

MONTANA SUPREME COURT PUBLIC MEETING MINUTES

Tuesday, December 13, 2016, 1:00 p.m.
Joseph P. Mazurek Justice Building
215 North Sanders, Helena
Attorney's Lounge, 4th floor

FILED
APR 06 2017
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

In attendance:

Chief Justice McGrath, and Justices Rice, Cotter, McKinnon, Baker, Wheat, and Shea
Chris Manos, Betsy Brandborg, Sam Alpert, Joe Menden, Katie MacFeaters, and Kathie
Lynch on behalf of the State Bar of Montana;
Niki Zupanic and Crystine Miller on behalf of the Montana Justice Foundation;
Bruce Spencer, current President of the State Bar of Montana;
Joseph Sullivan, David Carter, and Breeanne Johnson on behalf of the State Bar of
Montana Technology Committee;
Peter Habein and John Morrison on behalf of the State Bar of Montana Ethics
Committee;
Chris Wethern, Staff Attorney for the Montana Supreme Court;
Melanie D'Isidoro, Aislinn Shaul-Jensen, Hannah Cail, and Jason Collins, Law Clerks
for the Montana Supreme Court.

AF 09-0688 REVISIONS TO RULES 1.18, 4.4, and 8.4 OF THE MONTANA RULES OF PROFESSIONAL CONDUCT

- Chief Justice McGrath opened the meeting by advising those present that the Court had extended the comment period of Rule 8.4 and would not be considering it at this meeting.

Rule 1.18:

- On a joint petition from the Montana Justice Foundation and the State Bar of Montana, Niki Zupanic, Director of the Montana Justice Foundation, summarized the need for the rule revision.
- Justice Baker discussed the background of the rule, stating that in 2003 the Supreme Court of the United States ruled that giving interest generated from IOLTA accounts to state justice foundations is constitutional. She asked Ms. Zupanic to respond to the insightful comments submitted by Judy Williams.
- Ms. Zupanic stated Ms. Williams' comments regarding not wanting to alienate attorneys and ensuring attorneys have assistance in complying with the IOLTA reporting requirement are well taken. State Bar staff currently review daily the reports from attorneys, notifying non-complying attorneys by mail, email, and telephone calls. The online certification system has been revamped to make reporting easier; but paper forms are available on the State Bar website and will be mailed on request. The certification process has important administrative functions for IOLTA account holders. The petition

seeks to keep the suspension of lawyers discretionary, and Zupanic and Manos request direction from the Supreme Court regarding enforcement. Manos clarified that enforcement would be similar to how the State Bar currently enforces bar dues.

- Justice Baker moved to adopt the proposed revisions effective immediately;
- Justice Cotter seconded the motion.
- Chief Justice McGrath asked whether there were any further comments. Hearing none, he called for a vote. All Justices voted in favor of the revisions to Rule 1.18 of the Montana Rules of Professional Conduct. Chief Justice McGrath stated the Court will issue an order.

Rule 4.4:

- Peter Habein stated his gratitude for the interesting discussion generated by the Ethics Committee's proposed rule revision. On behalf of the Ethics Committee, he believes the new comments received since the last public meeting missed the point of the revision. The rule change relates to the conduct of lawyers deliberately seeking to get information – to wrongfully obtain privileged and protected information.
- Justice Baker asked whether something short of a rule amendment, such as an advisory opinion, would be sufficient.
- Habein responded that the Ethics Committee typically does not issue advisory opinions, nor did he think an ethics opinion was enough. A rule would be more widely published and more enforceable.
- John Morrison added that if the Supreme Court had not already amended the rule to keep up with technology, then maybe an ethics opinion would suffice.
- Justice Baker asked whether the Supreme Court adding a comment would be a better option, because she worried the rule amendment as proposed by the ethics committee is amorphous and that enforcement was questionable.
- Justice McKinnon asked whether to continue the discussion and develop the rule around a concrete situation.
- Habein answered that there needs to be a rule established so it may be enforced. He added that the rule is referring to conduct, offering an analogy of an attorney asking for a piece of paper from opposing counsel's note pad so he may use graphite to shade the paper and discover a private message between opposing counsel and the opposing client imprinted on the paper.
- Justice Wheat noted that the Technology Committee does not support the rule change and asked for comment.
- Joe Sullivan, of the Technology Committee, responded that attorneys can take steps to prevent opposing counsel from obtaining metadata left in shared electronic documents, suggesting that the onus is on the attorney creating and sharing the document to effectively clean that document of metadata before sharing. Sullivan was concerned about how broadly the rule is written, leaving open the potential that an innocent attorney who inadvertently opens a document containing the information could be disciplined for an accident.

