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CLERK OF THE SUPREME COURT
STATE OF MONTANA

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CLERK OF THE SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. OP08-0556

IN RE THE SUPREME COURT RULE ON ATTORNEY DISCIPLINE	))))	**PETITION FOR DECLARATORY RELIEF**

Comes now the Petitioner, *The Billings Gazette,* in the captioned matter and hereby submits its Petition for Declaratory Relief pursuant to Rule 14, Montana Rules of Appellate Procedure.

FACTS WHICH MAKE IT APPROPRIATE FOR THE COURT TO EXERCISE ORIGINAL JURISDICTION

On August 12th, 2008, this Court issued its opinion in *Billings Gazette v. Montana Commission on Practice and Office of Disciplinary Counsel,* 2008 MT 287, 345 Mont. 385, 190 P3d. 1126 (2008).

The case arose out of the disciplinary action prosecuted against attorney Moira D'Alton. Ms. D'Alton filed a Conditional Admission and Affidavit of Consent and this Court suspended her license and publicly censored her. The

Court listed the rules of conduct violated by Ms. D'Alton, but did not describe the behavior which led to the disciplinary action.

The *Gazette* requested from the Office of Disciplinary Counsel (ODC) the documents which would describe the specific actions that led to the censure. The *Gazette* relied upon Article II, Section 9, of the Montana Constitution guaranteeing access to documents of public agencies. It was the *Gazette's* position that the demands of Ms D'Alton's individual privacy did not clearly outweigh the right to know given that her conduct occurred while she was employed by a public entity and had apparently violated the public trust while in that employment. Citing Rules 20 and 26 of the Rules of Disciplinary Enforcement, the ODC declined to provide the requested documents. The *Gazette* filed a petition in the district court requesting access to the documents in question under Article II, Section 9, of the Constitution.

The trial court ruled that it was without subject matter jurisdiction because the challenged rule under which the documents were withheld had been promulgated by the Supreme Court and the district court could not issue a contrary ruling. This Court affirmed the district court and dismissed the case based on its ruling in *Boe v. Court Adm'r for the Mont. Jud. Branch*, 2007 Mont. 7, 335 Mont. 228, 150 P.3d 927 (2007). In *Boe*, the Court offered to permit the Plaintiff to pursue her claim by filing a petition for original jurisdiction. It declined to do so in

Gazette. The Court reasoned that to do so would violate the due process rights of D'Alton who had entered her "admission" based upon the rule making her file confidential.

This created a conundrum for the *Gazette*. In order to obtain this Court's review of the constitutionality of the rules on attorney discipline, it was foreclosed from requesting a document in custody of the ODC without running afoul of the *ex post facto* barriers imposed in *Gazette*. On the other hand, a challenge to the Supreme Court rules on attorney discipline absent a request for certain attorney records may fall short of the standards imposed by the "case or controversy" rule. Nonetheless, while it may well be the case that the ODC agrees with the *Gazette's* position on access to certain disciplinary records, it has no authority to provide them, given the inflexibility of the Supreme Court rule. Indeed, the only way to reach the merits of the issues raised in *Gazette* is to ask the Court to exercise original jurisdiction and pursue a facial challenge to the rule. It is the purpose of this Petition to raise that facial challenge.

Rule 26, "Discipline by Consent," reads, in pertinent part:

> All tendered admission proceedings prior to entry of a consent discipline order shall be confidential and subject to the provisions of Rule 20 of these Rules.

Rule 20, "Access to Disciplinary Information," reads:

> All disciplinary proceedings which are prior in time to the filing of a formal complaint with the Clerk of the Supreme Court shall be confidential, except

that the pendency, subject matter, and status of an investigation may be disclosed by Disciplinary Counsel if:

> (1) The respondent has waived confidentiality;
>
> (2) The proceeding is based upon allegations that include either the conviction of a crime or reciprocal discipline;
> (3) The proceeding is based upon allegations that have become generally known to the public; or
>
> (4) There is a need to notify another person or organization, including the Lawyers Fund for Client Protection Board or the Commission on Character and Fitness, in order to protect the public, the administration of justice or the legal profession.

Article II, Section 9, of the Montana Constitution provides:

No person shall be deprived of the right to examine documents ... of all public bodies or agencies of government and its subdivisions ... except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Since the Court's rules on attorney discipline do not contemplate the balancing test articulated in the Constitution, it is facially violative of Article II, Section 9.

