



September 6, 2024

**VIA ELECTRONIC MAIL ONLY**

Ms. Amy Regier, Chair  
Members of the Law & Justice Interim Committee  
Montana State Legislature  
State Capitol  
PO Box 201706  
Helena, MT 59620-1706

RE: Rules Governing the Practice of Law and the Legal Profession

Dear Chair Regier:

Thank you and the members of the Committee and staff for all your hard work during the 2023-24 interim and, particularly, concerning Senate Joint Resolution 31. We write today to address one matter of particular concern from the July 23, 2024 meeting of the Committee.

During that meeting, the Committee discussed the topic of procedural rules promulgated by the Montana Supreme Court and the potential for “disapproval” of certain of those rules by the Legislature pursuant to Article VII, Section 2 of the Montana Constitution, which states: “Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.”

The Committee reviewed a spreadsheet from the Montana Legislative Office of Research & Policy Analysis (Hearing Exhibit 4) which included various rules promulgated by the Montana Supreme Court from 2019 forward. I am attaching that exhibit to this letter.

Among the rules included on Exhibit 4 were those involving the regulation of the practice of law, specifically: the Rules for Admission to the Bar (AF 11-0244); Continuing Legal Education (AF 06-0163); Rules of Professional Conduct (AF 09-0688); and the Rules for Lawyer Disciplinary Enforcement (AF 06-0628).

We are concerned that Exhibit 4 and the discussion surrounding it may have caused some confusion and suggested that the Montana Legislature has the authority to “disapprove” of rules promulgated by the Montana Supreme Court which govern the practice of law. Respectfully, it does not.

As noted by Bruce Spencer, (who appeared on behalf of our organization), in his testimony, there is a distinction between “rules of procedure” which may be disapproved of by the Montana Legislature under Article VII, Section 2, and rules over which the Legislature does not have constitutional authority, including rules governing the practice of law and the legal profession.

It is longstanding and settled law that regulation of the practice of law in Montana rests solely under the authority of the Montana Supreme Court.

In the case styled *In re Montana Bar Association*, 10 years before adoption of the 1972 Constitution, the Montana Supreme Court noted that it “has since its inception exercised its power over the practice of law. . . . This court has the power and authority to adopt, promulgate and enforce all necessary, proper and appropriate rules for its own government and for the admission and regulation of attorneys at law.” 140 Mont. 101, 104, 368 P.2d 158, 160 (1962) (emphasis added).

Four years after the enactment of the 1972 Montana Constitution and the specific language of Article VII, Section 2 which both recognized the Montana Supreme Court’s longstanding inherent constitutional power and authority to govern the practice of law and promulgate rules governing the same, and also provided for legislative disapproval of “rules of procedure,” the Court was called upon to interpret that provision and decide what were and what were not “rules of procedure” subject to legislative disapproval.

In its 1976 decision in *In re: McCabe*, the Court definitively answered that question:

"Constitutional provisions like statutes are to be construed utilizing the same rules as apply to statutes. *Martien v. Porter*, 68 Mont. 450, 219 P. 817. A familiar rule of statutory construction often cited by this Court is that the language used must be reasonably and logically interpreted, giving words their usual and ordinary meaning. *Burrill and Safeway v. City of Butte*, 161 Mont. 530, 508 P.2d 563; *Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 132 P.2d 689. Applying such rules to the provision in question it is clear that the construction placed upon it by this Court not only satisfies the rules but is the only reasonable interpretation of which the language of the provision will admit.

The subject provision grants to the Supreme Court the right to make rules for five enumerated items. **Only two of those items relate to rules of procedure**, viz: (1) appellate procedure and (3) procedure for all other courts. The second sentence of subdivision (3) obviously means, without the necessity for any strained construction, that as to rules of appellate procedure and rules of procedure for other courts, such as the Montana Rules of Civil Procedure, the promulgation of such rules is subject to disapproval by the legislature. **As to rules which might be promulgated by the Court relative to practice, admission to the Bar, and conduct of members of the Bar, the legislature is given no such veto authority. Under the principle of separation of powers it follows then that the Supreme Court was given exclusive authority to promulgate such rules.**

Any other construction of the subject constitutional provision, such as that suggested by petitioners, would not only strain the language used by the framers of the Constitution to the breaking point, but would lead to the unseemly condition where this Court's attempt to regulate the conduct of members of the Bar and the qualifications for admission to the Bar, matters peculiarly and traditionally within its competence, would be constantly subject to ineffectual interference by the legislature. Ineffectual, since even under petitioners' view, the legislature could merely veto rules and would have no power to propose rules of its own.

**If the doctrine of separation of powers, which is specifically embodied in the 1972 Montana Constitution, is to mean anything, then even according to petitioners, this Court must have the authority to control the practice of law.** The framers of the Constitution recognized this and clearly provided this Court with such exclusive authority in Article VII, Section 2(3).

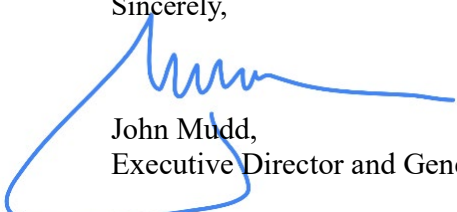
*In re McCabe*, 544 P.2d 825, 168 Mont. 334 (Mont. 1976)(emphasis added).

Thus, with due respect to the Committee and to the staff with whom we enjoy an excellent working relationship, those rules enumerated on Hearing Exhibit 4 which relate directly to the regulation of the practice of law - the Rules for Admission to the Bar (AF 11-0244), Continuing Legal Education (AF 06-0163), Rules of Professional Conduct (AF 09-0688) and Rules for Lawyer Disciplinary Enforcement (AF 06-0628) - are not “procedural rules” within the meaning of Article VII, Section 2 and are not subject to legislative “disapproval.” As conclusively answered in *McCabe*, nearly fifty years ago, the sole authority over those rules rests with the Montana Supreme Court.

Our interest in bringing this to your attention and that of the Committee comes both from the State Bar’s longstanding interest in protecting the independent regulation of the practice of law under the judicial branch and from the practical interest of not having the Committee and staff spend valuable time and resources drafting potential legislation that would run contrary to the provisions of Article VII, Section 2 of the Montana Constitution and settled law interpreting the same.

If we can be of any further assistance to the Committee in this regard, please do contact us.

Sincerely,



John Mudd,  
Executive Director and General Counsel

c: Sara Hess, Research Assistant  
Julianne Burkhardt, Staff Attorney  
Todd Everts, Director of Legal Services