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FILED

05/15/2020

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 06-0628

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 06-0628

In Re Revisions to the Montana Rules for Lawyer Disciplinary Enforcement

Petition

Comes now the Commission on Practice of the Montana Supreme Court and petitions this Court to amend the Montana Rules for Lawyer Disciplinary Enforcement as set forth hereafter. In support of this Petition, the Commission on Practice represents:

1. Article VII, § 2(3) of the Montana Constitution vests in the Montana Supreme Court the power and authority to make rules for the conduct of members of the bar.
2. This Court has adopted rules and procedures for a disciplinary process in accordance with its authority under the Montana Constitution.
3. By its Order dated September 21, 2000, this Court adopted changes to the Montana Rules for Lawyer Disciplinary Enforcement then in effect.
4. By a subsequent Order dated December 11, 2001, the Montana Supreme Court created the Office of Disciplinary Counsel, adopted structural changes to the Commission on Practice, and adopted certain changes to Montana's system of disciplining lawyers.

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5. By an Order dated September 21, 2000, this Court adopted changes to the Montana Rules for Lawyer Disciplinary Enforcement.

6. On September 20, 2002, this Court issued its ruling in *In re Creation of Office of Discipline Counsel*, 2001 MT 257, 307 M 210, 53 P3d 861 (2001), implementing additional changes to the disciplinary process in Montana. In its ruling, this Court expressly stated amendments to the Montana Rules for Lawyer Disciplinary Enforcement will be necessary and further Orders refining and clarifying the disciplinary process will be likely.

7. The Montana Rules for Lawyer Disciplinary Enforcement have been amended on April 2, 2013, October 13, 2015, and January 1, 2016 to continue necessary refinement and clarification of the disciplinary process.

8. The Commission on Practice believes further refinement and clarification of the process is appropriate and in the best interest of the Court, the Commission, the Office of Disciplinary Counsel, members of the Montana State Bar and the public.

9. In presenting this Petition and in recommending the changes to the Montana Rules for Lawyer Disciplinary Enforcement, the Commission on Practice has collaborated with the Office of Disciplinary Counsel, several members of the State Bar who regularly appear before the Commission, and Professor Jordan Gross of the University of Montana Alexander Blewett III School of Law.

Accordingly, the Commission on Practice petitions the Montana Supreme Court to consider amendment of the Montana Rules for Lawyer Disciplinary Enforcement as set forth in the "clean" and the redlined and stricken out versions attached hereto as Exhibits 1 and 2, to solicit comment from the members of the bar and the public, and to issue such orders and to hold such hearings as this Court deems appropriate. To assist those considering these proposed amendments, the Commission also submits herewith its explanatory commentary.

Respectfully submitted this 14th day of May, 2020.

Commission on Practice of the Supreme Court of Montana



Ward E. "Mick" Taleri, Chairperson

COMMENTS REGARDING PROPOSED REVISIONS TO THE MRLDE

Rule 1. The Rules currently use terms that can cause confusion. They referring to the initial report of a claimed ethical violation as a "complaint" and the filing by the Office of Disciplinary Counsel as the "formal Complaint" or "formal complaint". The person originating the initial report is referred to as the "complainant" or the "grievant." Throughout the MRLDE, the proposed changes are intended to consistently refer to the initial report of a claimed ethical violation as the "grievance", the reporting person as the "grievant" and the charging pleading filed with the Montana Supreme Court as the "Complaint". Additionally, the proposed change to this Rule is consistent with the role of the Commission's Review Panels to approve the filing of a Complaint. Similar changes to other Rules consistent with this change in terminology are proposed.

Rule 2. The proposed change to the paragraph heading more fully describes the scope of the Rule. Other proposed changes permit the Executive Secretary to be a non-lawyer member of the Commission and to clarify notice requirements. It was also felt that operating within budgetary limitations imposed by the Montana Supreme Court is not appropriately a rule, whether structural or otherwise, but is a consequence of the Supreme Court's oversight.

Rule 3. The proposed changes involve both style and substance. As for style, they reflect the change in terminology referred to in the Comment to Rule 1. Substantively, they are consistent with other Rules and certain proposed changes. Most significant is the reintroduction of the concept of private admonitions for minor infractions of ethical rules where recurrence is not likely and there has been little or no harm to the client, the public or the profession. Under the proposed change, a request for a private admonition must be initiated by the Office of Disciplinary Counsel and must be approved by a Review Panel, which will deliver the private admonition if approved. Once a Complaint is filed, the option for a private admonition is not available.

The proposed changes also make it clear that the deliberations of a Review Panel are confidential and closed but provide a means by which additional information can be provided by the Office of Disciplinary Counsel before deliberation occurs and establish that a refusal to allow a Complaint to be filed will be based on reasons disclosed to the ODC and the involved attorney. At present, if a request to file a Complaint is refused neither the ODC nor the attorney who is the subject of the grievance has any idea why, leading to confusion and the ability to address the grounds on which the Review Panel acted.