PARTICULAR LEGAL QUESTIONS AND ISSUES EXPECTED TO BE RAISED

1. Whether there is a justiciable controversy.

2. Whether the ODC is a "public body or agency of government" within the meaning of Article II, Section 9, of the Constitution.

3. Whether Rules 20 and 26 of the Rules of Disciplinary Enforcement facially violate Article II, Section 9, because they do not require the ODC to exercise the balancing test set forth in the Constitution.

ARGUMENTS AND AUTHORITIES FOR ACCEPTING JURISDICTION AND THE MERITS

I. THE GAZETTE'S PETITION FOR DECLARATORY RELIEF PRESENTS A JUSTICIABLE CASE OR CONTROVERSY

In determining whether there is a justiciable controversy, the Court has applied a three part test. *Montana-Dak. Util. Co. v. City of Billings*, 2003 MT 332, 318 Mont. 862, 80 P.3d 357 (2003). First, the parties must have existing and genuine rights or interests as distinguished from theoretical rights or interests. Second, the controversy must be one upon which the judgment of the Court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. Third, there must be a controversy the judicial determination of which will have the effect of a final judgment in law or equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities, be of such overriding public moment as to constitute the legal equivalent of all of them.

Here, the *Gazette* has a right firmly grounded in Article II, Section 9, of the Constitution to access documents of governmental entities. Indeed, its very purpose is to gather information about the functioning of these public entities and

disseminate such information to Montana citizens. Second, the lawyer discipline rules adopted by this Court have prevented in the past and continue to prevent the *Gazette* from fulfilling its obligations to report on issues of importance to its readers involving the discipline of government attorneys. Finally, this Court has the authority, nay, duty, to assure that its rules are in compliance with the Constitution. A judicial determination as to the viability of these rules can only be made by this Court and certainly is "of such overriding public moment" as to justify resolving the matters raised in the *Gazette's* petition.

II. ODC IS AN "AGENCY OF STATE GOVERNMENT" SUBJECT TO ARTICLE II, SECTION 9, OF THE MONTANA CONSTITUTION

The ODC functions as an arm of this Court. As such, the Court has the supervisory authority to ensure that it complies with statutes and rules governing its operations, as well as the Montana Constitution.

Since adoption of the "right-to-know" this Court has made it clear that judicial bodies are subject to the open records provisions of Article II, Section 9, as are all documents filed with such body. *State ex. Rel. Missoulian v. Montana Twenty-First Judicial District Court, Ravalli County*, 281 Mont. 285, 294, 933 P.2d 829, 835 (1997). Additionally, § 2-6-101, MCA, includes judicial records as one of four classes of public writings. Section 2-6-101(3)(b), MCA.

In *Great Falls Tribune Company, Inc. v. Day*, 1998 MT 133, ¶ 16. 289 Mont. 155, ¶ 16, 959 P.2d 508, ¶ 16, the Montana Supreme Court, in determining whether the Department of Corrections Committee for Private Prison Screening and Evaluation was a "public body," looked to the Montana Procurement Act, which defines "governmental body" as:

> A department, commission, council, board, bureau, committee, institution, legislative body, agency, government, corporation, or other entity, instrumentality, or official of the executive, legislative, or *judicial branch of this State*, including the Board of Regents, and the Montana University System.

Section 18-4-123(11), MCA (emphasis supplied).

In *Becky v. Butte-Silver Bow Sch. Dist. #1*, (1995), 274 Mont. 131, 138, 906 P.2d 193, 197, this Court held that any "documents generated or maintained by a public body which are somehow related to the functions and duties of that body" are public documents. The disciplinary records of attorneys are the "written acts or records of ... official bodies" and are "generated or maintained" by ODC as part of its official duties. These records are clearly subject to Article II, Section 9, of the Montana Constitution.

Montana has a long and well established tradition of an open judiciary. Considering the 1889 Constitutional guarantee of a public trial, this Court early on recognized that in order for a trial to be public, attendance can't be limited to only those persons necessary to the conduct of the trial. *State v Keeler*, (1916) 52 Mont.

