DAY 2- Item 3

A new era

THE AMENDED MONTANA RULES OF CIVIL PROCEDURE

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Litigation practitioners in Montana work under two sets of rules — the Federal Rules of Civil Procedure govern practice in federal courts and the Montana Rules of Civil Procedure govern proceedings in state courts. Over the years, the Montana Supreme Court has adopted recommendations of its Advisory Commission on Rules of Civil and Appellate Procedure and has generally followed the Federal Rules of Civil Procedure. The Montana Rules, however, fell behind a series of Federal Rule changes. The last significant changes to the Montana Rules occurred in the middle 1980s and in 1990. While the Court adopted numerous amendments to selected rules in the interim, by 2007 it was clear that the Montana Rules of Civil Procedure needed significant reform. Enter the Commission.

In the spring of 2006, the Commission, under the direction of Commission Chairman Jim Goetz, met to discuss the state of the Montana Rules and to make a decision whether to undertake revision. The Commission chose, at that meeting, to proceed with a complete revision and also chose to adopt a principle that would guide its work over the course of the ensuing four years leading to adoption of the Rules. The principle is that the Commission would recommend adoption of each individual Federal Rule unless there was a significant reason to retain or modify the existing Montana Rule. The reasons are simple. First, two separate sets of rules can lead to increased costs and the increased possibility of error.

Second, the Federal Rules and their recent amendments were created and adopted with evident care and there are significant improvements in language and content. Finally, Montana law has long made it clear that where the federal and state rules are identical, federal law interpretation of the rule is persuasive authority. *USF&G v. Rodgers, (1994) 882 P.2d 1037, 1039.* Because Montana does not have a large body of case law interpreting the Montana Rules, the ability to turn to federal case law for guidance is meaningful to courts and practitioners.

In late 2009, the Commission transmitted proposed

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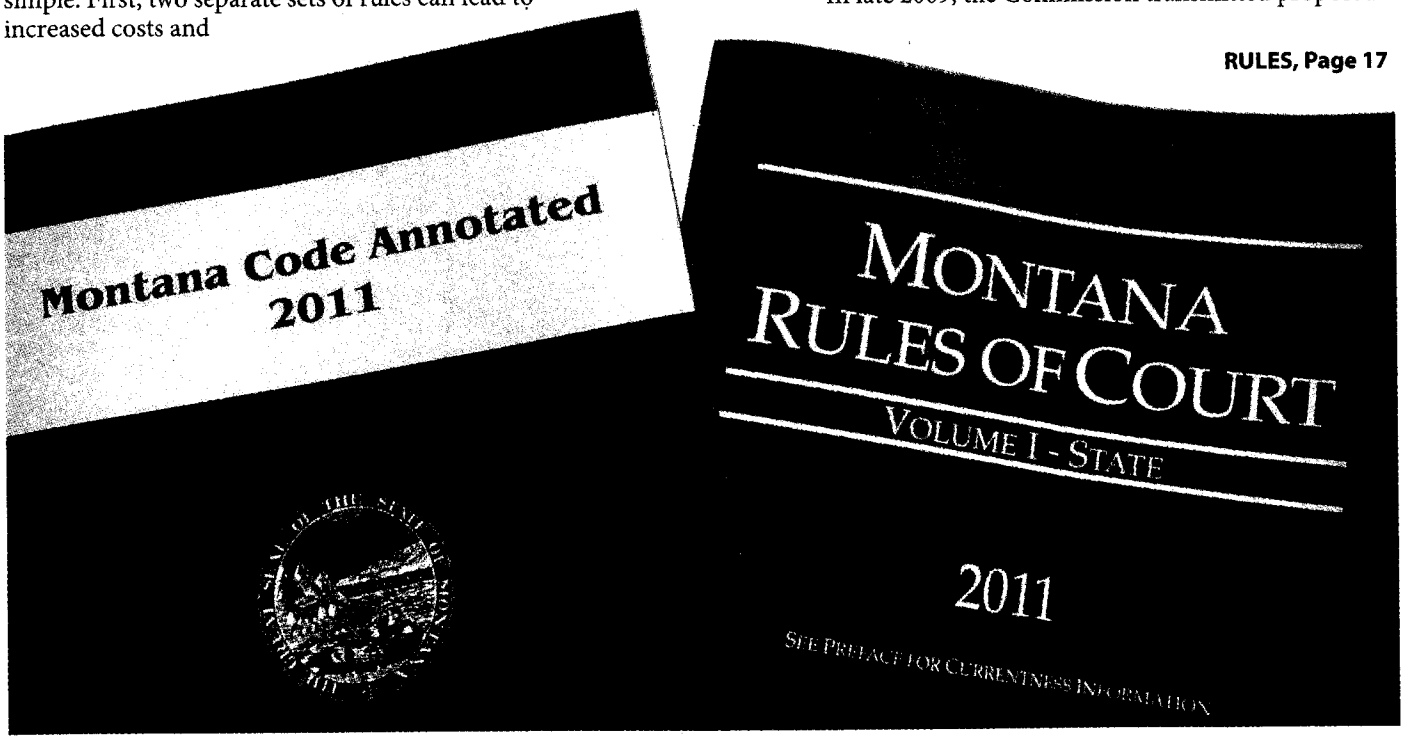

