ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. AF 07-0157

IN THE MATTER OF PROPOSED REVISIONS
TO THE MONTANA RULES OF CIVIL PROCEDURE

REQUEST TO CONSIDER SUBMISSION BY ADVISORY COMMISSION RE RULE 26(b)(5) OF THE PROPOSED MONTANA RULES OF CIVIL PROCEDURE

The Supreme Court Advisory Commission on Rules of Civil and Appellate Procedure hereby submits the following information regarding proposed Rule 26(b)(5) regarding protection from discovery of certain communications between attorneys and experts. The Court has considered deleting proposed Rule 26(b)(5). Because the Commission believes it is important to retain the provision, particularly because the proposed rule is similar to newly-amended Federal Rule 26 effective December 1, 2010, this special submission is made by the Commission. The Commission will have a representative at the Court's next meeting, September 29, if there are any specific questions.

THE BACKGROUND OF PROPOSED RULE 26(b)(5)

The Commission considered and adopted a provision that originated from an ABA recommendation to the Advisory Committee for the Federal Rules of Civil Procedure. The proposed rule was designed to protect communication between

lawyers and experts that is engaged in while developing and refining opinions. Generally speaking, the proposed rule protects draft reports and provides that some categories of attorney-expert communications are protected from discovery. Not protected is information regarding compensation for the expert's study or testimony, facts or data provided by the lawyer or assumptions provided by the lawyer that are relied upon in forming an opinion.

While our Commission was working on a revision of Montana's rules, the ABA recommendation was working its way through the federal Advisory Committee. After thorough study, and having obtained broad support from the ABA, the American College of Trial Lawyers, the American Association for Justice (formerly ATLA), the Federal Magistrate Judge's Association and the Department of Justice, among others, the decision was made by the Federal Rules Advisory Committee to propose amendment of Rule 26 of the federal rules to protect draft reports and certain other forms of attorney-expert communication. Attached as Exhibit "A" is an excerpt from the Report of the Judicial Conference, Committee on Rules of Practice and Procedure, detailing the amendments to Rule 26 proposed to the federal rules and explaining the reasons for the recommendation.

The United States Supreme Court has adopted the proposed amendments to Rule 26 and, assuming Congressional approval, the amendment will take effect in December 2010. The amended portions of Federal Rule 26 are attached as Exhibit "B."

One of the working premises of the Montana Advisory Commission was that federal rules should be adopted absent significant reason to the contrary. Federal Rule 26 will be amended to provide protection for draft expert reports and certain types of work products. The Commission originally agreed such protections were appropriate, which led to proposed Rule 26(b)(5). Now, we further propose adoption of the Rule in order to remain consistent with the December 1, 2010 amendment to Federal Rule 26.[1]

COURT'S CONSIDERATION OF PROPOSAL

The Court accepted the proposed rules, including Rule 26(b)(5), and solicited public comment. One of the comments related to the proposed Rule 26(b)(5) and the privilege for certain types of attorney-expert communication. That

[1] The Court should note that Federal Rule 26 and the proposed Montana Rule 26(b)(5) do not use the same language to reach the same result - protection of draft reports and other work-product type communication between experts and attorneys. If the Court concludes that it is appropriate to have the same protections in Montana Rule 26 as will soon be in Federal Rule 26, the Court should also consider whether the Montana language should track more closely - or even identically - with the Federal Rule language. The Commission stands ready to supply amended language tracking the Federal Rule if the Court so desires.

comment was submitted by the Montana Trial Lawyers Association (MTLA), and MTLA opposed the proposed change. The basis for and the portion of their objection appears on page 4 of MTLA's comments, attached as Exhibit "C."

On September 15, 2010, the Court held a public hearing and considered the proposed amendments to Rules 1 through 34. The Court voted to amend the proposed limitation on expert discovery out of Rule 26. Specifically, the Court voted to delete proposed Rule 26(b)(5) and to renumber the following two provisions as (b)(5) (insurance agreements) and (b)(6) (claiming privilege or protecting trial-preparation materials).