Rule 4. The proposed changes continue the change in terminology and make it clear that admonitions given by an Adjudicatory Panel are public. Subsection B(12) is stricken because only Review Panels authorize the filing of a Complaint by the ODC. The changes also consolidate the powers and duties of an Adjudicatory Panel in one Rule rather than placement within several Rules as is presently the case.

Rule 5. The proposed changes reflect the change in terminology and include language consistent with providing the ODC with the procedural tool of a private admonition prior to the filing of a Complaint.

Rule 7. The proposed changes are based on the ABA Standards for Imposing Lawyer Sanctions and clarify that attorneys who have been suspended, disbarred or are no longer practicing are subject to the Supreme Court's jurisdiction for conduct that occurred while they were practicing. Other changes are consistent with formatting in the Rules.

Rule 8. The proposed change recognizes the Commission in the exercise of its authority has the power of contempt.

Rule 9. The proposed changes reflect a realignment in which the forms of diversion (letter of caution and private admonition), discipline and sanctions are addressed in the same rule and are more thoroughly defined. The changes also set out the criteria to be considered for each and provide aggravating and mitigating factors. The factors are generally in alignment with the Model Rules.

Rule 10. The proposed changes reflect the change in terminology and the procedure for a private admonition, as well as provide for standing of the ODC to appear before other courts, such as the U.S. District Court for the District of Montana.

Rule 11. The proposed changes clarify language considered confusing about the tolling of time to file a grievance and creates a 10-year rule of repose.

Rule 12. The proposed changes make the time for responding to a Complaint consistent with Rule 12 of the Montana Rules of Civil Procedure and limits the ability to include certain motions in the Answer that are inapplicable to proceedings before the Commission. The proposed changes also require the Commission to hold a hearing on the appropriate form of discipline to impose or recommend, even in the event of a default and/or non-appearance by an attorney.

Rule 13. The proposed changes to other rules contain the recommended change regarding private admonitions. The remaining substantive portion of this Rule, which is the authority of an Adjudicatory Panel to deliver public admonitions, has been transferred to Rule 4.

Rule 14. The proposed changes reflect the change in terminology and provide that the ODC, rather than the Commission, notify a grievant of a dismissal by either the ODC or a Review Panel. The Commission has no contact with a grievant until, if at all, a hearing is held. It is felt more appropriate that the notice be issued by the ODC.

Rule 15. The change proposed allows a Commission member who may be a witness to cooperate with the ODC and the respondent attorney without violating the rule against ex parte contacts.

Rule 17. The proposed changes are largely a matter of form and to clarify the privileges and immunities attendant to participants in the disciplinary process.

Rule 19. The proposed changes are designed to clarify and limit who may issue a subpoena, to require service on the opposing party at the time a subpoena is returned, and to make clear the

Commission has the power of contempt to enforce subpoenas issued by it. On limited occasions a respondent attorney has "shopped" for a commissioner to issue a subpoena after another Commissioner has declined to do so. The proposed changes prevent such tactics and will provide consistency in the issuance of subpoenas.

Rule 20. The proposed changes reflect the change in terminology and make clear that an approved Rule 26 Conditional Admission accepted by an Adjudicatory Panel with the authority to impose the discipline is public information.

Rule 21. The proposed change is consistent with the concept that a public admonition is public information to be disseminated.

Rule 22. The proposed changes reflect the change in terminology, to make clear that a record is made only of public hearings, and provide that any member of the public, not just the respondent attorney, has the right to obtain a copy of the transcript on payment of the cost.

Rule 23. The proposed changes clarify that a pending appeal to the Montana Supreme Court or to another court, such as a federal court, or that a motion for a new trial is pending, will not delay the disciplinary process.

Rule 24. The proposed changes reflect the change in terminology, clarify that the Commission's authority derives from the Montana Supreme Court and clarify notice to the ODC as well as the respondent attorney of a show cause hearing. The current language regarding interim discipline is felt to be confusing. The Commission feels the change adds clarity for recommendations for interim discipline.

Rule 26. The proposed changes, in conjunction with the proposed changes to Rules 4 and 9, retain the role of an Adjudicatory Panel to hear Conditional Admissions but make it clear a Conditional Admission is tendered to the ODC rather than filed with the Commission and only if it is accepted by that office is a hearing scheduled. In addition, rather than the current rule which only allows the Commission to accept or deny a Conditional Admission as tendered, the proposed revision allows the Commission to accept the Conditional Admission but to impose the stated or a lesser form of discipline. The Commission is not authorized to impose a more severe form of discipline.

Rule 35. The Commission believes having an effective date that ties in with the date a Complaint is filed will eliminate confusion over which version of the Rules applies in a given case, which may occur in cases of a lengthy probation or reinstatement.