Notice of Legislative Committee Hearing on new Rules of Civil Procedure

On April 20, 2012, the Law and Justice Interim Committee, a statutory interim committee of the Montana Legislature, will hold a hearing on the new Montana Rules of Civil Procedure.

Pursuant to Article VII, section 2(3), of the Montana Constitution, the Legislature may disapprove rules of procedure adopted by the Montana Supreme Court in either of the two legislative sessions following adoption of the rules.

The purpose of the April hearing is to solicit testimony on whether or not the new rules should be disapproved. At its February meeting, the Committee may also expand the April hearing to include the new Rules of Appellate Procedure.

The hearing on the Rules will be held on April 20, 2012, beginning at 8:00 a.m. in Room 172 of the State Capitol in Helena.

Interested persons may contact the Committee staff, Ms. Sheri Scurr or Mr. David Niss, at (406) 444-3064, with any questions.

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rules revisions to the Court. Following a comment period, Supreme Court hearings and substantial additional work by the Commission, the Court adopted the Rules in April, 2011. The effective date of the new rules was October 1, 2011

The revision project would not have been completed but for the tireless and extraordinary efforts of Jim Goetz, and Karen Schultz, his assistant. While the work of others, including newly-appointed U.S. District Judge Dana L. Christensen and Anthony Johnstone, are of substantial note, Jim and Karen coordinated the massive effort necessary to complete the revisions. Jim also wrote entirely or did final editing of all Commission Comments to present them in a uniform style. The lawyers of Montana owe a debt of gratitude to Jim Goetz. Likewise, Commission members donated, literally, thousands of unpaid, volunteer hours to the effort.

It is also fair to say that the changes are substantial and significant. For practitioners with active federal court litigation practices, there is little new to learn, merely the application of certain federal rules and practices to state court litigation. For those without that background, however, the change in the routines of practice may be daunting. This article is designed to identify important changes to help the practitioner adapt to a new era of Montana procedural practice.

This article also attempts to capture the major rule changes and to point out major federal provisions that were rejected. Considerations of space preclude even an attempt to capture every change, and the article specifically ignores changes that merely adopted language of the federal rule but did not invoke substantive change. That having been said, the article turns now to the changes of significance imposed by the revisions to the Montana Rules.

MAJOR CHANGES BY TOPIC

▸ **Counting Days and Time for Motions — Rule 6:** Calculation of time periods for all manner of actions is unified and simplified and now tracks directly with the Federal Rules. Indeed, the Committee Notes specifically adopt the Federal rationale for changing the time calculation provisions of Rule 6 and set forth verbatim the Federal Commission Comment. Note that the time-computation provisions apply only when a time period must be computed, not when a fixed time to act has been set.

Generally speaking, all time periods are multiples of 7 in order to ease calculations by keeping time in one-week chunks. There is no longer a need to decide whether one must include or exclude weekends and holidays. All days are counted. The result of this change has been to shorten the time period for such things as filing briefs in support of or opposition to motions. The Local Rules will undergo changes to conform with the changes in the Montana Rules and, in fact, by Order November 29, 2011, the Court has amended the Uniform District Court Rules to extend the time period for filing answer and reply briefs from 10 to 14 days and some other less substantive changes. *See Order in Docket No. AF 07-0110.*

Generally speaking, a written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the exception of other time periods set by rule or order or when the motion may be heard ex parte.

