

VIA E-Mail: courts.mt.gov – E-filing

September 4, 2024

Chief Justice McGrath
Members of the Supreme Court
Chair Judge Menahan
Members of the Judicial Standards Commission
P.O. Box 203003
Helena, MT 59620-3003

RE: AF 14-0356
Comments to Proposed Rules of the Judicial Standards Commission published
8/26/24 attached to Justice McGrath Order Authorizing Public Comment

Dear Chief Justice McGrath and Judge Menahan:

Thank you for the opportunity to comment on Proposed amendments to Judicial Standards Commission Rules. I offer my perspective as a Montana lawyer. I address these comments to the Chief and Chair because the process indicates the Rule changes are before the Supreme Court, not the Judicial Standards Commission for public comment. It appears open government standards have not been followed to get the rules before the Supreme Court, which does leave open the risk the rules may be invalidated regardless of any perfection through public comment. I am aware that there was no public meeting by the Commission to consider proposed rule changes or to approve a petition to the Supreme Court for rule promulgation. I do not see any petition bringing the rules before the Supreme Court like there has been historically. As an open government advocate, I would urge adherence to open government standards when promulgating rule changes and would appreciate some formality distinguishing the Commission from the Supreme Court so that the Commission has independence from the Supreme Court justices, who are final decision makers on judicial discipline.

Rule 7 Confidentiality

I volunteer annually teaching continuing legal education courses in Ravalli County to include covering Ethics. In that role, I was denied access to the complaint and documented findings that supported the Supreme Court's public admonishment of Judge Dayton – 22-050. I asked for purposes of educating lawyers about what conduct contravenes Cannon 1.2. The sanitized conclusion that the comments were "inappropriate" had little educational value given the range of what may be considered sufficiently inappropriate to warrant sanctions. In response to my public records request, I received a Stipulation for Public Reprimand that omitted the inappropriate comments made. I received the order of reprimand, and was able to listen to the public admonishment, which contained none of the pertinent information. I was informed that the Supreme Court and the Commission possessed documents revealing what was said, but was denied access and given the following explanation:

From: Smith, Shelly shellysmith@mt.gov
Subject: JSC information re Hon. Raymond Dayton suspension/reprimand
Date: May 16, 2023 at 2:04 PM
To: joan@3brancheslaw.com



Pursuant to Rule 10(g) of the Judicial Standards Commission's Rules, "If the judge agrees to the Commission's suggested disposition, the matter may be disposed of on the basis of the agreement reached. If the agreed disposition is to be made public, the Commission shall file a report of such disposition in the office of the Clerk of the Supreme Court and the disposition shall become a matter of public record." [See attached *Stipulation for Public Reprimand and Suspension Under Judicial Standards Commission Rule 10(g)*]

Rule 10(h) states that if the proposal is made **after** the filing of a **formal complaint**, and is acceptable to the Commission, a report thereof shall be filed in the office of the Clerk of the Supreme Court, and the report shall be a matter of public record."

Rule 7 - Proceedings Confidential

(a) All papers filed herewith and all proceedings before the Commission shall be confidential while pending before the Commission. A Complaint dismissed by the Commission under Rule 10(e)-(f) is no longer confidential, and a complainant may disclose the complaint and the Commission's response. If an investigation results in formal proceedings, then the record filed by the Commission with the Supreme Court loses its confidential character upon its filing. Further, a proceeding loses its confidentiality if §§ 3-1-1121 through 1126, MCA, are invoked in accordance with the terms thereof.

There was no formal complaint filed with the Montana Supreme Court. The *Stipulation for Public Reprimand and Suspension Under Judicial Standards Commission Rule 10(g)* was filed with the Clerk of the Supreme Court on April 6, 2023. The Supreme Court filed its Order on May 2, 2023, agreeing to the agreed upon discipline. [See attached *Opinion and Order*] Therefore, the only information available to the public is what is I have attached to this email.

Shelly Smith

Executive Secretary
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I believed then and still do that the refusal to make available the requested complaint and corresponding documents that would reveal the precise nature of the misconduct violates Montana Constitution Art. II Sec. 9. – Right to Know. I believe the Right to Know applies to the courts. At the point that the comment warranted public censure, there was no justification for the withholding. Even constitutional privacy interests would have no bearing because there can be no expectation of privacy in public records, particularly those that justify admonishment of a public official. Chair Judge Menahan testified at the Senate Select Committee on Judicial Oversight and Reform to having withheld from the admonishment the words spoken to protect the victim. Omitting the words spoken do not protect the victim the withholding protects the judge. Omitting victim identity may protect the victim, but the victim should control that decision, not the JSC or its Chair.

The proposed rule changes do not improve transparency even though that was admittedly a goal according to Justice McGrath's press release indicating the changes were intended to conform with audit considerations. In 1980 when the people voted for Constitutional Amendment

9 to change the Judicial Standards Commission Art. VII Sec. 11 Subsection 4 to read: The proceedings of the commission are confidential except as provided by statute.”, the ballot statement for the Amendment read in pertinent part:

“Constitutional Amendment 9 is also necessary to give the Judicial Standards Commission the authority to release information to the public. The present Constitutional language totally prohibits the Commission from releasing any information to the public or the Legislature. The Commission should have the flexibility to release certain information. That is the only way the Commission can instill public confidence in the judicial disciplinary process....

The judicial branch of government has long been the most secretive branch of government. Much of the secrecy surrounding the judicial process is justified. However, when it comes to disciplining judges, total secrecy cannot be tolerated. Judges exercise vast powers which affect the lives and property of Montana’s citizens. A judge who acts improperly must be discipline or our system of justice will crumble. Limited public scrutiny of the disciplining judges is necessary to insure confidence in our legal system.”

