

Montana State Senate



The Big Sky Country

Select Senate Committee on Judicial Oversight and Reform
Montana State Capitol
Helena, MT 59601

September 23, 2024

Bowen Greenwood
Clerk of the Montana Supreme Court
215 N. Sanders
Helena, Montana 59601
Bowen.Greenwood@mt.gov

Dear Mr. Greenwood:

Please file the below comments with the Montana Supreme Court in Matter AF 14-0356.

The Senate Select Committee on Judicial Oversight and Reform has reviewed the proposed revisions to the rules of the Judicial Standards Commission filed with the Montana Supreme Court on August 26, 2024. These modifications are a significant overhaul of the Commission's rules. The purpose of this letter is to outline the Committee's recommendation, concerns, and objections.

First, we object to the extent of public notice and length of comment period about the proposed rules. Both deny the public the ability to review, analyze, and provide relevant comment about the rules. It is also in stark contrast to the notice and length of comment period for previous proposed rule changes by the Commission.

For example, when the Judicial Standards Commission proposed rule changes in 2015, the Supreme Court provided for a 90-day comment period. (See Order in AF 14-0346, filed January 5, 2015). The Order also explicitly requested the State Bar publish the notice of the comment period on its website and in the next available issue of the *Montana Lawyer*.

The comment period for the recent proposed rules is drastically abbreviated. Here, the order containing the proposed rules was filed on August 26, 2024, with a comment period ending on September 6, 2024. While the comment period has been extended to September 23, 2024, this is 60 days less than what the public received in 2015. Simply put, the comment period and public notice of the rules deny the public

the opportunity to provide informed and thoughtful comments. The Committee therefore requests the Supreme Court extend the comment period until November 25, 2024.

Next, throughout the proposed rules, the term “complaint” has been replaced with the term “grievance”. The term “grievance” is not contemplated in any of the Commission’s constitutional or statutory framework. The use of the term may be viewed as an attempt by the Commission to evade the provisions of Section 3-1-1126, MCA, which requires the Commission to submit a report to the Legislature that includes:

- (1) identification of each complaint, whether or not verified, received by the commission during the preceding biennium by a separate number that reveals the identity of the judge complained against;
- (2) the date each complaint was filed;
- (3) the general nature of each complaint, including the type of complaint, the issues involved, and the basic facts making up the complaint;
- (4) whether there have been previous complaints against the same judge and, if so, the general nature of the previous complaints;
- (5) the present status of all complaints filed with or pending before the commission during the preceding biennium;
- (6) whenever a final disposition of a complaint has been made during the preceding biennium, the nature of the disposition, the commission's recommendation, if any, to the supreme court, and the action taken by the supreme court; and
- (7) how each commission member voted.

(Emphasis added). Under the proposed modifications to the rules, the Judicial Standards Commission could argue that it did not have to report grievances filed with it. We strongly urge that the term “grievance” be removed from the proposed rules.

Next, the Commission believes that Rule 4 must clarify that retired judges may not investigate complaints and that the Judicial Standards Commission must use independent investigators.

Additionally, the rules need to better clarify what types of corrective action are available to the Judicial Standards Commission short of making recommendations for discipline to the Montana Supreme Court. The various types of corrective actions available, such as a letter of reprimand or suggestions for improvement, to the Commission should be identified in the rules. It is clear that corrective action or these types of lesser discipline are being used by the Commission in cases where a complaint has merit but does not rise to the level of making a recommendation for discipline to the Supreme Court. Along those lines, the rules need to clarify any complaint that results in any corrective action or lesser discipline from the Commission can no longer be considered an unsubstantiated complaint. In cases where the Commission issues any kind of corrective action, the Commission must inform the complainant that corrective action was taken instead of misinforming the complainant that the complaint was dismissed as unsubstantiated.

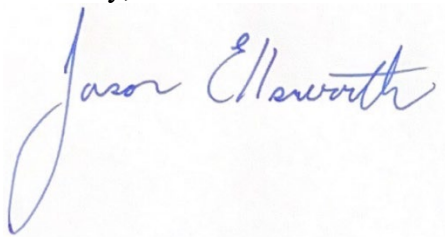
Furthermore, this Committee firmly believes that Rule 9 should include retaliation as grounds for discipline. Specifically, retaliation against a complainant by a judge after the complaint is filed with the Commission against that judge should be grounds for discipline. Rule 9 should also include definitions for the following terms: bias, conflict of interest, impartiality, inferable bias, judicial officer (see 1-1-

202(2), MCA), and open-mindedness. Defining these terms will provide the public with a better understanding of how judges are supervised.

Lastly, Rule 17 requires the rules to be adopted by the Montana Supreme Court. The Judicial Standards Commission is an independent entity created by the Legislature pursuant to Article VII, Section 11(1) of the Montana Constitution. Section 11(3) and Section 3-1-1107 MCA provide that upon recommendation of the Commission the Supreme Court may retire any justice or judge and may censure, suspend, or remove any justice or judge. Neither the Constitution nor any legislation confers rulemaking authority for the Commission on the Supreme Court or conditions the Commission's rulemaking authority on Supreme Court approval. Since the Commission is responsible for acting on complaints that may include complaints concerning justices of the Supreme Court, its independence from the Court is important for its ability to function. Rule 17 should be re-written to make clear that the Judicial Standards Commission adopts its own rules, subject only to the requirement of public comment.

In conclusion, aside from the suggestions provided in this letter, the Senate Select Committee on Judicial Oversight and Reform objects to the passage of the proposed rules and formally requests that the comment period be extended to November 25, 2024.

Sincerely,

A handwritten signature in blue ink that reads "Jason Ellsworth". The signature is written in a cursive style with a large, looped initial "J".

Senator Jason Ellsworth, President of the Montana Senate, Chair of the Senate Select Committee on Judicial Oversight and Reform

Senator Barry Usher, Vice Chair of the Select Senate Committee on Judicial Oversight and Reform

A very faint, light-colored handwritten signature, possibly in grey or light blue ink, which is difficult to read. It appears to be a cursive signature.

cc: Chairman Michael Menahan