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We wish to comment on the Proposed Revisions to Montana Rules of Civil Procedure, filed March 3, 2010.

**1) Time computation**

As a general matter, we support the change which computes the "days" in multiples of 7, 14, 21, or 28, in accordance with the newly adopted Rules of Federal Procedure. However, the ways the days are computed is confusing in the Proposed Rules. Two broad categories in which the computation of days needs clarification are outlined below.

**A) Consistency between the proposed M.R.Civ.Proc. and Uniform District Court Rule 2.**

For deadlines to respond to motions, we look to the UDCR Rule 2: *Motions*. UDCR 2(a) says that the time to file response briefs and reply briefs to all motions is 10 days. Under current M.R.Civ.Proc. 6(a), if a time period to respond is less than 11 days, then intermediate weekends and holidays are **not** counted. However, under Proposed Rule 6(a)(1)(B), intermediate weekends and holiday **are** counted. This leads to confusion when the time to file a response brief is not specified in the Proposed Rules.

For example, Proposed Rule 56(c)(1)(B) specifies that 21 days are allowed for the response brief to a motion for summary judgment, and 14 days for the (optional) reply brief of the movant. Those deadlines are consistent with the Federal Rules.

However, the Proposed Rules are silent as to the time in which to respond to motions (other than a motion for summary judgment under Proposed Rule 56(c)(1)(B)); for example, all Rule 12 motions, motion to compel, motion for

protective order, etc. That would compel us to look to the Uniform District Court Rule 2, which allows 10 days to respond to all briefs; but in coordinating Proposed Rule 6(a)(1)(B) with existing Uniform District Court Rule 2, the response to non-summary judgment briefs would be 10 days, counting intermediate weekends and holidays, which shortens the time allowed.

Like the Proposed Montana Rules, the Federal Rules are silent as to when responses to non-summary judgment briefs are due; but the Local Federal Rules for the District of Montana (effective December 1, 2009) clear up any confusion about when responses are due, and also differentiates between so-called dispositive and non-dispositive motions. Federal Local Rule 7.1(d)(B) states:

Any party that opposes a motion must file a response brief. Responses to motions to dismiss, for judgment on the pleadings, or for summary judgment must be filed within 21 days after the motion was filed. Responses to all other motions must be filed within 14 days after the motion was filed.

We recommend either:

- 1) That Uniform District Court Rule 2 be amended to allow 14 days in which to file response and reply briefs to all motions (except motions for summary judgment, which already has a special 21-day deadline under Proposed Rule 56(c)(1)(B)), which would comply with the stated aim to make the "days" more uniform in increments of 7/14/21 days; or
- 2) That the Proposed Rules be amended to specify the number of days in which to respond to various motions. For example, if Montana wants to follow the Local Federal practice of allowing 21 days to respond to "dispositive" motions (summary judgment, judgment on the pleadings, motion to dismiss) and allowing 14 days to respond to all "non-dispositive" motions (discovery disputes, etc.), then state those deadlines in the Rules themselves, as was done in Proposed Rule 56(c)(1)(B).

#### **B) Inconsistent "days" computations**

The following is list of "days" which appear to be inconsistent with the stated goals of: 1) having multiples of 7/14/21/28 days in which to take certain actions; and, 2) to be consistent with the Federal Rules. These appear to be oversights due to the large nature of the task rather than conscious decision to deviate from the 7/14/21-day protocol. As discussed above, periods of less than 11 days become very short when intermediate weekends and holiday have to be counted under Proposed Rule 6(a)(B), and should be enlarged to compensate for that.