58.33% (181,140) Montana voters favored transparency. Yet in 2023, I was denied access to a sustained complaint with the explanation that the Commission never filed a “formal complaint” even though there was a formal discipline and admonishment. By this example, there remains a lack of transparency that requires correction. It is unclear whether the same type of omissions and withholding of complaints will continue in the future as Commissioner Attorney Gerdrum testified before the Senate Select Committee on Judicial Oversight and Reform that the rule changes to Rule 7 would preclude it, but the Chair did not concur. Rule 7 needs to clearly state that the originating Complaint is not confidential when discipline is imposed whether stipulated or not or whether finalized informally or formally.

Other exceptions should be itemized as well to align with statute. MCA 3-1-1121 requires public disclosure in specified instances that should be itemized in the exceptions. MCA 3-1-1105 references confidentiality exceptions at MCA 3-1-1107, 3-1-1121, and 3-1-1126. It would be wise to add an exception that simply states: "as otherwise required by statute" to accommodate statutory changes. It would also be consistent with transparency and privilege laws to permit disclosure pursuant to a court order. A requestor should have the right to obtain records with judicial oversight where the requestor has a substantial need to know the information and has no alternative means to access the information.

Rule 7 should be rewritten in a manner that is internally consistent. The subsections are confusing and not necessarily consistent. Subsection (f) speaks to giving all information about "grievances" to the judge, which would not allow for victim anonymity where required to protect against retaliation or other harm like that considered necessary to protect the victim when withholding Dayton's words from the public. Presumably Dayton learned the identity of the complainant who likely was offended by his words whether the subject of the comment or a mere observer. It is interesting that Judges are afforded confidentiality, but not victims. Subsection (f) specifically calls out full disclosure in case of a "grievance", but is silent as to a "complaint" or

"formal complaint", which may be interpreted to mean there is only full disclosure of a "grievance". Subsection (d) is problematic where a witness may be precluded from calling witnesses in support of the "grievance" if prohibited from disclosing "the existence of the proceeding." Witnesses have the right to associate with and call others to support allegations of wrongdoing, and it would appear violative of a witness/victim's rights to preclude disclosure of the fact of a proceeding for purposes of providing proof of the grievance.

Subsection (c) of Rule 9 regarding sealing the records should be incorporated into subsection 7 with clear limits.

Rule 2 Definitions.

Rule 2 is incomplete. Definitions should include "grievance" and "formal complaint". It is not clear whether there remains a "complaint", which is distinct from a "grievance" and "formal complaint". The definitions should align with the Constitution to clarify how a "grievance" is a "complaint" as that term is used in the Constitution and in statute, for instance the reporting requirements at MCA 3-1-1126.

Rule 3 – Organization of the Commission

The proposed rule change implicates separation of powers to the extent the intent is to dictate who the Speaker chooses to appoint. It is unclear why the Montana Judges Association is referenced. The statute directs the speaker of the house to notify the district court judges, presumably all of them, not just those active with the Association. MCA 3-1-1115. The nomination panel then considers the judge's qualifications for purposes of nominating qualified judges.

Rule 10: Grievances Receipt and Review

The qualifier regarding summarily rejecting a grievance should be clarified to make clear that regardless of the merits of an appeal or sentence review or actual outcome, ethical violations shall be investigated. The new language may be interpreted to mandate dismissal even where the discrete ethical violations are apparent if appeal is taken. The new language also raises questions about whether or not the review will proceed where a court may also comment on the misconduct or otherwise make a ruling on it.

Rule 11: Grievances – Investigations

Subsection (d) should be rewritten to make clear that the grievant has no duty to maintain confidentiality of the complaint or grievance when the Commission has ended its process.

Rule 12: Negotiated Disposition

There should be no option for the Commission or Judge to stipulate to any disposition that includes a condition of confidentiality. All stipulated dispositions should be public.

Rule 15: Hearing on Formal Complaint

Subsection (a) struck "formal" and left the term "complaint". It is not clear whether that should be "grievance" or if there remains a "complaint." It also seems like there is no such thing as a "Formal Complaint", there is simply a "grievance" and a "complaint", but I cannot figure out what is intended. If there is no such thing as a "Formal Complaint" anymore because the word "grievance" distinguishes the phase, then the captions should be uniformly changed and any reference to "formal complaint" should be stricken throughout the rules.

The rules have provisions on grievance and formal complaints. It seems that there is an interim process between a grievance and a formal complaint. Maybe not, but the rules lack clarity about the investigative stage.

Rule 16: Interim Disqualification of Judicial Officers

Subsection (a) makes reference to "the formal complaint." Again is it a "formal complaint" or just a complaint. Also, would there be a situation where a grievance is so egregious that disqualification should be considered? Perhaps the formal process may be expedited for such purposes but the rules do not address it.

Rule 17: Effective Date and Amendment

The amendments implicate the Constitution that specifies the rules are those of the Commission, not the Supreme Court. Presumably, the Supreme Court may comment on proposed rules, but has no Constitutional authority to adopt them or otherwise promulgate them.

Very truly yours,
III Branches, PLLC

A handwritten signature in black ink, appearing to read 'Joan K. Mell', with a large, stylized initial 'J' and a long horizontal flourish extending to the right.

Joan K. Mell

CERTIFICATE OF SERVICE

I, Joan K. Mell, hereby certify that I have served true and accurate copies of the foregoing Correspondence - Comments to the following on 09-11-2024:

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Electronically Signed By: Joan K. Mell
Dated: 09-11-2024