



**Law and Justice Interim Committee**  
**62nd Montana Legislature**

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**TO:** Members, Law and Justice Interim Committee (LJIC)

**FROM:** David Niss, Staff Attorney

**RE:** Legislature's Constitutional Authority to Disapprove Rules of the Montana Supreme Court -- New Rules of Civil Procedure and Other Rules

**DATE:** October 6, 2011

For many years, the Legislative Services Division has published the Montana Rules of Civil Procedure, as adopted by the Montana Supreme Court, in Title 25, chapter 20, of the Montana Code Annotated (MCA). Publication of the Rules in the MCA is done as a convenience to the users of the state statutes, most of whom are not attorneys, not because the Rules have in any way been passed or approved by the Montana Legislature. The Rules are adopted only by the Montana Supreme Court.

This year, the Montana Supreme Court adopted a new set of Rules of Civil Procedure. By order of the Court dated April 26, but not effective until October 1, 2011, the Montana Supreme Court replaced all 86 rules of the Montana Rules of Civil Procedure. Many of the new Rules were recommended to the Supreme Court by the Court's Advisory Commission on the Rules of Civil and Appellate Procedure and were written by the Commission to bring the Rules more into line with the federal counterpart, the Federal Rules of Civil Procedure, and to better organize the Rules and make them more workable. Prior to the adoption of the new Rules, the Supreme Court accepted comments on the proposed Rules, both by way of written comment received by the Clerk of the Supreme Court and at several public meetings. A copy of Supreme Court order number No. AF 07-0157 is attached for your reference.

Beginning in 1972 with the adoption of the new Montana Constitution, the Montana Legislature was granted the authority by the people to exercise a power that the Legislature did not have under the 1889 Constitution, to disapprove rules of procedure adopted by the Montana Supreme Court. That authority granted for the first time by the 1972 Constitution, is contained in Article VII, section 2(3), of the Constitution and is set forth below:

**Section 2. Supreme court jurisdiction.**

\* \* \* \* \*

(3) It may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.

Thus, with the issuance of its order of April 26, 2011, the constitutional "clock" allowing disapproval of the new Montana Rules of Civil Procedure by the Legislature has begun to tick.

Several past opinions of the Montana Supreme Court have added some detail to the description of the power of the Legislature pursuant to the constitutional provision quoted above. In Coate v. Omholt, 203 Mont. 488, 662 P.2d 591 (1983), and again in In re Formation of East Bench Irrigation District, 2008 MT 210, 344 Mont. 184, 186 P.3d 1266 (2008), the Montana Supreme Court held that the Legislature may only disapprove rules of procedure promulgated by the Court but has no authority to propose or adopt rules itself. There are no reported judicial opinions specifying whether, if more than one procedural rule is promulgated by the Supreme Court, less than all of the rules may be disapproved by the Legislature.

The reason for providing you, the members of the LJIC, with this notice is not because there is any indication that there is anything wrong with the new Montana Rules of Civil Procedure or because input from any specific group was refused by the Supreme Court. It appears from the language of the Court's order adopting the Rules that the Supreme Court has received substantial input from Montana attorneys. However, because all of the Montana Rules of Civil Procedure have been replaced by the new Rules and because of the number of ordinary Montanans who may be affected by the changes embodied in the new Rules as litigants, both represented and unrepresented, this notice is provided to the LJIC because this Committee is the logical entity to receive input from those Montanans who are not licensed attorneys or otherwise connected to the legal profession. Additionally, this notice is provided to the LJIC because of the time limitation embodied in Article VII, section 2(3), of the Montana Constitution: if the Legislature doesn't consider testimony for the purpose of legislative action in the 63rd or 64th Legislative Sessions, the Legislature will be foreclosed from legislative action on the Rules until the Rules are again amended by the Supreme Court.

In addition to the replacement of all of the Montana Rules of Civil Procedure, the Montana Supreme Court also adopted on the same day as the new Rules of Civil Procedure, an order replacing all 29 rules of the Montana Rules of Appellate Procedure (and 9 forms) and an order replacing all 15 rules of the Uniform District Court Rules. Both the Rules of Appellate Procedure and the Uniform District Court Rules have the exact same status as the Rules of Civil Procedure. That is, they have both been published in the MCA. only as a convenience to users of the state statutes, are

promulgated only by the Montana Supreme Court, and are subject to the power of the Legislature under Article VII, section 2(3), to disapprove the Rules. A copy of each of the orders adopting these rules is also attached.

If the Committee determines that testimony should be taken on the issue of the newly adopted rules, the Committee meeting at which that testimony is to be taken should, of course, be preceded by adequate notice to the Supreme Court, the Montana Bar Association, other stakeholders, those persons on the Committee's interested persons list, and other persons who normally receive notice of Committee meetings.

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