Unfortunately, the Court was not advised either by the Advisory Commission or by any of the comments of the pending change to the federal rule or of the wide support – including from the organization formerly known as ATLA – that existed for the proposed amendment. Before the Court makes a final determination on the scope of Rule 26, it should be aware of the pending amendment to Federal Rule 26 and should also be aware of the broad support from judges, agencies, the plaintiff's bar and the defense bar for the similar amendment to federal Rule 26.

The amendment to Rule 26 proposed by the Advisory Commission enjoyed wide support on the Commission and the same type of protections from discovery proposed by the Commission also appear in Federal Rule 26 and will, in all

likelihood, be in effect as of December 1, 2010. Thus, the Commission wants the Court to be aware that it strongly recommends adoption of Rule 26(b)(5) both because it is good policy and because the Montana rule will then be consistent with the provisions of the federal rule covering the same issue. Indeed, the Commission voted with only one dissent to submit this additional information to the Court and to make its position on this issue specifically known.

CONCLUSION AND REQUEST TO RECONSIDER

In light of the additional information, this Commission's preference, and the pending amendment to Rule 26 of the Federal Rules of Civil Procedure, the Advisory Commission respectfully requests that the Court reconsider the initial action taken with respect to the proposed Rule 26(b)(5) and that it either retain the proposed language or direct the Committee to submit language providing the same protections patterned more closely, or identically, upon the pending new provisions of Federal Rule 26.

DATED this 27th day of September, 2010.

Randy J. Cox, for and acting under authority of the Chairman, James H. Goetz, and with approval of the Advisory Committee

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

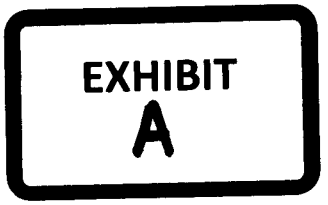
* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 8(c), 26, and 56, and Illustrative Form 52, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments to Rules 26 and 56 were circulated to the bench and bar for comment in August 2008. Approximately 90 witnesses testified at the three public hearings on the proposed amendments to Rules 26 and 56. The proposed amendment to Rule 8(c) was circulated earlier for comment in August 2007, and the scheduled public hearings were canceled because no one asked to testify.

The proposed amendment to Rule 8(c) deletes the reference to "discharge in bankruptcy" from the rule's list of affirmative defenses that must be asserted in response to a pleading. Under 11 U.S.C. § 524(a), a discharge voids a judgment to the extent that it determines the debtor's personal liability for the discharged debt. Though the self-executing statutory provision controls and vitiates the affirmative-defense pleading requirement, the continued reference to "discharge" in Rule 8's list of affirmative defenses generates confusion, has led to incorrect decisions, and causes unnecessary litigation. The amendment conforms Rule 8 to the statute. The Committee Note was revised to address the Department of Justice's concern that courts and litigants should be aware that some categories of debt are excepted from discharge.



The proposed amendments to Rule 26 apply work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, communications between those witnesses and retaining counsel. The proposed amendments also address witnesses who will provide expert testimony but who are not required to provide a Rule 26(a)(2)(B) report because they are not retained or specially employed to provide such testimony, or they are not employees who regularly give expert testimony. Under the amendments, the lawyer relying on such a witness must disclose the subject matter and summarize the facts and opinions that the witness is expected to offer.

The proposed amendments address the problems created by extensive changes to Rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony. More than 15 years of experience with the rule has shown significant practical problems. Both sets of amendments to Rule 26 are broadly supported by lawyers and bar organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly ATLA), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice.

Experience with the 1993 amendments to Rule 26, requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, has shown that lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts – one for consultation, to do the work and develop the opinions, and

one to provide the testimony – to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work.

Notwithstanding these tactics, lawyers devote much time during depositions of the adversary's expert witnesses attempting to uncover information about the development of that expert's opinions, in an often futile effort to show that the expert's opinions were shaped by the lawyer retaining the expert's services. Testimony and statements from many experienced plaintiff and defense lawyers presented to the advisory committee before and during the public comment period showed that such questioning during depositions was rarely successful in doing anything but prolonging the questioning. Questions that focus on the lawyer's involvement instead of on the strengths or weaknesses of the expert's opinions do little to expose substantive problems with those opinions. Instead, the principal and most successful means to discredit an expert's opinions are by cross-examining on the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

