betsy Brandborg, betsyb@montanabar.org; Dave Patterson, DavidJ.Patterson@umontana.edu; Shauna Ryan, Administrative Assistant to the Commission on Practice; each Clerk of the District Court in the State of Montana; each District Judge for the State of Montana; the Montana Attorney General; the Director of the Montana Trial Lawyers; the Director of the Montana Defense Trial Lawyers, the University of Montana School of Law; and the State Law Librarian.

DATED this 17th day of March, 2010.

/S/ MIKE McGRATH

MONTANA RULES FOR LAWYER DISCIPLINARY ENFORCEMENT

Rule 4 – Adjudicatory Panels: Composition; Powers & Duties; Quorum

A. Composition. The Chairperson of the Commission shall appoint one or more Adjudicatory Panels of nine members each, at least three of whom shall be nonlawyers; shall designate a Chairperson for each Adjudicatory Panel; and shall realign the membership of Adjudicatory Panels from time to time.

B. Powers and Duties. Adjudicatory Panels shall, in accordance with the specific procedures and provisions of these Rules:

(1) Hold hearings on formal complaints and complaints for Interim suspension filed by Disciplinary Counsel;

(2) After hearing, make findings of fact, conclusions of law and recommendations to the Court for discipline or other disposition of formal complaints and complaints for interim suspension.

(3) Hear and determine preliminary and procedural matters incidental to the exercise of its powers and duties.

~~(4) Administer private admonitions pursuant to Rule 13.~~

~~(5)~~ (4) Hear and determine requests for reconsideration pursuant to Rule 14.

~~(6)~~ (5) Administer oaths, provide for discovery and exercise its subpoena power pursuant to Rule 19.

~~(7)~~ (6) Authorize the stay of a disciplinary proceeding for good cause shown pursuant to Rule 28.

~~(8)~~ (7) Hold show cause hearings when a lawyer has refused to respond or cooperate with the Office of Disciplinary Counsel, a Review Panel or an Adjudicatory Panel pursuant to Rule 24.

~~(9)~~ (8) Administer discipline by consent pursuant to Rule 26.

~~(10)~~ (9) Conduct proceedings relative to disability and transfer to inactive status pursuant to Rule 28.

~~(11)~~ (10) Hold hearings on petitions for reinstatement and make recommendations for their disposition to the Supreme Court pursuant to Rule 29.

~~(12)~~ (11) Hold hearings and make recommendations to the Court concerning assessment of the costs of proceedings, investigations and audits pursuant to Rule 9.

C. Quorum. Five members of an Adjudicatory Panel, at least three of whom are lawyers, shall constitute a quorum, however, any act of the Adjudicatory Panel shall require the vote of three members.

Comment: Since private admonitions would be eliminated under this proposed rule change, this subsection is deleted.

Rule 5 – Office of Disciplinary Counsel

A. Appointment. The Court shall appoint a lawyer to serve as Chief Disciplinary Counsel and may appoint such Deputy Disciplinary Counsels as they deem necessary. Disciplinary Counsel shall not engage in private practice; shall be admitted to practice in Montana at the time of appointment or within a reasonable time thereafter as determined by the Court; and shall maintain offices in Helena, Montana, in facilities designated by the Court.

B. Powers and Duties. Disciplinary Counsel shall perform all prosecutorial functions and shall have the following powers and duties:

(1) Supervise Office of Disciplinary Counsel (Office) staff in performing central intake functions;

(2) Evaluate all information coming to the attention of the Office to determine whether it is within the disciplinary jurisdiction of the Court;

(3) Investigate all information coming to the attention of the Office which, if true, would be grounds for discipline or transfer to disability/inactive status;

(4) Investigate all facts pertaining to petitions for reinstatement or readmission;

(5) ~~Dismiss the information which, if true, would not constitute misconduct or incapacity; or recommend discipline.~~ **Dismiss or issue a corrective action or letter of caution; or recommend probation, a stay, filing of formal charges, transfer to disability inactive status, or reinstatement or readmission with respect to each matter brought to the attention of the Office;**

(6) Prosecute before Review Panels, Adjudicatory Panels and the Court, discipline, interim suspension, reinstatement and readmission proceedings, and proceedings for transfer to or from disability/inactive status;

(7) Employ and supervise Office staff needed for the performance of prosecutorial functions and, when circumstances necessitate their use, appoint and supervise special investigators and volunteer special counsel;