205, 156 P. 1080. The important public policy sought to be served by public sittings of Montana courts was:

> The people are interested in knowing, and have the right to know, how their Servants — the judge, county attorney, sheriff, and clerk —conduct the public's business. As was said by the Supreme Court of California: "in this country, it is a first principle that the people have the right to know what is done in their courts."

(Citing *In re Shortridge,* 99 Cal 529, 84 Pac. 227.) *Keeler* at 1084.

The 1972 Constitution preserved this policy in Article II, Section 24's "speedy public trial" and Section 9's "right to know" provision. Beginning in 1980, the Court has applied Article II, Section 9, to proceedings in the district courts. In *Great Falls Tribune v. District Court,* 186 Mont. 433, 608 P.2d 116 (1980), the Court applied the balancing test of Article II, Section 9, to overrule the court's blanket closure of voir dire. In *State ex. Rel. Smith v. District Court* 201 Mont. 376, 654 P.2d 982 (1982), this Court renewed its commitment to adherence by the district courts to the access provisions of Article II, Section 9, reversing a trial court's closure of a suppression hearing. In *Missoulian v. Montana Twenty-First Judicial Dist. Court, Ravalli County,* 281 Mont. 285, 294, 933 P.2d 829, 835 (1997), the Montana Supreme Court confirmed, again, that judicial bodies are subject to Article II, Section 9:

> Article II, Section 9's guarantee of a right to know grants the public an interest in receiving information about the criminal process.

(Citing *Great Falls Tribune* and *Smith*).

Here the *Gazette* challenges the rules which render certain records of attorney discipline confidential. Section 2-6-101, MCA, the statutory open records law, provides for four classes of public writings. "Judicial records" are one of those classes. (Section 2-6-101(3)(b), MCA.) Clearly, the judicial branch and its subdivisions are "public bodies" subject to the public records proscriptions of Article II, Section 9.

Rule 20A of the Rules for Lawyer Disciplinary Enforcement provides that "(a)ll disciplinary proceedings which are prior in time to the filing of a formal complaint ... shall be confidential ..." If, as in the instant case, pursuant to Rule 26, the charged lawyer tenders an admission to the allegations of misconduct prior to the filing of a formal complaint, the Court may impose discipline and the entire proceedings are confidential by operation of Rule 20A. Since the appropriate analysis under Article II, Section 9, necessarily requires a "case-by case" balancing exercise, this absolute secrecy provision violates Article II, Section 9.

Article II, Section 9, is a fundamental right. Under extraordinary circumstances, the Supreme Court's blanket confidentiality rule on pre-complaint proceedings of the ODC could pass constitutional muster if there were a "compelling interest" in keeping the information giving rise to the disciplinary proceedings private.

The rationale behind the rule is set forth in the comments to Rule 16 of the ABA *Model Rules of Lawyer Disciplinary Enforcement*:

> The confidentiality that attaches prior to a finding of probable cause and the filing of formal charges is primarily for the benefit of the respondent, and protects against publicity predicated upon unfounded accusations.
> If the respondent waives confidentiality or if the nature of the accusation is already known to the public, the basis for confidentiality no longer exists. Where information has become widely known, interested individuals and particularly the media often seek comments from the disciplinary agency involved. The existence of privacy requirements places the disciplinary agency in the awkward position of being unable to acknowledge the existence of an investigation. This could lead to a mistaken notice that the agency is unaware of or uninterested in allegations of misconduct, without in any way protecting the reputation of the lawyer.
>
> Once a finding of probable cause has been made, there is no longer a danger that the allegations against the respondent are frivolous. The need to protect the integrity of the disciplinary process in the eyes of the public requires at this point that further proceedings be open to the public.

Comment to Model Rule 16 (emphasis supplied).

When the disciplinee admits the allegations giving rise to the investigation, the rationale behind the confidentiality rule *("protect(ing) against publicity predicated upon unfounded accusations")* no longer applies. At least, then, as to disciplinary proceedings in which an admission is made, there is no longer a rational basis, let alone a compelling interest in keeping the proceedings secret.

The text of Article II, Section 9, of the Montana Constitution explicitly mandates that "no person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state

determine whether an individual has a protected privacy interest under Article II, Section 10, of the Montana Constitution, a two-part test is applied. *Yellowstone County v. Billings Gazette*, ¶ 20 (citation omitted). A constitutionally protected privacy interest exists when a person has a subjective or actual expectation of privacy that society is willing to recognize as reasonable. *Yellowstone County v. Billings Gazette*, ¶ 20 (citing *Lincoln County Com'n v. Nixon*, 1998 MT 298, ¶ 16, 292 Mont. 43, ¶ 16, 968 P.2d 1141, ¶ 16).