- Justice Baker asked whether the Ethics Committee considered the Technology Committee's alternative language. Habein stated the Ethics Committee has not considered the alternative language as a committee.
- Chief Justice McGrath stated the rule amendment decision should be postponed because he would prefer to see a compromise between the Ethics and Technology Committees. Justice Wheat concurred that the committees should work together.
- Bruce Spencer stated that, as President of the State Bar, he would seek to facilitate the discussion between the Ethics and Technology Committees, with the hope of presenting the proposed language to the State Bar of Montana Board of Trustees, which would in turn petition the Court.
- Justice Shea stated his concerns with the Technology Committee's interpretation that the onus should be placed on the attorney using technology and sending documents to clean the documents of meta-data and potentially privileged information. Justice Shea believes the onus is on the person intentionally and unjustly seeking out meta-data from documents. Justice McKinnon agreed, and was concerned about whether the emphasis is placed on the receiver or the sender.
- Chief Justice McGrath stated that the Rule 4.4 amendment would be postponed in order for the State Bar of Montana Board of Trustees to weigh in on the language.

AF 11-0244 IN RE CREATION OF STANDING COMMITTEE ON LEGAL EDUCATION TESTING AND BAR ELIGIBILITY UNDER THE RULES FOR ADMISSION TO THE BAR OF MONTANA

- Chief Justice McGrath stated that the expenses of committee members are not usually covered, but he otherwise supported the petition as provided by Dean Paul Kirgis.
- Justice Rice stated the Bar Committee recommended the creation of the Standing Committee on Legal Education Testing, because any other states have an annual review of the testing process.
- Justice Rice moved to approval the proposal.
- Justices Baker and McKinnon seconded the motion.
- Justice Baker and Chief Justice McGrath moved to strike the provision that expenses of committee members not be covered in keeping with other committee practices.
- Justice McKinnon seconded the motion.
- Chief Justice McGrath asked whether there were any further comments. Hearing none, he called for a vote. All Justices voted in favor – petition adopted. Chief Justice McGrath stated the Court will issue an order.

AF 07-0157 IN THE MATTER OF THE MONTANA RULES OF CIVIL PROCEDURE
4(c)(2)(C)(i) and (ii), 4(j)(3)(B), 4(p)(2)(C), 4(o)(1)(C), 52(a)(3), 59(f), and
60(c)(1)

- Justice Cotter and Chris Wethern presented their work on revisions of the Rules of Civil Procedure, stating that judges from Missoula suggested changes and clarifications to better identify the 60-day and 120-day the timelines for motions deemed denied under Rules 59(f) and 60(c)(1).
- Justice Cotter asked what would be the most appropriate effective date of the rule changes. Justice Baker suggested there should be some “lead-time” to enable the “deemed denied” timeline changes to take place. Chief Justice McGrath stated the default effective date is October 1; but also suggested July 1. Justice Cotter supported the July 1 effective date.
- Justice Baker moved to accept the changes as proposed, with the amendment suggested by the Missoula Judges and an effective date of July 1, 2017. Justice Cotter seconded the motion.
- Chief Justice McGrath asked for comments. Hearing none, he called for a vote. All Justices voted in favor. Chief Justice McGrath stated that the Court will issue an order.

AF 06-0185 APPOINTMENT TO THE SENTENCE REVIEW DIVISION (CHIEF JUSTICE)

- Chief Justice McGrath, pursuant to § 46-18-901, MCA, reappointed the Hon. Brenda Gilbert of the 6th Judicial District Court as a member of the Sentence Review Division for a term of three years, expiring Dec. 31, 2019.

AF 06-0263 APPOINTMENT TO THE COMMISSION ON COURTS OF LIMITED
JURISDICTION

- Chief Justice McGrath noted that the Hon. Bob Wood was already appointed to the Commission, and therefore this agenda item was no longer applicable.

AF 13-0276 APPOINTMENT TO THE COMMISSION ON CHARACTER AND FITNESS

- Chief Justice McGrath stated the Hon. Michael C. Prezeau resigned his position. The Supreme Court expressed its gratitude for his service.
- Chief Justice McGrath noted that the Hon. Carolyn Ostby had indicated her willing to serve on the Commission on Character and Fitness.
- The Court agreed and signed an order appointing the Hon. Carolyn Ostby to the Commission on Character and Fitness.

AF 06-0216 APPOINTMENTS TO THE COMMISSION ON TECHNOLOGY

- Chief Justice McGrath stated the Hon. Greg Mohr is retiring in December 2016 and Lisa Mecklenberg-Jackson resigned as State Law Librarian. The Supreme Court thanked the Hon. Greg Mohr and Lisa Mecklenberg-Jackson for their service.
- The Court signed an order appointing the Hon. Audrey Barger as Limited Jurisdiction Judge, term expiring in Oct 31, 2018, to the Commission on Technology.
- The Court signed an order appointing Sarah McClain, the new State Law Librarian, term expiring Dec. 31, 2019, to the Commission on Technology.

Chief Justice McGrath adjourned the meeting at 2:50 pm.

Duly Submitted
Hannah Cail
Aislinn Shaul-Jensen
Law Clerks

Notice of Supreme Court Public Meetings will be given by posting the agenda on the Montana Courts Website at courts.mt.gov and delivering a copy of the agenda to the Office of the Clerk of this Court. Minutes of the Supreme Court public meetings are available in the office of the Clerk of the Montana Supreme Court.