(8) Notify promptly the complainant and the lawyer that an investigation is to be initiated by Disciplinary Counsel or, where Disciplinary Counsel dismisses, provide a concise written statement of the facts and reasons a matter has been dismissed;

(9) Develop written guidelines for determining which matters fail to allege facts that would constitute grounds for disciplinary action;

(10) Request the Clerk of the Supreme Court to notify each jurisdiction in which a lawyer is admitted of a transfer to or from disability/inactive status, reinstatement, readmission or any ~~public~~ discipline imposed in this state;

(11) Whenever costs have been assessed against a lawyer by the Supreme Court, assemble and serve on the lawyer an itemized list of the costs of proceedings, investigations and audits;

(12) Seek reciprocal discipline when informed of any public discipline imposed in any other jurisdiction;

(13) Forward a certified copy of the judgment of conviction to the disciplinary office in each jurisdiction in which a lawyer is admitted when the lawyer is convicted of a serious crime (as hereinafter defined) in this state;

(14) Maintain permanent records of discipline and disability matters and compile statistics to aid in the administration of the system;

(15) Prepare an annual budget for the Office and submit it to the Board of Trustees of the State Bar of Montana for review;

(16) Make reasonable and necessary expenditures pursuant to the reviewed budget to perform the duties of the Office;

(17) Supervise and direct Office staff and operations;

(18) Prepare and submit to the Court recommendations concerning the annual assessment of Bar members; and

(19) Make recommendations to the Court about the lawyer regulation system.

C. Prohibited Activities. Disciplinary Counsel shall not have authority to render advisory opinions, either orally or in writing, or to impose any form of discipline on a lawyer.

Comment: Since private admonitions would be eliminated under this proposed rule change, this language is deleted. The new language is inserted to allow Disciplinary Counsel to dismiss matters or issue corrective actions or letters of caution as provided by Rule 10.

Rule 9 – Discipline and Sanctions

A. Forms of Discipline. Discipline may take one or more of the following forms:

(1) Disbarment. “Disbarment” means the unconditional termination of any privilege to practice law in this State and, when applied to any attorney not admitted to practice law in this State, means the unconditional exclusion from the admission to or the exercise of any privilege to practice law in this State.

(2) Suspension from the practice of law for a definite period of time or for an indefinite period of time with a fixed minimum term. “Suspension” means the temporary or indefinite termination of the privilege to practice law in this State and, when applied to any attorney not admitted to practice law in this State, means the temporary or indefinite exclusion from the admission to or the exercise of any privilege to practice law in this State.

(3) Public censure.

~~(4) Private admonition.~~

~~(5)~~ (4) Probation.

~~(6)~~ (5) Requirement of restitution to persons financially injured.

~~(7)~~ (6) Reimbursement to the Lawyers' Fund for Client Protection.

~~(8)~~ (7) Assessment of the cost of proceedings, investigations and audits.

Whenever costs of proceedings are assessed by the Supreme Court as part of the discipline imposed upon a lawyer, the Disciplinary Counsel shall assemble and serve upon the lawyer an itemized list of those costs. The lawyer shall then have ten days

thereafter in which to file written objections and, if so desired, request a hearing before an Adjudicatory Panel on whether the amount of such costs is reasonable and necessary. An Adjudicatory Panel shall thereafter recommend an amount of costs to be imposed, and shall file its recommendation, along with any objections thereto, with the Supreme Court, which shall then issue an appropriate order assessing costs.

~~(9)(8)~~ Interim suspension pending final determination of discipline.

Comment: It appeared to be the consensus of the judicial members of the working committee, that when Disciplinary Counsel determined probable cause existed to believe the lawyer engaged in misconduct which warranted discipline, all proceedings after that point should be made public. There would no longer be a need to engage in “private admonitions.” Only those proceedings in which Disciplinary Council determined that an infraction occurred, but no discipline was warranted, would remain confidential. In these latter cases Disciplinary Counsel would be authorized to issue a corrective action plan and/or letter of caution that further misconduct may result in disciplinary proceedings. In the event that Disciplinary Counsel issues a corrective action or letter of caution, this shall not be considered disciplinary action.

B. Discipline Criteria. The following factors shall be considered in determining discipline to be recommended or imposed:

- (1) The gravity and nature of the duty violated, including whether the duty is owed to a client, to the public, to the legal system or to the profession;
- (2) The lawyer's mental state;
- (3) The actual or potential injury caused by the lawyer's misconduct; ~~and~~
- (4) The existence of aggravating or mitigating factors, and
- (5) The existence of prior offenses.

