

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 07-0157

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IN THE MATTER OF REVISIONS TO THE )  
MONTANA RULES OF CIVIL PROCEDURE ) ORDER  
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In February of 2010, the Court’s Advisory Commission on the Rules of Civil and Appellate Procedure submitted to the Court a comprehensive set of proposed revisions to the Montana Rules of Civil Procedure. The Advisory Commission stated its proposed changes would bring the Rules more closely in line with the current Federal Rules of Civil Procedure and would make the Rules better organized, more readable, and more workable. The Advisory Commission further advised the Court that the main substantive changes it proposed were in Rules 5.1 and 5.2, 11, 23, 26, 28(c), 58(e), and 62. We published notice of the proposed rule changes and solicited and received a good deal of public comment on them, both in written filings with the Clerk of this Court and at several public meetings.

The Court extends its sincere thanks to the Commission members for their time, hard work, and expertise. We also thank all others who have submitted their comments, ideas, and suggestions on the Rules.

Following consideration, the Court has determined to adopt the great majority of the changes proposed by the Commission. In some respects, we have determined it is appropriate for Montana to update the language of an existing Rule, instead of changing the Rule to reflect the corresponding Federal Rule. The Court also has made its own substantial changes to some Rules; among those, we have adopted Rules 4.1 and 4.2 to encourage limited scope representation in Montana. The Notes following each Rule in the attached Montana Rules of Civil Procedure explain the rationale for the language adopted in that Rule.

IT IS NOW ORDERED that the attached Montana Rules of Civil Procedure are adopted, effective October 1, 2011.

The Clerk is directed to provide copies of this Order to each Clerk of the District Court in the State of Montana; each District Judge for the State of Montana; Lee Heiman at the Montana Legislative Services Division; the Montana Attorney General; the Director of the Montana Trial Lawyers; the Director of the Montana Defense Trial Lawyers; the Clerk of the United States District Court for the District of Montana; the President of the Montana Magistrates' Association; the Executive Director of the State Bar of Montana; the University of Montana School of Law; the State Law Librarian; and the Chair and each member of the Advisory Commission on Rules of Civil and Appellate Procedure.

DATED this 26<sup>th</sup> day of April, 2011.

/S/ MIKE McGRATH  
/S/ PATRICIA COTTER  
/S/ MICHAEL E WHEAT  
/S/ BETH BAKER  
/S/ JIM RICE  
/S/ JAMES C. NELSON  
/S/ BRIAN MORRIS

JAMES H. GOETZ  
BRIAN K. GALLIK  
ROBERT K. BALDWIN  
J. DEVLAN GEDDES  
TRENT M. GARDNER  
BONNIE L. JARRETT  
JIM BARR COLEMAN  
BENJAMIN J. ALKE

**GOETZ, GALLIK & BALDWIN P.C.**

ATTORNEYS AT LAW  
35 NORTH GRAND 59715  
P.O. BOX 6580  
BOZEMAN, MONTANA 59771-6580  
PH. (406) 587-0618 FAX (406) 587-5144

EMAIL:  
goetzlawfirm@goetzlawfirm.com  
WEBSITE:  
www.goetzlawfirm.com

October 23, 2009

Hon. Mike McGrath, Chief Justice  
Montana Supreme Court  
Room 323, Justice Building  
215 North Sanders  
P. O. Box 203003  
Helena, MT 59620-3003

*Re: Advisory Commission on Rules of Civil and Appellate Procedure*  
**Revision of Montana Rules of Civil Procedure**

Dear Chief Justice McGrath:

Enclosed in paper as well as CD form is the Advisory Commission's work product regarding recommended changes in the Montana Rules of Civil Procedure. This is the culmination of over two years of careful work by the Commission Members.

The decision was made in the fall of 2007 to do a general overhaul of the Civil Rules in line with the revision of the Federal Civil Rules, which resulted in their adoption by Order of the U. S. Supreme Court effective December 1, 2007. The Federal Rules revisions were largely stylistic, designed to make the rules better organized, more readable, and more workable. Our Commission voted to follow the Federal Rules quite literally because of the improvements in the language, the evident care which had gone into the Federal revisions, and because of the guidance Federal treatise and case law provide in interpretation of the rules – guidance which would be of great help to the Montana courts and practitioners.

We did not, however, vote to move lockstep with the Federal Rules. The most obvious departure is in Rule 26. We voted to continue most of Montana's present practice, rather than opting for the automatic disclosure requirements of Federal Rule 26(a).

Rather than complicate our presentation with messy line-outs and underlines, we have opted to present the proposed rule changes in a side-by-side format, with the present Montana rule on the left-hand side and the proposed new rule on the right-hand side. This follows the format of the Federal Rules changes when they were proposed, and it is the format that we reviewed briefly with Justices Nelson and Warner during our Commission meetings.

The main substantive changes are as follow:

1. **Rule 4(t)**. The Commission decided not to adopt the Federal requirement

that a summons and complaint be served within 120 days of the complaint being filed (Federal Rule 4(m)), but decided to reduce the time for service of a Summons from three years to two years. The Court should note that this proposed revision will need an effective date to be filled in.