Here, an attorney making a conditional admission does not have a constitutionally protected privacy interest in professional discipline records which society is willing to recognize as reasonable. This is particularly true when the attorney's misconduct arises out of misdeeds in public employment. This Court has previously determined that society is not willing to recognize as reasonable the privacy interest of individuals who hold positions of public trust when the information sought relates to that individual's ability to perform public duties. In *Great Falls Tribune v. Sheriff* (1989), 238 Mont. 103, 107, 775 P.2d 1267, 1269, the Court held the public's right to know outweighed the privacy interests of three disciplined police officers because police officers hold positions of "great public trust." The Court stated that:

> [T]he public has a right to know when law enforcement officers act in such a manner as to be subject to disciplinary action. The public health, safety, and welfare are closely tied to an honest police force. The conduct of our law enforcement officers is a sensitive matter so that if they engage in conduct

> resulting in discipline for misconduct in the line of duty, the public should know.

Great Falls Tribune v. Sheriff, 238 Mont. at 107, 775 P.2d at 1269.

In *Bozeman Daily Chronicle v. Police Dept.* 260 Mont. 218, 227, 859 P.2d 435, 440-41 (1993), the Court held that investigative documents associated with allegations of sexual intercourse without consent by an off-duty police officer were proper matters for public scrutiny because "such alleged misconduct went directly to the police officer's breach of his position of public trust ..." In *Svaldi v. Anaconda-Deer Lodge County*, 2005 MT 17, ¶ 31, 325 Mont. 365, ¶ 31, 106 P.3d 548, ¶ 31, the Court held that a public school teacher entrusted with the care and instruction of children held a position of public trust and therefore the public had a right to view records from an investigation into the teacher's abuse of students.

And most recently, in *Yellowstone County v. Billings Gazette*, 2006 MT 218, 333 Mont. 390, 143 P.3d 135, the Montana Supreme Court held that the public's right to access an interim chief public defender's deposition in an employment related matter outweighed any privacy interest the public defender might otherwise assert in the deposition. The Court stated that "[p]ublic defenders, as the officers of our courts charged with safeguarding the public's fundamental constitutional rights to counsel and a fair and speedy trial, play an essential role in preserving public confidence in our judicial system and preserving these rights for every member of society." *Yellowstone County v. Billings Gazette*, ¶ 22.

Rule 20A is patently deficient in that it does not permit disclosure to occur when the attorney's conduct arose out of public employment. Nor does it permit the balancing test required by Article II, Section 9, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Indeed, there is nothing rational about keeping the misdeeds of a government attorney from public scrutiny while permitting disclosure of information related to the discipline of a police officer, teacher or public defender.

Other courts faced with similar issues have not hesitated to order disclosure of lawyer disciplinary proceedings. *See, e.g., State Bar of Nevada v. Claiborne* (Nev. 1988), 756 P.2d 464 (although it was an established rule that bar disciplinary proceedings are confidential, records in proceeding against former judge convicted of tax offenses were ordered open to the public); *Sadler v. Oregon State Bar* (Or. 1976) (court held that state public records law was applicable to the state bar's records regarding the professional conduct of a particular attorney); and *In re Klausmeyer* (Ohio 1970), 265 N.E.2d 275 (despite their own rule providing for confidentiality, the Ohio Supreme Court held that a grand jury was entitled to hear the facts regarding an investigation of alleged criminal conduct of attorneys that had been conducted by a bar association's grievance committee).

The present rule neither permits the ODC to make the balancing test required by the Constitution nor to apply the precedent established by this Court as

to privacy assertions made by public officials vested with the public trust. If it is the purpose of an attorney discipline proceeding to protect the public and maintain the integrity of the legal profession, a rule that keeps the conduct of an attorney vested with the public trust a secret, cannot further that purpose.

It is respectfully submitted that this Court should exercise its original jurisdiction, hold this rule to be facially violative of Article II, Section 9, of the Montana Constitution and recast the Rule to vindicate the public's right to know.

RESPECTFULLY SUBMITTED this 3rd day of November, 2008.

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