Comment: In order to guide, to some extent, the exercise of discretion by Disciplinary Counsel as to whether discipline was warranted, a slightly more detailed set of criteria is appropriate. The additional language is drawn, in part, from the ABA Model Rules. Recognition of the importance of considering discipline when the duty violated is to the “public,” will permit the ODC to determine that a violation of a public duty might merit discipline, thus triggering an open proceeding.

C. Probation. A lawyer, against whom disciplinary proceedings are pending, may be placed on probation by the Supreme Court, or, with lawyer's concurrence, by an Adjudicatory Panel. The probation shall be for such time and upon such terms and conditions as are determined appropriate in the case. Discipline may be imposed for violation of any of the terms and conditions of such probation, including satisfactory completion of a diversion or treatment program.

D. Procedure for Discipline for Willful Contempt of Court and Failure to Purge the Contempt. Upon receipt of a certified copy of an order of contempt that has become final, the Supreme Court may, in its discretion, issue an order to show cause why the lawyer's license to practice law should not be suspended or other discipline should not be imposed. The lawyer against whom such an order has been entered in district court shall not have the right or opportunity to re-litigate the merits of the contempt order, the right to hearing and due process having been afforded him or her in the district court. In the alternative, the Supreme Court may direct an Adjudicatory Panel to issue the order to show cause or direct the lawyer to appear before the Adjudicatory Panel. In that event, the Adjudicatory Panel shall make a written recommendation to the Supreme Court regarding suspension of the lawyer's license or other discipline. An attorney who has been purged of the contempt order may be reinstated to practice law. Prior to reinstatement, the lawyer shall be required to pay the costs of any proceedings before the Commission on Practice.

RULE 10 – Office of Disciplinary Counsel Procedures

A. Central Intake and Evaluation. The Office of Disciplinary Counsel shall perform central intake functions including, but not limited to the following:

- (1) Receive information and complaints regarding lawyers' misconduct from members of the public;
- (2) Make appropriate referrals regarding information and complaints while assuring that any member of the public who wishes to make a complaint against a lawyer is able to do so;
- (3) Send to the complainant a packet of written materials containing forms, instructions and information about Montana's lawyer disciplinary process; and
- (4) Receive written complaints on the forms provided.

B. Preliminary Review and Processing of Informal Complaints. The Office of Disciplinary Counsel shall conduct a preliminary review of each written complaint received by the Office and determine whether the complaint involves a matter that is within the disciplinary jurisdiction of the Court.

C. Investigation.

- (1) All investigations shall be conducted by or under the authority and direction of Disciplinary Counsel. Upon such investigation as Disciplinary Counsel deems appropriate, he or she may:
 - (a)(1) Send the complaint to the lawyer against whom the complaint is made;
 - (2) Send the lawyer's response to the complainant and, if appropriate, request his or her reply to the lawyer's response;
 - (3) Prepare an intake summary; and
 - (4) Conduct an investigation and prepare an investigative report; or
- (b) With or without some or all of the process set forth in Rule 10C(1)(a), dismiss the complaint without prejudice, where the complaint does not appear to be

within the disciplinary jurisdiction of the Court, or the facts do not appear to warrant disciplinary action.

(2) If, upon consideration of the criteria listed in Rule 9(B), Disciplinary Counsel has probable cause to believe that an infraction occurred, but that disciplinary action is not warranted, the case may be dismissed. In such case, the dismissal document may be accompanied by a plan for corrective action and a warning that further infractions may result in a formal complaint. Any such action by Disciplinary Counsel is not disciplinary action.

Comment: This new section is designed to clarify that ODC can utilize a “private” proceeding in those cases where an infraction has occurred but more can be achieved through corrective action than discipline. Since the behavior in question is not serious enough to merit discipline, the demands of privacy justify confidential treatment.

(3) Notice to Respondent. Disciplinary Counsel shall not recommend a disposition other than dismissal or stay without first notifying the respondent in writing of the substance of the matter and affording respondent an opportunity to be heard. Notice to respondent at respondent’s last known address is sufficient.

Comment: this new section is to guarantee that a respondent shall have the right to due process in the event that any form of discipline may be rendered. The language is taken from the ABA Model Rules.

~~(2)~~ (4) Notice of Disposition. In the event of a dismissal, Disciplinary Counsel shall give written notice to the complainant and to the respondent of the dismissal, stating the reasons for the action taken, and advising the complainant of the right to request review of the dismissal, or to file an amended complaint.