The advisory committee's analysis of practice under the 1993 amendments to Rule 26 showed that many experienced lawyers recognize the inefficiencies of retaining two sets of experts, imposing artificial record-keeping practices on their experts, and wasting valuable deposition time in exploring every communication between lawyer and expert and every change in the expert's draft reports. Many experienced lawyers routinely stipulate at the outset of a case

that they will not seek draft reports from each other's experts in discovery and will not seek to discover such communications. In response to persistent calls from its members for a more systematic improvement of discovery, the American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and limit discovery of attorney-expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them. The State of New Jersey did enact such a rule and the advisory committee obtained information from lawyers practicing on both sides of the "v" and in a variety of subject areas about their experiences with it. Those practitioners reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated, with no decline in the quality of information about expert opinions.

The proposed amendments to Rule 26 recognize that discovery into the bases of an expert's opinion is critical. The amendments make clear that while discovery into draft reports and many communications between an expert and retaining lawyer is subject to work-product protection, discovery is not limited for the areas important to learning the strengths and weaknesses of an expert's opinion. The amended rule specifically provides that communications between lawyer and expert about the following are open to discovery: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

In considering whether to amend the rule, the advisory committee carefully examined the views of a group of academics who opposed the amendments. These academics expressed concern that the amendments could prevent a party from learning and showing that the opinions

of an expert witness were unduly influenced by the lawyer retaining the expert's services. These concerns were not borne out by the practitioners' experience. After extensive study, the advisory committee was satisfied that the best means of scrutinizing the merits of an expert's opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues. The advisory committee was satisfied that discovery into draft reports and all communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions; was time-consuming and expensive; and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

Establishing work-product protection for draft reports and some categories of attorney-expert communications will not impede effective discovery or examination at trial. In some cases, a party may be able to make the showings of need and hardship that overcome work-product protection. But in all cases, the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Note, nothing in the Rule 26 amendments affects the court's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The proposed amendments to Rule 56 are intended to improve the procedures for presenting and deciding summary-judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice. The proposed amendments are not intended to change the summary-judgment standard or burdens.

The text of Rule 56 has not been significantly changed for over 40 years. During this time, the Supreme Court has developed the contemporary summary-judgment standards in a trio

of well-known cases, and the district courts have, in turn, prescribed local rules with practices and procedures that are inconsistent in many respects with the national rule text and with each other. The local rule variations do not appear to be justified by unique or different conditions in the districts. The fact that there are so many local rules governing summary-judgment motion practice demonstrates the inadequacy of the national rule.

Although there is wide variation in the local rules and individual-judge rules, there are similarities among them. The proposed amendments draw from many summary-judgment provisions common in the current local rules. For example, the amendments adopt a provision found in many local rules that requires a party asserting a fact that cannot be genuinely disputed to provide a "pinpoint citation" to the record supporting its fact position. Other salient changes: (1) recognize that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an affidavit to support or oppose a summary-judgment motion; (2) provide courts with options when an assertion of fact has not been properly supported by the party or responded to by the opposing party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion; (3) set a time period, subject to variation by local rule or court order in a case, for a party to file a summary-judgment motion; and (4) explicitly recognize that "partial summary judgments" may be entered.

The public comment drew the advisory committee's attention to two provisions that raised significant interest. The first dealt with a single word change in the rule that took effect in December 2007 as part of the comprehensive Style Project and remained unchanged in the Rule 56 proposal published for comment in August 2008. The second was a proposed amendment that would have enhanced consistency by putting in the national rule the practice of

many courts requiring parties to submit a "point-counterpoint" statement of undisputed facts. This proposed "point-counterpoint" provision in the national rule was a default, subject to variation by a court's order in a case. With the exception of these two important aspects, the public comment on all other provisions of the proposed amendments was highly favorable.

