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Chief Justice Michael McGrath
Justice Jim Rice
Justice Patricia Cotter
Justice W. William Leaphart
Justice Brian Morris
Justice James C. Nelson
Justice Michael E. Wheat
Justice Building, Room 414
215 North Sanders
P.O. Box 203001
Helena MT 59620-3001

Dear Justices:

Re: Proposed Lawyer Disciplinary Rule Amendments

These comments are submitted on behalf of the *Billings Gazette*, the Montana Newspaper Association and me concerning the proposed revisions to the Rules for Lawyer Disciplinary Enforcement.

From the perspective of one who has actively practiced in the realm of public access to government since Article II, Section 9 of the Montana Constitution was adopted, the proposed revisions contain good news and bad news.

TENDERED ADMISSIONS.

The Good News. The confidential tendered admission process at the heart of the *D'Alton* case has been partially eliminated. Under the new rule, tendered admissions can no longer be made during the confidential investigatory process. Rule 26 would restrict the use of tendered admissions to cases in which formal disciplinary proceedings have been filed. Rule 26D provides that an order of discipline entered by the Court upon a tendered admission is public along with the admission and affidavit of consent.

The Bad News. On the other hand, the combined changes to Rules 13 and 20 permit Adjudicatory Panels to impose private discipline in all cases, including those in which the lawyer makes a tendered admission and then when Panel enters the order of discipline, the discipline and the affidavit of consent may be kept secret. While these

secret admonitions are only supposed to be imposed in cases of minor misconduct, there is no effective way for the public to scrutinize the actions of the Panel in these cases. As a practical matter, then, the disciplinary process will remain closed to the public at the whim of the Panel.

PRE-COMPLAINT DIVERSION.

The Good News. The proposed changes to Rules 5 and 10 authorize the ODC to divert attorneys from the formal process when the circumstances of the case (presumably in cases of minor misconduct when there is little or no injury to the public and little chance of repetition) merit a "corrective action" letter. The entire process is confidential and withheld from public scrutiny.

This revision was proposed by the Court's working group as an alternative to private admonitions. While the group was concerned about vesting too much discretion in the ODC to dispose of cases by a corrective action letter, it seemed a worthy tradeoff. The ODC could take care of minor cases privately and private admonitions rendered by Adjudicatory Panels and Court would be eliminated.

The Bad News. With the addition of the new changes proposed in Rule 13, however, there would be two kinds of private admonitions: one by corrective action letter from the ODC and the second issued by Adjudicatory Panels, even after the filing of a formal complaint. In short, the working group did not receive its *quid pro quo*. While the Court would propose to vest ODC with the authority to privately dispose of minor cases, private admonitions have still been retained by Rule 13.

Proponents of the new Rule 13 will argue that it is limited to "cases of minor misconduct, when there is little or no injury to the public, the legal system or the profession, and when there is little likelihood of repetition." Moreover, they will say, the public has a right to challenge the decision by filing a request for review by the Court.

This procedural avenue is patently deficient. There is no public notice requirement which precedes a closed adjudicatory hearing or issuance of a private admonition. There is no compulsory duty imposed on the Panel to give any reasons justifying the closing of the hearing. There are no standards by which closing a hearing or imposing private discipline may be measured. And, most significantly, the public will simply not know what the attorney was claimed to have done and will thereby be powerless to test the Panel decision before the Court.

At bottom, then, the Court proposes to adopt two avenues of private lawyer discipline when there is presently only one. And, the public challenge opportunity is procedurally ineffective. The net result of the changes, if adopted, is likely to be that the public will be shut out of more lawyer disciplinary information than was the case under the old rule.

THE CONSTITUTIONAL ISSUES.

The underlying principles followed by the working group were three-fold. First, the Court and its proxies, ODC and COP, are public bodies within the meaning of Article II, Section 9 of the Constitution. Second, all lawyers, public and private are officers of the court. They are vested with the public trust in all aspects of their practice of law. As such, they can have no expectation of privacy with respect to actions which violate the Court's rules of professional conduct. Third, under the well-settled jurisprudence of this Court, the public has a right to know about these transgressions under Article II, Section 9.

Article II, Section 10 of the Constitution preserves the right of privacy in Montana. However, when it comes to competition between the rights of Montana citizens to access private information held by its public bodies, the balancing test is set forth in Article II, Section 9. That test permits a public body to withhold access to information only when the demands of individual privacy clearly exceed the merits of public disclosure. This Court has ruled on numerous occasions that when a person vested with the public trust violates that trust, the information concerning the violation must be made public. This is so for school teachers, cops, fire fighters and it must be so for attorneys.

Any rule which authorizes an Adjudicatory Panel to close a hearing or issue a private admonition in a case where an officer of the court has violated the Supreme Court's Rules of Professional Conduct, runs afoul of Article II, Section 9.

Moreover, authorizing Adjudicatory Panels to keep hearings closed or discipline in secret will necessarily propagate public mistrust of the entire lawyer disciplinary process. Indeed, the addition of the language in Rule 13 retaining private hearings and admonitions is wrongheaded from a public confidence perspective and violates the right-to-know mandates of the Montana Constitution.

THE REMEDY.

The Court is respectfully requested and urged to repeal the Rule on private admonitions in favor of retaining the changes authorizing the ODC to handle minor infractions by corrective action letter.

If the Court is not so inclined, the provisions of Rule 13 must be modified to assure public notice of the Panel's intentions to close meetings or issue private admonitions. The Panel should be required to issue findings which apply this Court's balancing jurisprudence and which justify the closure or the private admonition in sufficient detail so the public may meaningfully participate in a challenge to the Panel's decision. The standard should be written in the rule so it is clear to the Adjudicatory Panel that hearing closures or private admonitions can only be implemented when privacy interests *clearly* outweigh the merits of public disclosure. Again, it is hard to

reconcile recognition of privacy rights for an attorney who has breached the public trust by failing to follow this Court's rules governing professional conduct.

Sincerely,

PETER MICHAEL MELOY

PMM/dmr

cc: Pat Bellinghausen
John Barrows, MNA