- 1) Proposed Rule 4(d)(3)(D): *Service*, specifies 20 days to return notice and acknowledgment when served by mail, while the Proposed Rule 4(d)(3)(D) directly above specifies 21 days. Probably just an oversight. We recommend specifying 21 days.
- 2) Proposed Rule 4(o)(5): *Service by Publication*, states that summons and complaint must be mailed no later than ten days after publication. This would appear to shorten the time since intervening weekends are now included in computation under Proposed Rule 6(a)(1)(B). We recommend enlarging the time to 14 days.
- 3) Proposed 5(d)(3)(B): *Electronic Filing, Signing, or Verification* specifies that if papers are first filed by fax, the original document must be filed by the clerk of court within 5 business days. We recommend enlarging to 7 days to remain consistent, especially since 5 business days is essentially the same as 7 days.
- 4) Proposed Rule 26(f)(6): *Discovery Conference* specifies that objections to a motion for a discovery conference must be served within 10 days. We recommend enlarging the time to 14 days.
- 5) Proposed Rule 32(a)(5): *Limitation on Use for Deposition Taken on Short Notice* designates 11 days as a "short notice" deposition. F.R.Civ.P. 30(a)(5) specifies 14 days. We recommend enlarging the time 14 days to be consistent with both the Federal Rules and with the 7/14/21 day protocol.
- 6) Proposed Rule 45(a)(4)(c)(1): *Subpoena, Notice of Service* specifies that notice of service of subpoena be provided to all parties within 10 days before the commanded action. We recommend that the period be enlarged to 14 days for consistency with the 7/14/21 day protocol.
- 7) Proposed Rule 50(d): *Time for a Losing Party's New-Trial Motion* specifies that the losing party has 10 days to file a motion for a new trial. However, Proposed Rule 50(b), Proposed Rule 52(b), and Proposed Rule 59(b) all allow 28 days for similar motions; plus the Committee Notes to Rule 50 states "Former Rules 50, 52 and 59 adopted 10-day periods for their respective post-judgment motions," and then gives the reasons for expanding those deadlines from 10 to 28 days. It is apparently an oversight that the time under Proposed Rule 50(d) would be substantially different that the time allowed under Proposed Rule 50(b). Moreover, F.R.Civ.P. 50(d) allows 28 days. We recommend that Proposed Rule 50(d) expand the time for filing from 10 to 28 days.

- 8) Proposed Rules 68(a) and 68(c): *Offer of Judgment* specify a 10-day period before trial begins to make an offer of judgment. F.R.Civ.P. 68(a) and 68(c) specify 14 days. We recommend that the time be enlarged to 14 days.
- 9) Proposed Rule 77(d): *Notice of Entry of Judgment or Order Served* specifies 10 days after entry of judgment for the prevailing party to serve it on other parties. We recommend that the time be enlarged to 14 days to be consistent with the 7/14/21-day protocol.

**2) Coordination between Proposed Rules of Civil Procedure and the Uniform District Court Rules**

In addition to the issue outlined above at 1.A concerning the tension between Proposed Rule 6(a)(1)(B) and current UDCR 2(a), there are several other areas in which the interplay between the Proposed Rules of Civil Procedure and the Uniform District Court Rules merit our comments.

- A) According to the Committee Notes, Proposed Rule 5(d)(1) requires that notices of deposition be filed with the court. But the Commission Comment to UDCR 4 states that it is not necessary to file any discovery with the court, including not filing a notice of deposition (or any other discovery-related notice). Federal Rule 5(d)(1) does not require the filing of deposition notices with the court, and Local Federal Rule 26.2(a) specifically exempts all notices of discovery, including notices of depositions, from routine filing. We recommend that notices of deposition not be routinely filed with the court, in conformance with current Uniform District Court Rule 4 and with Federal Rule 5(d)(1)/Federal Local Rule 26.2(a).
- B) UDRC 2(a) allows a brief in support of a motion to be filed within 5 days of the filing of the motion. While the Federal Rules are silent, Federal District of Montana Local Rule 7.1(d)(A) mandates that the brief in support of the motion must be filed at the same time as the motion. We support a change to Uniform District Court Rule 2(a) to require that the motion and supporting brief be filed on the same day.

Yours Very Truly,

CHURCH, HARRIS, JOHNSON & WILLIAMS, P.C.

By

  
RICHARD F. GALLAGHER