

# ORIGINAL

## MONTANA SUPREME COURT PUBLIC MEETING MINUTES

Tuesday, September 24, 2019, 1:00 p.m.

Joseph P. Mazurek Justice Building  
215 North Sanders, Helena  
Attorney's Lounge, 4th Floor

**FILED**

NOV 19 2019

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

Chief Justice McGrath called the meeting to order at 1:04 pm. In attendance were Chief Justice McGrath and Justices Baker, McKinnon, Rice, Sandefur, and Shea. Justice Gustafson was not present.

Also in attendance: Honorable Judge Amy Eddy via videoconference; Jeanine Blaner, Supreme Court Staff Attorney; Summer Carmack, Lowell Chandler, Molly Kelly, Sam King, John Nesbitt, and Rebecca Stursberg, Supreme Court Law Clerks.

Chief Justice McGrath announced he would proceed out of order from the agenda.

### **Item One: AF 07-0110 Revisions to the Uniform District Court Rules**

- The Chief Justice requested that Judge Eddy discuss the proposed changes to the Uniform District Court Rules.
- Rule 2:
  - Judge Eddy explained that the changes to Rule 2 were generally reorganizing, updating, and combining changes from Rule 6. She addressed Montana Legal Services Association's (MLSA) concern regarding the proposed Rule 2(f) which requires a moving party to file a notice of submittal with the Court after briefing is completed and to send an additional copy of the notice to the presiding judge's chambers. MLSA is concerned that pro se litigants may not be a reliable source of information for the Court about whether an issue is fully submitted and there is a risk of documents containing inappropriate ex parte material to make their way directly to the presiding judge. Justice Baker asked if there were problems currently noted with pro se litigants concerning ex parte rules. Judge Eddy said district judges currently get an extraordinary amount of improper ex parte motions, and she believed they could manage any unwarranted submissions.
  - Justice Baker asked about MLSA's comment regarding Rule 2(a)'s requirement of ex parte contact with the non-moving party and the potential

for parties to violate an order of protection or have contact in cases involving domestic violence (DV) allegations. Justice Baker mentioned other examples, such as appellate motions that state they did not contact the other party when the other party is incarcerated. She asked Judge Eddy what she thought about adding something to the effect that the moving party must explain why it did not contact the non-moving party. Judge Eddy responded that Rule 2(a) should be read in conjunction with Rule 3 regarding ex parte motions. DV is a bit different because a party cannot get an order of protection without contacting the other side. She explained that the petitioner could not be penalized for violating an order of protection when limited contact is permitted for court proceedings. Under §§ 40-15-201, -202, MCA, judges can give exceptions to allow communication under an order of protection for legitimate legal or business communications. Chief Justice McGrath indicated that preliminary injunctions are generally done ex parte. Judge Eddy explained that the proposed new rules allow for that communication by stating “except as otherwise provided by statute.”

- Justice McKinnon expressed concern in a situation where a DV victim could not indicate DV as a reason for non-compliance with Rule 2’s mandatory communication. Judge Eddy responded that the better solution is to keep the clarifying language in Rule 3 rather than insert it into Rule 2(a).
- Justice Baker noted the proposal is substantively identical to Rule 16 in the Rules of Appellate Procedure and expressed there probably was no reason to do anything different. Justice Baker agreed with the proposed rule after hearing Judge Eddy’s comments.
- Rule 3
  - Judge Eddy explained that the current Rule 3 describes what is considered ex parte and the procedure for filing ex parte orders, but courts see so many ex parte communications that the Commission proposed the rule to clarify that all ex parte is improper unless there is an exception.
- Rule 4
  - Chief Justice McGrath asked for input on the proposed Rule 4 change requiring court approval before filing discovery. Judge Eddy explained the intent of the rule is to reduce the amount of discovery documents filed with the clerks of court.

