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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. AF 09-0688

IN RE PETITION OF THE
STATE BAR OF MONTANA
FOR REVISION OF THE
MONTANA RULES OF
PROFESSIONAL CONDUCT

FILED

JUN 05 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

**COMMENT ON "PETITION IN SUPPORT OF REVISION OF THE
MONTANA RULES OF PROFESSIONAL CONDUCT"**

An Original Proceeding

APPEARANCE:

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APPEARING FOR THE PURPOSE
OF MAKING PUBLIC COMMENT

COMMENT

The following constitutes my public comment on the “Petition in Support of Revision of the Montana Rules of Professional Conduct” (Petition), filed in the Supreme Court on March 7, 2019. Pursuant to the Court’s Order, also of March 7, 2019, this comment is filed within 90 days of the Petition. I make this comment based on my own personal beliefs and solely in my capacity as an active member of the Montana Bar.

Generally, I would like to express support for the effort to update the Rules and bring them into closer alignment with the American Bar Association’s Model Rules. I believe the proposed Rules in the Petition are a great improvement in many ways. In addition to my general support for the changes suggested by the Petition, I have two specific comments and/or suggestions for additional changes to the Rules, beyond those suggested by the Petition.

First, because of some special challenges faced by subordinate lawyers in Montana (who are often new or less-experienced lawyers), I propose specific amendments to Rule 5.1 and 5.2. Second, although I do not have a specific amendment to propose, I encourage the Court to consider how the Rules might be amended to further support female lawyers and lawyers of a religious minority.

I. ADDITIONAL PROPOSED AMENDMENT TO RULES 5.1 AND 5.2

Rule 5.1 deals with the “Responsibility of Partners, Managers and Supervisory Lawyers” to those lawyers who are subordinate to them. On page 21 of Attachment B of the Petition, the Montana Bar indicates that Montana’s Rule 5.1 is unique, differing from the ABA Model Rule by holding supervisory lawyers to a higher standard. This difference is found in Rule 5.1(c)(1), where Montana inserts the phrase “or ignores” into the Model Rule’s statement of when a supervisory lawyer can be held accountable for another lawyer’s violation of the Rules.

While Montana’s higher standard in Rule 5.1 is preferable to that of the Model Rule, I do not believe that it goes far enough, and therefore I proposed the following additional amendment to Rule 5.1(b):

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct and shall not encourage or order any other lawyer to act in violation of the Rules of Professional Conduct, or act in a way that the subordinate lawyer believes to be in violation of the Rules of Professional Conduct.
- (c) A lawyer within a firm shall be responsible for another lawyer in the firm’s violation of the Rules of Professional Conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies or ignores the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Additionally, Montana's Rule 5.2 addresses the "Responsibilities of a Subordinate Lawyer." Although not addressed in Attachment B to the Petition, Montana's Rule 5.2 is identical to the ABA's Model Rule 5.2. I propose the following additional amendments to Rule 5.2:

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if the lawyer acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty.
- (c) A subordinate lawyer is not responsible for violations of the Rules of Professional Conduct committed by a supervisory lawyer, as long as the subordinate lawyer made reasonable attempts to notify a supervisory lawyer of the potential violation.

Both Rule 5.1 and 5.2 must be considered in the context of a subordinate lawyer's obligations under Rule 8.3. Under Rule 8.3, a subordinate lawyer (or any lawyer) "shall inform" the Bar if that lawyer "*knows* that another lawyer has committed a violation... that raises a *substantial question* as to that lawyer's *honesty, trustworthiness or fitness*" (8.3(a), emphasis added). In my reading of Rules 5.1, 5.2, and 8.3, a subordinate lawyer must therefore do what she is told in an "arguable question of professional duty" (5.2(b)) and does not report anything

to the Bar unless she is certain that the supervisory lawyer's conduct raises substantial questions about "honesty, trustworthiness or fitness." This seems like a license for supervising lawyers to do, or order subordinate lawyers to do, ethically questionable things, without the subordinate lawyer having much recourse.

I would like subordinate lawyers to be a mechanism for changing ethically questionable practices, and so I would like to arm them with more—either more ability to resist questionable practices or more protection from situations they may not have a lot of power to change. Supervisory lawyers are uniquely positioned to set the standards of practice within their firms or practice groups, and the best of these (with whom I have had the privilege of working) mold an atmosphere where ethical conduct is taught, exemplified, promoted, and valued. However, subordinate lawyers—who are often younger or less experienced—can sometimes feel trapped in an established dynamic that does not comport with what they might otherwise practice. Often, quitting a job is not a practical or financial option for these subordinate lawyers, nor is refusing an order from a supervisor—even if it raises ethical red flags.

Some guidance from the Rules on the responsibilities of subordinate lawyers in these difficult situations would be appreciated. The two additional amendments I propose above are one suggestion for such guidance.

II. FURTHER AMENDMENT TO SUPPORT FEMALE LAWYERS AND LAWYERS OF A RELIGIOUS MINORITY

The history of proposed amendments to Rule 8.4(g) indicate that there are tremendous difficulties in amending the Rules where gender and religion are concerned. Difficulties aside, I still believe that the Rules could do more to encourage lawyers who face particular challenges in Montana. As I can only speak to those groups of which I am a member, I will raise the concern that there are times where the Rules do not protect or promote as much as they could female lawyers as a minority. Additionally, as the Rules (both Montana's Rules and the ABA Model Rules) are based historically on Judeo-Christian ethical norms, lawyers of other religious and cultural backgrounds may find that their personal and professional ethics collide. This can create even greater difficulties for lawyers who already face an uphill battle. For these reasons, I invite the Court to consider how the Rules might be amended to better shield and encourage lawyers in various minority groups.

Respectfully submitted this 5th day of June, 2019.

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