~~(3)~~ (5) Request for Review. The complainant may file a written request for review of Disciplinary Counsel’s dismissal within 30 days of the notice of disposition pursuant to Rule 10C(2). Disciplinary Counsel’s dismissal shall be reviewed by a Review Panel upon the record before it. The Review Panel may approve, disapprove, or modify Disciplinary Counsel’s disposition.

D. Review Panel Proceeding. Disciplinary Counsel shall:

- (1) Prepare recommendations to a Review Panel;
- (2) Present the intake summary, investigative report and recommendations to a Review Panel, orally supplementing them at the request of a Review Panel; and
- (3) Conduct further investigation at the request of a Review Panel.

E. Adjudicatory Panel Proceeding. Disciplinary Counsel shall:

- (1) Draft and prosecute formal complaints and complaints proposing interim suspension before an Adjudicatory Panel;
- (2) Recommend discipline or other disposition of a case to an Adjudicatory Panel;
- (3) Conduct any discovery pursuant to Rule 19;
- (4) At the request of an Adjudicatory Panel, investigate all allegations in a petition for reinstatement and present relevant evidence at an Adjudicatory Panel hearing on the petition; and
- (5) Advocate findings of fact and conclusions of law resulting from Adjudicatory Panel proceedings.

Rule 11 – Review Panel Procedures

A Review Panel shall:

- A. (1) Review the complaint, the response from the lawyer against whom the complaint was made, and any reply from the complainant, together with other relevant documents and Disciplinary Counsel's intake summary, investigative report and recommendations;
- (2) Determine any preliminary and procedural matters;
- (3) Refer complaint to Disciplinary Counsel for any further investigation;
- (4) Dismiss the complaint when the facts do not appear to warrant disciplinary action and notify the complainant and lawyer of the Review Panel's action;
- (5) Request Disciplinary Counsel to prepare and file a formal complaint when the facts appear to warrant disciplinary action; and
- (6) Request Disciplinary Counsel to prepare and file a complaint proposing interim suspension in an appropriate case; and
- ~~(7) When undisputed facts prove an ethical violation by clear and convincing evidence, recommend to an Adjudicatory Panel imposition of a private admonition in appropriate cases.~~

Comment: Since private admonitions would be eliminated under this proposed rule change, this section is deleted.

B. In the event that Disciplinary Counsel is present at any review panel in a proceeding, the respondent shall be given notice and the right also to be present. The respondent, however, shall have no right to be heard or participate in the review panel proceeding.

Comment: Under the current system, Disciplinary Counsel is permitted to participate in the review panel process, and to be present during the deliberative process of the review panel. This new section would permit a respondent the same opportunity to be present, but not participate in the review panel.

Rule 13-Private Admonitions

~~At any time before initiation of formal disciplinary proceedings, an Adjudicatory Panel, in its discretion, may give a private admonition to the lawyer in the name of the Supreme Court, either orally or in writing, with or without imposition of costs of proceedings, and may require the lawyer to appear personally before an Adjudicatory Panel to receive the admonition. Thereupon, the matter shall be deemed terminated except that the Commission shall maintain a record of such admonition which record may be considered by Adjudicatory Panels and Review Panels in determining discipline to be recommended or imposed in any subsequent disciplinary proceeding involving the lawyer. Private admonitions are not appealable.~~

Comment: Since private admonitions would be eliminated under this proposed rule change, this section is deleted.

RULE 20 – Access to Disciplinary Information

A. Confidentiality. All disciplinary proceedings which are prior in time to the ~~filing of a formal complaint with the Clerk of the Supreme Court~~ determination of Disciplinary Counsel that probable cause exists to warrant discipline shall be confidential, except that the pendency, subject matter, and status of an investigation may be disclosed by Disciplinary Counsel if:

- (1) The respondent has waived confidentiality;
- (2) The proceeding is based upon allegations that include either the conviction of a crime or reciprocal discipline;
- (3) The proceeding is based upon allegations that have become generally known to the public; or
- (4) There is a need to notify another person or organization, including the Lawyers Fund for Client Protection Board or the Commission on Character and Fitness, in order to protect the public, the administration of justice, or the legal profession.

Upon the filing of a formal complaint, the Commission's entire file on the matter shall be subject to discovery.

B. Public Proceedings. Upon the determination of Disciplinary Counsel that probable cause exists to believe that misconduct warranting discipline occurred or the filing of a formal complaint with the Clerk of the Supreme Court in a disciplinary matter, or upon the filing with the Clerk of the Supreme Court of a petition for reinstatement, the proceedings before the Commission thereafter shall be public except for:

- (1) Deliberations and minutes of the Commission: and

(2) Information or proceedings with respect to which an Adjudicatory Panel or Supreme Court has issued a protective order.