Three days are still added for service by mail. Rule 6(d).

▸ **Brief Must Be Filed With the Motion — Uniform District Court Rule 2(a):** Effective March 1, 2012, the long-standing Montana practice of filing a motion and having 5 days thereafter to file a brief supporting that motion will come to an end. In its November 29, 2012, Order, the Court amended UDC Rule 2 to require that a brief be filed with the motion.

▸ **Privacy Protections — Rule 5.2:** Similar to Federal Rule 5.2, the new rule provides instruction regarding protected information and handling of personal information in court filings. While Rule 5.2 has been suspended by Supreme Court order, personal information must still be protected.

▸ **Disclosure Statement Now Required — Rule 7.1:** As is the case in federal court, the new rules requires filing of corporate disclosure statements.

▸ **New Procedure for Rule 11 Motions:** Sanctions motions may be served but may not be filed until 21 days after service. Rule 11 motions may not be combined with other motions and do not apply to disclosures, discovery requests, responses, objections and motions under Rules 26 — 37.

▸ **Third-Party Practice — Rule 14:** The time to serve a third-party complaint without leave of court is reduced from 30 to 14 days.

▸ **Pretrial Conferences; Scheduling; Management:** The District Court no longer has a mandatory duty to issue a scheduling order 120 days after filing of a complaint. Rather, parties may request a scheduling order be issued within 90 days after such a request. The purpose is

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to allow each party to assess the need for and timing of a scheduling order and to avoid the routine and potentially premature issuance of such orders when the parties agree an order is unnecessary.

Lawyers attending pretrial conference must have the authority to make stipulations and admissions. This is to help make such conferences meaningful.

The new Rule 16 identifies litigation management topics that are non-binding but nevertheless designed to provide opportunities to the parties and the court to structure the litigation to meet the particular needs of the case. The Rule eliminates any debate over the authority of the court to make appropriate orders designed to facilitate settlement or to provide for an efficient and economical course of discovery and trial. These provisions are patterned on Federal Rule 16.

▸ **Class Action Changes — Rule 23:** Changes adopted reflect an intent to follow the Federal Rules. By Order November 29, 2011, the Court has modified the rule and made it clear an order granting or denying class certification is directly appealable. Likewise, a final order rejecting a class action settlement is appealable. Rules 23(g) and (h) govern appointment of class counsel and payment of fees and costs to class counsel.

▸ **Discovery — Rule 26:** It is in Rule 26 that the Commission and the Court departed the most from the federal rule. The initial disclosure and pretrial disclosure requirements of Federal Rule 26 were rejected principally based on cost and complexity. Note, however, that the Comment to Rule 26 makes explicit reference to and approval of a district court choosing to impose detailed disclosure requirements through orders issued following preliminary pretrial conferences.

Other significant changes in Rule 26, either accepting or rejecting Federal Rule 26 provisions are:

- Detailed expert disclosure requirements of the federal rule have been rejected.
- Expert depositions are always allowed.
- Privilege logs are now required under Rule 26(b)(7).
- The federal rule privilege for attorney-expert communication was rejected, notwithstanding strong recommendation by a near-unanimous Commission. The discussion in the Committee Note regarding adoption of an ABA proposal protecting from discovery expert draft reports and communications between counsel and experts is an artifact of the drafting process and has no applicability under the rule as adopted by the Supreme Court.
- -Rule 26(3), contains more detailed requirements regarding the duty to supplement discovery, including expert disclosures.

▸ **Depositions — Rule 28:** New subsection (c) was adopted to facilitate interstate depositions and directs the clerk of court to recognize a "foreign subpoena" and issue a Montana subpoena based thereon. Note, also, that 28(d) imposes restrictions on court reporters and prohibits financial incentives to parties. This should preclude out-of-state deposition services from offering price breaks to only one of the parties in the litigation.

