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July 19, 2010

Chief Justice Mike McGrath
The Supreme Court of Montana
c/o Clerk of the Montana Supreme Court
Room 323, Justice Building--215 North Sanders
P.O. Box 203003
Helena, MT 59620-3003

Re: Proposed Rule IV for Regulation of the Practice of Law in Montana.
Our File No.: 7910-001

Dear Mr. Chief Justice and Associate Justices:

I am writing this letter as a individual Montana attorney, as a 14- year member of your Commission on the Unauthorized Practice of Law which you recently disbanded, and as a member of the BETTR (Business, Estates, Trusts, Taxation, and Real Estate) Section of the State Bar. I have reviewed and also fully concur with that separate letter sent to you on the same matter from four law professors at the University of Montana, Burke, Gagliardi, Renz, and Willey.

If your Rule IV is intended as such to define the practice of law in Montana, I respectively submit that it is much too narrow. As I have indicated to you in previous letters, specifically a letter which addressed this very issue in April of last year; a continuing problem which is used again and again as a justification to practice law by unlicensed individuals in this State is the lack of a clear definition of the practice of law. The Montana Code at § 37-61-201, MCA, which uses the definition of one "who shall engage in the business and duties and perform such acts, matters, and things as are usually performed by an attorney at law" does not really give a lot of guidance or clarification to the issue of a definition of the practice of law as to what are the "acts, matters,

and things as are usually performed by an attorney at law." The issue is not unique to the State of Montana and will continue to be of concern until there is a more specific definition.

The Rule IV definition as proposed is what I call the "little half" definition approach used by others in the past to simply limit the definition to actual court litigation, when it is my belief that any proper definition should include at least what I call the "big three," which goes past just actual court litigation and includes other related matters, i.e, (i) representing a client in an adjunctive proceeding (a court proceeding being just half of this category, but possibly eliminating other actions where the specific legal rights, responsibilities, duties, obligations, constraints, or freedoms of that client is to be determined, such as, state or federal administrative proceedings, or multiple party non-judicial dispute resolution actions such as arbitration, mediation, or other types of proceedings or negotiations); (ii) representing a client in selecting, drafting, or reviewing legal documents; and (iii) representing a client in giving legal advice or opinions as to past, present, or future transactions as to the first two categories.

If only the "little half" definition is the practice of law in Montana, then those of us, including most members of the BETTR Section of the State Bar who are performing the balance of the rest of the "big three" actions, are not really practicing law in those transaction actions. I do not believe that is the case nor has that position been expressed by this Court in the past. I do not need to remind the Court that it has recently re-affirmed that premise as to the limited aspect of the "little half" definition when it ruled that ...."this Court has long defined the practice of law to include legal services whose product touches legal matters not immediately at issue in court." Commission on the Unauthorized Practice of Law v. O'Neil, 147 P.3d 200, 334 Mont 311, 2006 MT 284 at ¶ 82 (Mont. 2006). Furthermore, in that O'Neil decision at ¶¶'s 86 and 87, this Court reaffirmed the decision of the District Court, and the inclusion of the "big three" (or in this case, big four) categories when it listed the following as indicia of the practice of law and as actions which unquestionably constitutes "practicing law" under § 37-61-201, MCA, to wit:

(a) The giving of advice or counsel to others as to their legal rights or responsibilities or the rights or responsibilities of others.

(b) Selecting, drafting and completing legal papers, pleading, agreements and other documents which affect the legal rights or responsibilities of others.

(c) Appearing, or attempting to appear, as a legal representative or advocate for others in a court or tribunal of this State.

(d) Negotiating the legal rights or responsibilities of others.

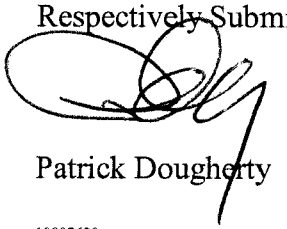
As this Court ruled in the O'Neil decision, the primary reason for prohibiting the unauthorized practice of law is to protect the public from being advised and represented by unqualified persons. However, if this Court retreats from the position it has taken in the O'Neil decision and adopts the extremely narrow approach apparently taken in its Proposed Rule IV, there may be other repercussions well beyond just protecting the public from being advised and represented by unqualified persons and certain unintended consequences may result.

If the practice of law is limited to just court litigation, attorneys licensed to practice law can therefore arguably take the position that they are not practicing law, and are instead acting or practicing in some other professional capacity or position, such as the all inclusive term "consultant," when they are performing certain non-litigation actions (for example, preparing or reviewing legal documents, or giving advice as to those documents, such as deeds, estate planning documents, or contracts), if other unqualified and unlicensed individuals are equally allowed to do so. If they are not practicing law in performing those transactions, cannot it then be at least arguably stated that those actions therefore cannot expose them to legal malpractice or legal conflicts of interest (or other violations of the rules of professional conduct) as they are not practicing law in the performance of those actions just like other non-lawyers are not practicing law when they are performing these transactions.

The result being that we will have two categories of transactions similar to that of barristers and solicitors under English law, with the Montana exception that the solicitors are not practicing law and therefore do not necessarily have to be an attorney. Law firms can therefore reorganize and create subsidiary or related entities (or even unrelated affiliate entities with non-attorney owners) where one entity is involved in a strictly litigation practice and is therefore practicing law. The other related or unrelated affiliate entity is performing actions which is non-litigation, and does not constitute the practice of law and therefore cannot be involved in violations of the rules of professional conduct, or other rules applicable to attorneys, if they should occur or surface in any dispute.

I hope we do not get to that position, but it appears to be the logical result if the "big three" is not included in the definition of the practice of law, as it will force attorneys, as they do now, to compete in the marketplace with non-attorneys, who are not subject to the same standards, rules, qualifications, or procedures that bind licensed attorneys in this State, and therefore technically have an unfair competitive advantage over those licensed attorneys in the performance of these transactions.

Respectively Submitted,



Patrick Dougherty

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