The first aspect of divided public comment related to a change made in 2007 with virtually no comment. As part of the Style Project, the word "shall," which appeared in many rules, was changed in each rule to clarify whether it meant "must," "may," or "should." The word "shall" is inherently ambiguous. Whether "shall" meant, in a particular rule, "must," "may," or "should," had to be determined by studying the context and how courts had interpreted and applied the rule. In 2007, the word "shall" in Rule 56(a) was changed to "should" in stating the standard governing a court's decision to grant summary judgment. ("The judgment sought *should* be rendered if [the record shows] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.") The change to "should" was based on the advisory committee's and Standing Committee's study of the case law. Like all the changes made as part of the Style Project, the change to "should" in Rule 56(a) was accompanied by a statement that the change was intended to be stylistic only and not intended to change the substantive meaning or make prior case law inapplicable. That change was virtually unnoticed until the current proposed amendments to Rule 56 were published for comment. Those amendments left the word "should" unchanged, consistent with the intent to improve the procedures for litigating summary-judgment motions but not to change the standard for granting or denying them.

Many comments expressed a strong preference for "must" or "shall," based in part on a concern that retaining "should" in rule text would lead to undesirable failures to grant appropriate summary judgments. Proponents of the word "must" pointed to language in

opinions stating that a grant of summary judgment is directed when the movant is "entitled" to judgment as a matter of law. These comments emphasized the importance of summary judgment as a protection against the burdens imposed by unnecessary trial and against the shift of settlement bargaining power that follows a denial of a valid summary-judgment motion.

Equally vigorous comments expressed a strong preference for retaining "should." These comments emphasized the importance of the trial court having some discretion in handling summary-judgment motions, particularly motions for partial summary judgment that leave some issues to be tried, and the trial record will provide a superior basis for deciding the issues as to which summary judgment was sought. These comments emphasized case law supporting the continued use of the word "should" as opposed to changing the word to "must." And trial-court judges pointed out that a trial may consume much less court time than would be needed to determine whether a summary judgment can be granted, besides providing a more reliable basis for the decision at the trial level and a better record for appellate review.

After considering these comments, and after extensive research into the case law in different contexts, the advisory committee concluded that it could not accurately or properly decide whether "shall" in Rule 56(a) meant "must" or "should" in all cases. Both the proponents of "must" and of "should" found support for their position in the case law. The case law ambiguity on whether "shall" means "must" or "should" is further complicated by circuit differences in the summary-judgment standard and differences in the standard depending on the subject matter. But the cases reflect, in part, the fact that they were decided based on the word "shall" in the statement of the standard for granting summary-judgment motions. The advisory committee decided that changing the word "shall" created an unacceptable risk of changing the substantive summary-judgment standard as it had developed in different circuits and different subject areas. The advisory committee decided that the words of Rule 56(a) – "The court *shall*

grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" – had achieved the status of a term of art or "sacred phrase" that could not be safely changed for stylistic reasons without risking a change to substantive meaning. Instead, the advisory committee decided to restore the word "shall" to avoid the unintended consequences of either "must" or "should" and to allow the case law to continue to develop.

After extensive public comment, the advisory committee decided to withdraw the "point-counterpoint" proposal that was included in the rule text published for comment. Under the proposal, a movant would be required to include with the motion and brief a "point-counterpoint" statement of facts that are asserted to be undisputed and entitle the movant to summary judgment. The respondent, in addition to submitting a brief, would have to address each fact by accepting it, disputing it, or accepting it in part and disputing it in part (which could be done for purposes of the motion only). A court could vary the procedure by order in a case. The point-counterpoint statements were intended to identify the essential issues and provide a more efficient and reliable process for the judge to rule on the motion.

During the public comment period, the advisory committee heard from lawyers and judges who found the point-counterpoint statement useful and efficient. But the advisory committee also heard that the procedure can be burdensome and expensive, with parties submitting long and unwieldy lists of facts and counter-facts. Some courts adopted the point-counterpoint procedure by local rule and subsequently abandoned it or are rethinking it. Testimony and comments did not provide sufficient support for including the point-counterpoint procedure in the national rule. Instead, the rule is revised to continue to provide discretion to the courts to adopt the procedure or not, by entering an order in an individual case or by local rule.