▸ **The Fleet-Footed Defendant:** The provision allowing a party 45 days for response to discovery served with the summons and complaint has been carried forward in Rules 32, 34 and 36.

▸ **Adoption of Federal Rule re Electronically-Stored Information — Rule 34:** Rule 34(b)(2(D) and (E) are taken directly from Federal Rule 34. Federal case law is therefore made directly applicable to interpretation of the federal rule.

▸ **Rule 37 — Motions to Compel; Discovery Sanctions:** The following are of particular note:

- Rule 37(a)(1) adopts the federal "confer and certify" requirement.
- If in response to a motion to compel the requested discovery is provided, the court must, after notice and hearing, order payment of reasonable expenses including fees.
- Motions for sanctions are explicitly subject to the "confer and certify" requirements. Rule 37(d)(1)(B).
- Federal rule adopted regarding limitation of court's ability to impose sanctions due to loss of ESI so long as the loss is the result of good-faith operation of an electronic information system.

▸ **Rule 50(b) — Renewing Motion for JMOL:** The time period for renewing a motion for judgment as a matter of law (JMOL), which may be

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combined with a motion for new trial, is extended from 10 to 28 days. Such a motion is deemed denied if not ruled upon within 60 days.

▸ **Important Modifications to Rule 56 Summary Judgment Proceedings:** Montana has adopted Federal Rule 56 with these four specific changes:

1. The timing provisions of Rule 56(c)(1) specifically control over any local rule. Thus, the opposition to a summary judgment motion is to be filed within 21 days after the motion is served or a responsive pleading is due, whichever is later, and a reply brief is due 14 days thereafter;
2. A motion for summary judgment may be filed "at any time unless the court orders otherwise."
3. Absent court order to the contrary, any opposing affidavits must be filed according to the briefing schedule. No longer may opposing affidavits be filed at any time "prior to the day of the hearing."
4. Rule 56(c)(2) expresses the Montana common law rule that parties are generally entitled to a hearing on a motion for summary judgment but the hearing is waived if not requested within 14 days of the time for filing the reply brief.

▸ **Entry of Judgment — Rule 58:** Rule 58(a) adopts the federal "separate document" requirement and exceptions. Further, Rule 58(b) imposes on the clerk the obligation to prepare, sign and enter a judgment, without court direction, when there is a general jury verdict, the court awards only costs or a sum certain or the court denies all relief. Practitioners would be wise to provide such a form of judgment to the clerk.

▸ **Deemed Denial is Retained:** Rule 59 and 60 motions are deemed denied if not acted upon by the district court within 60 days, as has been the rule for many years. The federal rules contain no such provisions.

▸ **Automatic Stay Period Against Execution.** Rule 62(a) provides a 14-day automatic stay period against execution, in conformity with the federal rule. Likewise, Rule 62(f)(2) is new and substantive and specifically addresses bond provisions, allowing for provision of various forms of security in the court's discretion. (N.B.: Any issue involving bond and execution of judgment practice must be considered in conjunction with Rules 22 and 23 of the Appellate Rules.)

▸ **Judge's Inability to Proceed — Rule 63.** Montana has not previously had a counterpart to Federal Rule 63 and that rule has now been adopted with minor modifications.

There is no substitute for reading the former Montana Rules and the newly-adopted Montana Rules side-by-side.

There are dozens, if not hundreds, of other minor changes — everything from the changes necessary for all time periods, to stylistic and language changes. There is no substitute for reading the former Montana Rules and the newly-adopted Montana Rules side-by-side. The State Bar of Montana has published an outline prepared by the author of this article from a seminar held prior to the effective date of the Rules. That outline is nearly up to date. (From Feb. 2011 CLE "Rules Update" available at bookstore, www.montanabar.org.)

The changes imposed by the newly-adopted Rules are not overwhelming or difficult, particularly in light of the fact that most of them are based on existing federal rule practice. Nevertheless, the practitioner is advised to spend some time learning the new rules and to never assume that the "old way" of doing things is still correct. Further, all calendaring systems need attention to make certain they take into account new deadlines.

***Randy J. Cox** is a shareholder in the Missoula firm Boone Karlberg, P.C. He was a member of the Advisory Committee that completed the Rules revision project.*