- Rule 5
  - Chief Justice McGrath asked for input on Rule 5 and there was no comment.
- Rules 6 is proposed for elimination, and the remaining rules were renumbered.
- Chief Justice McGrath asked if there was anything on electronic-related rules. Judge Eddy said the rules provide for electronic signatures and electronic service. She explained that the proposed rules clarify existing practice for clerks to follow.
- Rule 16
  - Chief Justice McGrath opened the discussion for proposed Rule 16—Simplified Procedure for Civil Actions. Judge Eddy suggested renumbering Rule 16 for clarity. Justice Baker agreed and stated it may alleviate some of the burden of redrafting all forms that MLSA mentioned it will have to do. Justice Baker suggested renumbering it as Rule 6 since the proposed rules eliminate the former Rule 6. Judge Eddy agreed.
  - Judge Eddy explained that the proposed simplified procedure action would assist litigants and lawyers in resolving complex civil cases and serve as an attempt to control the docket of district court judges when it comes to civil litigation. It was a give and take between the bench and the bar to get cases handled. The idea arose unanimously from the members of the Uniform District Court Rules Commission. Judge Eddy addressed the comments from the Missoula and Gallatin District Courts expressing their concern that they cannot handle the 6-month timeline for a trial date that the proposed rule requires. Judge Eddy indicated that the 6-month timeline is the target, and the potential increase in cases would not be that much of a burden, as less than 0.5% of civil cases go to trial. She stated the proposed rule allows flexibility for district court judges by specifying: “unless otherwise ordered by a court.”
  - Judge Eddy discussed her recent experience with attorneys trying a complex civil case in two days involving claims of negligence, breach of contract, unjust enrichment, comparative negligence, equitable estoppel, and counterclaims. She found there was enough time to be thorough and found the simplified procedure steered the case right to the heart of the issue. She stated the central question of the case would not have changed even with more time or more depositions. She emphasized that there needs to be a change in mindset for lawyers in part in order for the simplified procedures to succeed. The decision whether to opt into the simplified procedures will be based on the expertise of the attorneys. Much like

current practice with other procedural matters, pro se litigants will rely on explanations from the judge during the scheduling conference when deciding whether or not to follow the simplified procedure.

- Justice Baker addressed MLSA's comment regarding proposed Rule 16(b). She proposed to insert "and all parties" after the opening phrase to recognize not all parties have attorneys. She discussed having the Commission create an informational piece in collaboration with MLSA and court staff to explain the changes. She also wondered about adding "and in the discretion of the court" to the end of proposed Rule 16(b) in order to help address some of the comments from the district court judges and clarify that the actual use of the rule is ultimately discretionary. Justice Baker asked Judge Eddy to comment.
- Judge Eddy explained that the proposed rule is a tool the busiest districts can use to control their dockets by reducing the number of motions for summary judgment, motions in limine, or motions to dismiss. Scheduling of the trial seems to be the largest concern: proposed Rule 16(c)(1) reads "or as soon as the court's schedule allows," so there is flexibility for the district court. She believes the rule as drafted adequately addresses the district courts' concerns regarding ultimate control of scheduling while still encouraging expedited litigation with limited discovery.
- Justice McKinnon questioned if the proposed rule will push out other cases, which are following discovery according to the current rules. She asked if the Commission had discussed whether the simplified procedure cases would get priority over the remaining docket and what the impact on the remaining docket would be. Judge Eddy stated there is a net efficiency because the judge would not be doing extensive pre-trial work so it frees the district court up exponentially to handle the other cases.
- Chief Justice McGrath asked if the proposed rule would cause cases to either settle or not settle. Judge Eddy does not think it will make much difference. She does not know how much the rule will be used because it requires experienced attorneys or attorneys who have a relationship with the judge. She asserted something dramatic must be done to address costs and time of civil litigation and the burden on the district courts.
- Justice McKinnon asked what would happen if one party decides they do not want to be in the simplified procedure a few months down the road, and if it would restart the cases. She further questioned what would happen at trial if there were issues with discovery and what jurisprudence are courts

relying on to address issues. Judge Eddy replied that there is a change of circumstances exception and the process can terminate at any time prior to trial. She asserted extensions are still happening all of the time on the regular docket and this rule would not have any different application than regular docket.

- Justice Baker pointed out that under the proposed rule the court can terminate the procedure on motion and for changed circumstances, but she did not think the proposed rule as written made it clear that the court has the authority to terminate application on its own motion without a showing of changed circumstances. She proposed adding “. . . anytime prior to trial, on the court’s own motion or upon a specific showing of changed circumstances,” to proposed Rule 16(d) to allow the court flexibility. Judge Eddy did not disagree, but argued the parties are giving up a lot to litigate under this rule, so that should be another reason to not continue trials set under the rule.
- Justice Baker asked for input from Judge Eddy regarding the comment that suggested an amendment for self-authentication of evidence. Judge Eddy explained that district courts are already doing it somewhat, but lawyers did not like the idea of self-authentication across the board.
- Justice McKinnon asked to clarify that if there are opposing counsels that agree and work together, is the problem getting a trial date set? Judge Eddy indicated that it is a problem according to Missoula and Gallatin District Courts, not to other jurisdictions. Justice McKinnon further questioned that if there are situations where counsel are working together in their clients’ best interest in an expedited way, what is the point of the rule? Judge Eddy replied that even lawyers who get along put an extraordinary amount of resources into litigation and the proposed simplified procedure is an effort to bring parties together in equal limitation to determine the necessary scope of the case.
- Chief Justice McGrath said, if adopted, the rule amendments would be effective January 1, 2020, but it does not preclude parties from giving it a try before then. Judge Eddy explained that in her court, she immediately schedules an in-chambers meeting where all parties discuss whether the case would be appropriate for the proposed simplified procedure.
- Justice Baker moved for two amendments: in subsection 16(b), second sentence, after “simplified procedure” add “, and all parties shall be prepared to”; in subsection 16(d) add, “on the court’s own motion or”.

