

## Alerts

### Montana Supreme Court Finds Due Process Violation in Lawyer Disciplinary Proceeding

May 27, 2010

*Lawyers for the Profession® Alert*

*In re Best*, 355 Mont. 365, \_\_\_ P.3d \_\_\_, 2010 WL 1040987 (2010)

#### Brief Summary

The Montana Supreme Court held that a lawyer's due process rights were violated in a disciplinary action because the Commission on Practice decided to admonish her without giving her notice of, or an opportunity to respond to, the charge against her.

#### Complete Summary

Petitioner, a lawyer, sought declaratory and injunctive relief in the Montana Supreme Court from a decision by the Commission on Practice (COP) to admonish her. In the underlying matter, petitioner brought a lawsuit against a hospital on behalf of a doctor. Petitioner encouraged the doctor to join the Montana Medical Association (MMA) in hopes that the association would participate in the case. Around the same time, the doctor informed petitioner that both the hospital and the MMA were represented by the same counsel. Petitioner then wrote a letter seeking assistance from the MMA in the doctor's case. The hospital's attorneys filed a complaint with the Office of Disciplinary Counsel (ODC) based on this letter.

The ODC presented this complaint to the COP with a recommendation that it be dismissed. The COP agreed to dismiss the claims contained in the original complaint, but decided *sua sponte* that petitioner had violated Montana Rule of Professional Conduct (MRPC) 4.2 (Communication with Person Represented by Counsel) and decided to admonish her. The COP did not inform petitioner of the conduct or disciplinary rule upon which the admonition was based, and private admonitions are not appealable in Montana.

Petitioner then brought the instant action for declaratory and injunctive relief in the Montana Supreme Court, arguing that the COP's actions violated her due process rights. The Court first held that it had original jurisdiction over the case because it "involve[d] issues of major statewide importance . . ."

The Court then held that the COP violated petitioner's due process rights because petitioner was denied both notice and an opportunity to respond to the charge that she violated MRPC 4.2. The COP argued that because of the informal and relatively benign nature of an admonition, petitioner's due process

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rights were minimal. But the Court noted that admonitions can negatively affect future disciplinary actions, *pro hac vice* application and insurance premiums, among other things. The Court dismissed the underlying disciplinary action with prejudice.

The Court also held that the COP had exceeded its authority when it, *sua sponte*, charged petitioner with an MRPC violation. The Court noted that the risk of unfairness could, in certain circumstances, be too high if the COP were allowed to combine its adjudicatory functions with prosecutorial functions. Prosecutorial functions, the Court noted, are the domain of the ODC.

### **Significance of Opinion**

This case serves as a reminder that no matter how informal a disciplinary proceeding may be, it still must be fair to the accused attorney. As the Court notes, even a mere admonishment can negatively impact an attorney's career.

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