

Senate Select Committee on Judicial Oversight and Reform
Attn: Jason Ellsworth, President of the Senate
PO Box 200500
Helena, MT 59620-0500
c/o Rachel Weiss: Rachel.weiss@legmt.gov

RE: Rules of Professional Conduct/Statements Regarding the Judiciary

Dear President Ellsworth:

As you know, I am a nonvoting member of the Senate Select Committee on Judicial Oversight and Reform (the "Committee"). I am writing regarding the Montana Rules of Professional Conduct (the "Professional Rules") as those rules relate to a lawyer's obligations not to (a) make a statement that the lawyer knows to be false or with reckless disregard for its truth or falsity concerning the qualifications or integrity of a judge, (b) engage in conduct that is prejudicial to the administration of justice, (c) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Professional Rules or other law, or (d) knowingly assist a judge or judicial officer in conduct that is a violation of applicable code of judicial conduct or other law. This letter merely represents my personal view of the Professional Rules which I feel obligated to express to the Committee as they relate to testimony given to the Committee and information subsequently received by me on account of my service on the Committee.

At the Committee's meeting on July 19, 2024, Billings attorneys Peter Habien and Mark Parker testified, in part, on their view of the Professional Rules. During Mr. Habien's testimony, I understood him to testify that (a) the Professional Rules prohibit a Montana lawyer from making a statement that questions the integrity of a Montana judiciary, and (b) a lawyer can commit a violation pursuant to Rule 8.3 of the Professional Rules if the lawyer fails to report to the Office of Disciplinary Counsel that a lawyer has become aware of a statement made by another lawyer that questions the integrity of the Montana judiciary.

Also at the Committee meeting on July 19, 2024, the Committee was asked to consider a draft letter to the Montana Supreme Court regarding the extent to which, if at all, statements made by retired judges or justices impact the ability of a retired judge or justice to impartially render a decision if called to service by the Chief Justice of the Montana Supreme Court. I noted to the Committee that, while I was a nonvoting member, I was specifically abstaining from either supporting or opposing the letter. The reason for my statement was that I was unable to gain sufficient knowledge regarding the referenced statements allegedly made by retired judges or justices to satisfy myself that I had satisfied my obligations under the Professional Rules.

Subsequent to the meeting, I received an email which included a video segment from a 2024 Montana continuing education class entitled Portraits of Courage (the "CLE"). The CLE included a panel discussion including the Honorable Mike Moses, Ret., Randy Cox, Esq., Ret., Mark Warner, Esq., Jim Goetz, Esq., and Justice Laurie McKinnon of the Montana Supreme Court. I subsequently viewed the recording of the CLE.

Justice McKinnon introduced the CLE as covering a number of topics including the obligation to and need for lawyers to defend the integrity and independence of the Montana judiciary.

Mr. Goetz then made several comments during the CLE. Those comments included, at approximately the 11:00 minute mark of the video, referring to a decision rendered by the Montana Supreme Court as a "piece of s**t." Mr. Goetz then suggested, at approximately the 11:15 minute mark of the video, that a lawsuit filed by Mr. Goetz during a time of great political pressure was wrongly decided because the justices lost their courage (as opposed to justices exercising their independent legal reasoning in a manner with which Mr. Goetz did not agree). Mr. Goetz then commented, at approximately the 26:50 minute mark of the video, regarding his attempt to engage in telephone conversations with a supreme court justice or a supreme court justice's clerk without all parties being present (an *ex parte* communication).

Because of Mr. Habein's testimony and my comments regarding the Committee's letter regarding retired justices, I viewed the CLE with a heightened degree of sensitivity. The Professional Rules do not specifically state whether a lawyer's obligation to report professional misconduct by a lawyer includes retired lawyers. I am writing to explain why I am not filing a complaint with the Office of Disciplinary Counsel against any participant in the CLE.

There are two main reasons that I do not consider my review of the CLE to result in an obligation to file an ethical complaint pursuant to Rule 8.3 of the Professional Rules. First, I believe that it is critically important to consider whether the judges or justices who are aware of a comment regarding the judiciary consider the comment to question the integrity of a court. Rule 2.4 of the Montana Rules of Judicial Conduct (the "Judicial Rules") obligates a judge not to be swayed by public clamor or fear of criticism. Rule 2.16 of the Judicial Rules obligates a judge having knowledge that a lawyer has committed a violation of the Professional Rules that raises a substantial question regarding the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects to inform the appropriate authority (the Office of Disciplinary Counsel). In this case, Justice McKinnon noted that she had invited Mr. Goetz to the CLE. Further, Justice McKinnon not only did not express any concern regarding Mr. Goetz's comments but laughed in response. I am unaware of Justice McKinnon or any other judge or justice filing an ethical complaint regarding Mr. Goetz. I am unaware of any other member of the panel of presenters or any person in attendance filing an ethical

complaint against Mr. Goetz. Accordingly, it is my opinion that when a potential violation of the Professional Rules is based upon public comments that could be construed as questioning the integrity of a judge or justice, it is unlikely that a violation of the Professional Rules has occurred if no judge or justice reports the potential violation to the Office of Disciplinary Counsel.

Second, the Professional Rules contemplate a distinction between the professional functions of a lawyer and a lawyer's personal affairs. While the Professional Rules apply to a lawyer's personal and business affairs, some aspects of the Professional Rules are more specifically related to a lawyer's professional functions such as representing a client. If the CLE had represented the type of situation where someone is "caught saying the quiet part out loud," the CLE would be more concerning in relation to the Professional Rules. However, in this case, Mr. Goetz appeared to have developed a Saturday Night Live Harry Caray impression or *pierrot* persona to entertain the audience members. It is difficult to conclude that Mr. Goetz was actually encouraging members of the bar to contact justices in an *ex parte* manner or encouraging members of the bench to accept *ex parte* communications from members of the bar. It is similarly difficult to conclude that Mr. Goetz was accusing a majority of Montana Supreme Justices of violating their ethical obligation to withstand public clamor pursuant to Rule 2.4 of the Judicial Rules.

Again, I am writing this letter solely as my personal explanation of my professional responsibilities with respect to information provided to me by the Committee. Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, consisting of stylized initials 'ATB' followed by a horizontal line extending to the right.

Andrew T. Billstein