The proposed revision of Illustrative Form 52, Report of the Parties' Planning Meeting, (formerly Form 35), corrects an inadvertent omission made during the comprehensive revision of illustrative forms in 2007. The revision reinstates two provisions that took effect in 2006 but were omitted in the comprehensive revision in 2007. The provisions require that a discovery plan include: (1) a reference to the way that electronically stored information would be handled in discovery or disclosure; and (2) a reference to an agreement between parties regarding claims of privilege or work-product protection. The two provisions are consistent with amendments to Rule 16(b)(3) that took effect in 2006. The proposed revision is not published for public comment because it is technical and conforming.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

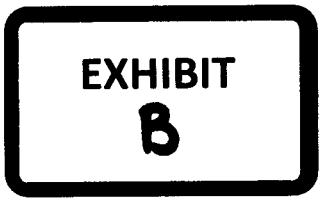
* * * * *

(b) Discovery Scope and Limits.

* * * * *

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for



trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal

theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it —

that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert

relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * * * *

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 07-1057

IN THE MATTER OF PROPOSED REVISIONS	)	
	)	COMMENTS OF
TO THE MONTANA RULES	)	THE MONTANA
	)	TRIAL LAWYERS
OF CIVIL PROCEDURE	)	ASSOCIATION

INTRODUCTION

The Montana Trial Lawyers Association ("MTLA") respectfully submits these comments to the Proposed Revisions to the Montana Rules of Civil Procedure. MTLA recognizes and appreciates the considerable effort and time spent by the members of the Advisory Commission on Rules of Civil and Appellate Procedure in considering and preparing the proposed Revisions to the Rules.

Rule 1 of the Montana Rules of Civil Procedure includes a simple, but profoundly important principle:

> [These Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action.

MTLA believes that any proposed revision to the Rules of Civil Procedure should be considered in light of the principle set forth in Rule 1, which in turn serves the important rights to access and to a trial by jury under Montana's Constitution.

EXHIBIT C

Mont. Const. art. II, §§16, 27 (1972). Unless a proposed revision enhances the opportunity for litigants to have access to the civil justice system to obtain a just, speedy, and inexpensive determination of a dispute, the revision should be rejected. Conversely, any revision that serves those purposes should be adopted.

As the Court noted in its March 30, 2010 Order inviting comments to the Proposed Revisions, the Advisory Committee approached its task by considering whether Montana's Rules should be revised to conform to revisions that have been made to the Federal Rules of Civil Procedure. Because Montana has for nearly 50 years been a "federal rules" state, using the federal rules as a point of reference makes sense. In recent years, however, changes in the federal rules and, perhaps more significantly, federal courts' interpretation and application of those rules, have not been consistent with the principle set forth in Rule 1 of the Montana Rules of Civil Procedure. *See, e.g.,* Ashcroft v. Iqbal, 2009 U.S. LEXIS 3472, 129 S.Ct. 1937, 173 L.Ed. 2d 868 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed. 2d 929 (2007); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.E. 2d. 469 (1993). Thus, MTLA respectfully urges this Court to be vigilant in assuring that Montana courts remain open and accessible to parties, and that the right to trial by jury be safeguarded.

MTLA applauds the Advisory Committee for rejecting some of the changes in the Federal Rules on the grounds that those changes would unnecessarily increase costs and otherwise make it more difficult for persons to access the civil justice system. *See, e.g.,* Committee Notes to Rules 16 and 26. MTLA further agrees with many of the proposed revisions, which make some rules more easily understood, and/or clarify matters that have been the subject of disputes and confusion. As discussed below, MTLA urges the Court to reject the Advisory Committee's proposed revisions in Rules 4 (c)(1), 4(t), 26(b)(5), 39(b), and 41(a)(1)(B). MTLA also provides comments concerning an apparent discrepancy between the Advisory Committee's proposed Rule 35(b)(4) and its Notes concerning that Rule.

COMMENTS

Rule 4 (c)(1), Rule 4 (t):

New proposed Rule 4(c)(1) refers to a new proposed Rule 4(t) which proposes to modify the time for serving summonses. MTLA opposes this change in reducing the time period in which to accomplish service from three to two years. MTLA objects to the proposed change because it addresses a non-existent problem and changes decades of practice in Montana. Further, sometimes damages take years to develop and therefore, shortening the time to two years would prejudice injured persons.

Rule 26(b)(5):

MTLA opposes the Committee's proposal to add subsection (5) to Rule 26(b). This new subsection would create a new privilege for draft reports and communications between attorneys and testifying experts. By doing so, it would change existing law, which favors full disclosure of the bases for a testifying expert's opinions.