2. **Rule 5.1** is new. It essentially replaces present Rule 24(d) regarding “Cases Involving Constitutional Questions Where the State is not a Party.” The Commission decided to re-number this provision to follow Federal Rule 5.1, which is styled “Constitutional Challenge to a Statute – Notice, Certification, and Intervention.”
3. **Rule 5.2** dealing with “Privacy Protections for Filings Made with the Court” is new and follows the Federal format. This rule incorporates part of Rule 10.6 and 10.7 of M. R. App. P. Commission Member Lisa Speare worked closely with Law Librarian Judy Meadows on the language for this privacy provision.
4. Recommended **Rule 11** is based verbatim on Federal Rule 11. The main substantive difference between Montana’s present rule and the Federal Rule is the aspect of Federal Rule 11(c)(2) regarding motions for sanctions. Under Federal Rule 11(c)(2), and the proposed Montana rule, a sanctions motion must be served but may not be filed or presented to the court for 21 days, enabling the non-moving party to cure the problem.
5. We have also recommended amendment of **Rule 23**. First, we have followed the Federal Rule 23(f) which allows appeal of an order granting or denying class action certification if the appellate court permits. Second, we have also added language to allow an interlocutory appeal of a district court decision refusing to approve a class action settlement in cases where both the class and defendants stipulate that an appeal is appropriate. This also would be in the discretion of the appellate court. This latter feature is not in Federal Rule 23, but is in accordance with the recommendations of the American Law Institute’s Principles of Aggregate Litigation, § 3.12 (Draft No. 2).
6. As noted above, recommended **Rule 26** is significantly different from the Federal Rule. Commission rejected the Federal approach for automatic disclosure of experts, expert reports and documents. The Commission did, however, adopt in Rule 26(B)(4)(A)(ii), a provision providing for depositions of experts without court approval. Also, one major change is the provision in recommended Rule 26(B)(5) providing, in accordance with ABA recommendations, that draft reports of experts and communications between

experts and counsel be privileged and not discoverable. The policy behind this is to encourage more open and candid discussions between counsel and experts. This is not found in the Federal Rule 26, but as noted, is an ABA recommendation.

7. **Rule 28(c)**, contains a substantive amendment adopting the Interstate Depositions and Discovery Act, and has been recommended (and I believe adopted by this Court) in accordance with the information supplied by Justices Nelson and Cotter. Also, **Rule 28(d)** has been amended to encompass the request of the Court Reporters association, which has felt unfairly pressured by certain litigants (particularly the insurance industry) to provide special rates. There is no counterpart to this provision in Federal Rule 28.
8. **Rule 58(e)** is proposed to be amended to conform to Appellate Rule 4.1(a), making it clear that a judgment is not final for purposes of the running of time for filing a notice of appeal until all issues regarding the award of attorneys' fees, costs or sanctions have been resolved. This rule attempts to address the thorny issue of when a judgment becomes final for appeal purposes when there is a pending motion for attorneys' fees, costs, or sanctions. The Commission reads Rule 4(1)(a), M. R. App. P., as deeming a judgment not final for appeal purposes until the amount of costs, attorneys' fees and sanctions are determined. Rule 58(e) attempts to incorporate that concept. The Court may want to consider updating M. R. App. P., Rule 4(5)(a)(iv), to incorporate attorneys' fees, costs and sanction.
9. **Rule 62** regarding stays pending appeal and supersedeas bonds has been substantially revised. First, Rule 62(a) of the Federal Rule has been proposed to be reinstated, giving a 10-day period for automatic stay of execution to allow a party to obtain a stay order and put a bond in place. Also, there is a provision allowing for posting of security other than a supersedeas bond in recommended Rule 62(f)(1). Stay of execution and bond practices are also governed by Rules 22 and 23 of M. R. App. P. and, if the Court is to accept our proposed Rule 62, some modification of those two Appellate Rules may be necessary.

I intend to place some of my Commission files on these rules with the State Law Library so that we can preserve as much "legislative history" as possible regarding deliberations on these rules.

I urge the Court and staff to look these over very carefully. Although we tried to be very careful, this is a major revision of the rules and there are undoubtedly going to be glitches that need

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to be worked out.

Finally, I call the Court's attention to § 3-2-702, MCA, which provides for an "advisory committee." I believe we are called a "commission" in some contexts. Because of the statutory citation, we have styled the notes at the end of the rules as "Committee Notes," instead of "Commission Notes." I also note that the statutory provision provides that composition of the committee should have at least three district court judges. We presently have two, Judges Krueger and Sandefur.

We are working on a recommendation for the forms that follow the Civil Rules. I will send that shortly.

I would be remiss if I did not bring the Court's attention to the Commission Members who devoted long hours (and their own travel and lodging monies) to the completion of this project. The Commission Members are: **Elizabeth Best, Julianne Burkhardt, Dana L. Christensen, Randy J. Cox, Phillip J. Grainey, Anthony Johnstone, Hon. Kurt Krueger, Hon. Dirk Sandefur, Matthew W. Knierim, Robert J. Savage, and Lisa A. Speare.** I also would like to thank my assistant, Karen Schultz, for all of her work in typing the numerous iterations; and my associate, Ben Alke, who helped finalize the Committee Notes.

Sincerely,



James H. Goetz

JHG/kas

Enclosures

cc: Commission Members (with CD of Rules)  
Judy Meadows, State Law Library (with CD of Rules)