C. Violation. Violation by any person of any confidential information under these rules shall be punishable as a contempt of the Supreme Court.

D. Duty of Participants. All participants in a proceeding under these rules shall conduct themselves so as to maintain the confidentiality mandated by this rule.

E. Admissibility in Other Proceedings. The conclusions, opinions and recommendations of Disciplinary Counsel or any investigator or special counsel acting on behalf of the Office Disciplinary Counsel while acting in those capacities are not relevant or admissible for any purpose in any quasi judicial or judicial forum, exclusive of the Commission on Practice and the Montana Supreme Court in a disciplinary action.

Comment: These amendments clarify that all complaints in which a determination has been made by ODC that probable cause exists with respect to an alleged violation and disciplinary action is appropriate, that the proceedings will become public.

Rule 21 – Dissemination of Disciplinary Information

Notice of Discipline Imposed. The Clerk of the Supreme Court shall cause copies of orders and notices of transfer to disability/inactive status, public censure, suspension, disbarment, and reinstatement to be given to the Clerks of all of the District Courts of the State of Montana, all of the District Judges of the State of Montana, the Clerk of the Federal District Court for the District of Montana, the Clerk of the Circuit Court of Appeals of the Ninth Circuit, the Chairperson of the Commission, and the Executive Director of the State Bar of Montana, or as the Supreme Court otherwise may direct

Rule 26 – Discipline by Consent

A. Adjudicatory Panel Approval of Tendered Admission. A lawyer concerning whom an investigation is being conducted because of allegations of misconduct, or against whom formal disciplinary proceedings have been filed may tender a conditional admission to the complaint or to a particular count thereof in exchange for a stated form of discipline. The tendered admission shall be submitted to an Adjudicatory Panel. An Adjudicatory Panel may refer the tendered admission to the Disciplinary Counsel for recommendations. The Adjudicatory Panel may either approve or reject the tendered admission. The Adjudicatory Panel, with the lawyer's consent, may hold a ~~private~~ hearing for the purpose of obtaining information to aid the Adjudicatory Panel in determining whether to approve or reject the tendered admission. If the tendered admission is approved by the Adjudicatory Panel, ~~such approval shall be final if the stated form of discipline is private admonition, with or without imposition of costs of the proceeding; but, in all other instances the tendered~~

admission shall be subject to approval or rejection by the Supreme Court. If the stated form of discipline is rejected by either the Adjudicatory Panel or the Supreme Court, the admission shall be deemed withdrawn and cannot be used against the lawyer in any subsequent proceedings.

B. Affidavit of Consent. If the stated form of discipline is approved, the lawyer shall present to the Adjudicatory Panel an affidavit stating his or her consent to the discipline and that:

- (1) The lawyer's consent is freely and voluntarily tendered, and that the lawyer is not being subjected to coercion or duress, and that the lawyer is fully aware of the implications of submitting the consent;
- (2) The lawyer is aware that there is presently pending an investigation into, or proceeding involving, allegations that there exists grounds for discipline, the nature of which the lawyer shall specifically set forth;
- (3) The lawyer acknowledges that the material facts so alleged are true or the lawyer submits his or her consent because he or she knows that if charges predicated upon the matters under investigation were filed, or if the pending proceeding were prosecuted, he or she could not successfully defend himself or herself.

The final order of discipline shall be predicated upon the complaint, if any, the conditional admission, the affidavit, and such other information and evidence to which the Disciplinary Counsel and the lawyer may have stipulated, or which may have been elicited at a ~~private~~ hearing referred to in Rule 26A.

C. Order of Discipline. ~~If the discipline by consent is a private admonition by the Adjudicatory Panel, the Adjudicatory Panel shall enter the order.~~ In all other instances in which the proposed discipline has been approved, the Supreme Court shall enter the order. The order of discipline by consent shall be filed with the Clerk of the Supreme Court, and a copy thereof shall be served upon the lawyer, the lawyer's counsel, the Commission, Disciplinary Counsel and the complainant.

~~**D. Confidentiality.** All tendered admission proceedings prior to entry of a consent discipline order shall be confidential and subject to the provisions of Rule 20 of these Rules.~~

Comment: These amendments retain the process of obtaining consent admissions, but eliminate the provisions of the former rule that close proceedings involving tendered admissions made before a formal complaint is filed or involving private admonitions.