The proposed rule would impede a party's ability to fully analyze the testifying expert's opinions, and the grounds upon which those opinions are based. It would therefore impede a party's ability to cross-examine the opposing expert, and potentially expose prior inconsistent statements, bias, and other potential grounds for challenging the legitimacy of the expert's opinions.

Subsection 26(b)(5)(B) of the proposed rule sets forth exceptions, consistent with current law, which allow the discovery of facts and data relied upon by the expert. This exception is likely to create discovery disputes because the distinction between "facts and data" and other information conveyed by an attorney to an expert is often not clear.

Parties should have full access to an expert's working materials because such access enhances the truth-finding process of a trial. The Court should reject the Committee's proposed Rule 26(b)(5).

Rule 35(b)(4):

There appears to be a discrepancy between the Committee Notes to proposed Rule 35, and the text of the proposed Rule 35(b)(4). The Committee Notes indicate that the proposed Rule 35(b)(4) carries forward "verbatim from previous Rule 35(b)(2), limiting the waiver of doctor-patient privilege in instances where treatment, consultation, prescription or examination relates to a mental or physical condition "not related to the pending action.'" The text of proposed Rule 35(b)(4), however, does not include this limitation. MTLA assumes this is a clerical mistake.

Proposed Rule 35(b)(4) should read:

> **(4)** ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have -- in that action or any other action involving the same controversy -- concerning testimony about all examinations of the same condition. *Such waiver shall not apply to any treatment, consultation, prescription or examination for any mental or physical condition not related to the pending action. Upon motion seasonably made, and upon notice and for good cause shown, the court in which the action is pending, may make an order prohibiting the introduction of evidence of any such portion of the medical record of any person as may not be relevant to the issues in the pending action.*

The italicized language above is omitted from the text of the proposed Rule. It should be included in the final Rule as adopted by this Court.

Rule 39(b):

Proposed Rule 39(b) deletes language from the existing rule, which allows a court on its own initiative to order a jury trial when the parties have not requested one. The proposed rule would allow the court to order a jury trial, after the parties had not requested one, only upon motion of a party.

MTLA believes jury trials should be protected and preserved. The proposed rule is a modest limitation, because it would apply only when the parties to an action have not requested a jury trial. Nevertheless, MTLA believes even modest limitations on the jury trial should be avoided. Thus, MTLA requests that the Court retain the language in the current Rule 39(b), which allows a court on its own initiative, with 10 days notice, to order a jury trial on all or some of the issues in a case.

Rule 41(a)(1)(B):

Proposed Rule 41(a)(1)(B) (voluntary dismissal by plaintiff) changes existing law by providing that "if the plaintiff previously dismissed any federal -- or state -- court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." The existing Rule simply provides that a voluntary dismissal by the Plaintiff is without prejudice, unless the notice or stipulation of dismissal states otherwise.

A plaintiff may voluntarily dismiss an action without court order at any time before the opposing party serves an answer or moves for summary judgment. There may be circumstances when a plaintiff files a claim initially in federal court, and then dismisses and re-files in state court. Under those circumstances, the plaintiff should retain the ability to voluntarily dismiss the state court action without prejudice if circumstances warrant doing so. The proposed Rule would limit the plaintiff's ability to voluntarily dismiss under such circumstances.

MTLA opposes the additional language in the proposed Rule. Defendants will not be harmed by a plaintiff's second voluntary dismissal. The Defendant will not have filed an answer or motion for summary judgment, and any action that is pursued must still be filed within applicable statutes of limitation.

CONCLUSION

As stated at the outset, MTLA appreciates the work done by the Advisory Committee, and in large part agrees with the proposed Revisions to the Rules of Civil Procedure that they have presented to this Court for consideration. MTLA objects to the proposed revisions to Rules 4(c)(1), 4(t),26(b)(5), 39(b), and 41(a)(1)(B), and supports adoption of Rule 35(b)(4) as set forth above.

RESPECTFULLY SUBMITTED this 1st day of June, 2010.

Allen Smith Jr., Executive Director
Montana Trial Lawyers Association