- Chief Justice McGrath called for a vote: 4 ayes, 2 nays. The motion passed with Justices Sandefur and McKinnon voting no.
- Justice Baker moved to adopt proposed Uniform District Court Rule 6 (formerly Proposed Rule 16). Chief Justice McGrath opened the motion to discussion.
  - Justice Sandefur stated he was against it adamantly. His view is the changes deprive the people who elect to use the simplified procedure of a well-established framework of procedures. He did not see the need for an additional rule here. He stated he is concerned about what happens later on when the “wheels come off” when parties want to get out of the proceedings and move into uncharted territory.
  - Chief Justice McGrath stated he was in favor of the proposed rule. He stated there will be a limited application. Complex cases will not opt in when the case is not appropriate. He stated he sees the proposed rule as encouraging participation and gives judges a tool to deal with discovery abuses.
  - Justice McKinnon opposed the rule. She echoed Justice Sandefur’s comments. She argued the proposed simplified procedures target a certain type of complex civil litigation, not pro se litigation, and felt that the limitations and specificity will lead to unrecognized problems that will be dealt with by this Court. She concluded by stating the parties are giving up a lot, and was concerned about the derailing and how to address what has been given up on appeal. She emphasized the purpose of the proposed rule is an ideal the court can express somewhere in the rules, but not in this proposed Rule 6.
  - Justice Baker spoke in favor of the rule. She argued that the court has a standard maxim: “A party who acquiesces in error cannot complain.” There is flexibility in the rule if parties stipulate to the simplified procedure and later developments require a change. She argued the proposed rule allows for enough flexibility to address unexpected circumstances. She expressed her belief that the rule will help serve self-represented litigants and help achieve access to justice by allowing parties to save money and time for clients.
  - The Chief Justice asked for further comments.
  - Justice Shea stated he had the same concern as Justice Baker and appreciated the amendments to make it clear the district courts have flexibility to opt out once the proceedings have moved forward.

Since Judge Eddy is using it successfully and it is voluntary, he approved of the rule's concrete guidelines. He stated no one is forced into the path. Judge Eddy commented that originally some members of the Commission wanted this to be mandatory, but ultimately found that went too far in light of the Rules of Civil Procedure.

- Chief Justice McGrath called for a vote to approve Rule 6 [proposed Rule 16]: 4 ayes, 2 nays. The motion passed, with Justices Sandefur and McKinnon voting no.
- Justice Baker moved for admission of the rest of the rule amendments.
- Chief Justice McGrath called for a vote on the remaining rule changes. Motion passed unanimously.
- Chief Justice McGrath thanked Judge Eddy personally as well as the commission. He stated his appreciation of the initiative and work it took to get together.

**Item Two: AF 06-0652 Appointments to the Uniform District Court Rules Commission**

- Chief Justice McGrath introduced this item. He stated that James Molloy's term on the Commission will expire September 30, 2019, and he would like to be reappointed as a member of the commission. The Court unanimously reappointed James Molloy.
- Chief Justice McGrath circulated the Order for signatures.
- Judge Eddy notified the court that the Commission will next look into proposals for electronic filing and uniform e-filing rules. She further stated she would work with the State Law Library or whoever else is designated to put together an informational document regarding the new Rule 6 involving simplified procedures.

**Item Three: AF 06-0651 Appointments to the Commission of Continuing Legal Education**

- Chief Justice McGrath introduced this item and stated three of the Commission of Continuing Legal Education members' terms will expire on September 30, 2019. All three members would like to be reappointed. The Court unanimously reappointed Courtney Cosgrove, Lisa Mecklenberg Jackson, and Cynthia Thiel.

**Item Four: AF 13-0276 Appointments to the Commission on Character and Fitness**

- Chief Justice McGrath introduced this item and stated there were two vacancies for traditionally non-attorney slots and there is still one vacancy. Chief Justice McGrath said Rachel Stanich had declined to be appointed because of other time commitments. He informed the Court that Margie Thompson from Butte does not wish to be reappointed, and nominated Rex Renk, who has agreed to serve. The Court unanimously voted to appoint Rex Renk.

**Item Five: Approval of the Minutes from Tuesday, August 6, 2019 Public Meeting**

- The attending Justices unanimously approved the minutes from the August 6, 2019 public meeting.

Chief Justice McGrath opened the floor to public comment and there was none.

Chief Justice McGrath adjourned the meeting at 2:01PM.

Submitted by: Molly Kelly and Rebecca Stursberg on October 1, 2019.