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Montana Supreme Court
Justice Building
215 N. Sanders
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Helena, MT 59620-3001

Re: Comments to Proposed Changes to the Montana Rules of Civil Procedure and the Montan Rules of Professional Conduct Nos. AF 07-0157 and AF 09-0688

To the Honorable Supreme Court of the State of Montana:

I am an attorney licensed in California and a national expert on the subject of limited scope representation, and have been teaching and writing about the subject since the mid- 1990s. I published my first book on limited scope in 1997, and travel frequently throughout the US and Canada training lawyers and speaking to judges on the practice and ethics of limited scope. In October 2010 I had the pleasure of speaking to the Montana District Judges, as well as teaching a CLE for attorneys in Billings on limited scope. Additionally, I participated in a conference call with the Ethics Committee of the Montana State Bar, along with Judge Russell Fagg on November 4, 2010.

I would like to make some general comments in favor of the proposed rule changes designated AF 07-0157 and AF 09-0688, followed by specific responses to objections raised in my conference call with the Ethics Committee members.

First, I would like to compliment the work of the Task Force, the Commission on Self-Represented Litigants, and the Access to Justice Committee in connection with their study of this important issue. It is clear that much thoughtful consideration went into the recommended rule changes. I routinely see proposed rules from across the country, and I believe the proposed Montana Rules are among the best. I strongly encourage the Supreme Court to adopt them promptly *as proposed.*

Introductory Comments

Current Rule

Montana currently has Rule 1.2c, which clearly authorizes attorneys to limit the scope of their representation if the limitation is reasonable under the circumstances and the client gives informed consent. I strongly support the addition of the words "in writing" at the end of that sentence. Many states do not require a writing (including California, where I am based). Nevertheless, I teach hundreds of lawyers every year, and as part of that training I instruct them to always get the limitation in writing, whether or not their state rules require it. It is essential to informed consent that

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the client knows what s/he is, and even more importantly, is not getting, and since any ambiguity is going to be resolved in favor of the client, a writing is essential to protect the lawyer as well.

Some have questioned why, since limited scope is already authorized by the Montana rules, further modifications are required. I can speak from personal experience in crafting and promoting the rules in California and elsewhere that clarity and express permission are essential. California also had no prohibition against limited scope when we looked into adopting formal rules in 2000. However, since lawyers are inherently conservative and want to be sure they are not committing any ethical violations, we determined it was critical to clearly and unambiguously affirm the ethical appropriateness of limited scope, including ghostwriting, as well as to clarify the parameters of where it should and should not be used. The Montana proposed rules do just that. Lawyers won't have to guess whether limited scope is appropriate under your rules, and the clarifying language will go far to reassure them, which is essential to encouraging the practice, which is in turn so critical to access to justice.

Access to Justice

While I know the Court is acutely sensitive to access to justice issues, I must underscore the importance of limited scope in promoting access. The October 2010 report of the World Justice Project [worldjusticeproject.org] ranks the US eleventh of thirty-five nations in access to justice (the last among developed countries), behind such countries as the Dominican Republic and Croatia. This is obviously unacceptable. While I don't know the actual *pro se* statistics for Montana, I routinely see reports of between 50% and 75% self represented litigants in some areas of the law. For example, in California, between 70% and 80% of all family law litigants are unrepresented. That is a staggering statistic, and means that 100% of California family lawyers represent less than 30% of the population. These trying economic times are increasing those imbalances.

Limited scope is not exclusively an indigent phenomenon, though it is critical to meeting the needs of indigent litigants. It is a middle class issue, driven by consumer demand, as more and more people find themselves priced out of the legal marketplace and increasingly turn to the internet, to paraprofessionals, and sometimes outright predators, for legal assistance. This is not intended as a criticism of lawyers or legal fees. It is expensive to run a law office and many legitimate claims which do not lend themselves to contingent fees are simply too small for an attorney to handle cost-effectively using a full service model. However, these claims are important to the claimants, who often can neither afford to walk away from their claim or to hire a lawyer to represent them.

Access to justice requires that the legal profession, conservative as it may be, *must* innovate and find new ways to deliver quality legal services to the general public in an affordable way. Innovations must be made to ensure the availability of quality legal services to the entire population, and not just the few who either are wealthy enough to retain full service counsel or the indigent who qualify for legal services and are lucky enough to actually find a local program which is willing and able to help them. Failure to do so harms the public, and calls into question lawyers' monopoly on the market. Forgive me for stating the obvious, but a legal system which only serves a small percentage of citizens, while leaving everyone else to twist in the wind, has failed. The proposed Montana rules

are an important step.

Pro Bono

Limited scope is particularly helpful in the area of pro bono in that it significantly aids in the recruitment volunteer lawyers. Attorneys who would balk at taking a contentious family law case pro bono for fear of being stuck in the case and unable to get out will gladly donate a few hours of time to draft pleadings, assist with a parenting plan, or even appear for an occasional hearing. This helps the litigant, the courts, and society as a whole.

Some argue that mandatory pro bono should be adopted in lieu of limited scope representation. As I stated in my paper for the Summit on the Future of Self Represented Litigants in 2005 [available at selfhelpsupport.org], no single solution will satisfy the vast demand for affordable legal services. With only 3,000 lawyers in the state, I do not see how the Montana Bar can possibly meet the need for legal services using only a full service model, even with some form of mandatory pro bono, which I do not recommend. I am acutely aware that many solo and small firm lawyers are barely making a living themselves, and the imposition of a mandatory pro bono rule would create a significant hardship for them. Limited scope representation allows available legal resources to be spread farther, and is an essential element of meeting the legal needs of the citizens.

Unauthorized Practice of Law

It is important to make a distinction between limited scope representation and computerized internet based document preparation services. Limited scope document assistance is an attorney/client relationship where the documents are tailored to the client's specific needs and the lawyer exercises professional judgment in their preparation. The lawyer who provides document assistance owes the client the same duties of competence, confidentiality and loyalty as would be owed to any other client. The same cannot be said for the web based services.

When litigants are unable to afford the services of a qualified lawyer, or believe themselves to be so, they turn elsewhere for legal assistance. They turn to We the People, Legal Zoom, or other online or local providers, many of whom are not competent to provide the services the client needs and may, in their ignorance, do significant harm. I also find that these unqualified providers often charge as much or more than a lawyer would for the same limited service. One of the reasons the regulatory arm of the State Bar of California embraced limited scope in the late 1990s was the observation that it provided a counterbalance to the unauthorized practice of law. Those who would otherwise turn to "notarios" or other unqualified document preparers could instead consult qualified lawyers for assistance with their documents. Similarly, with the clarification of the rules, lawyers could offer such services with confidence that they weren't crossing some ethical boundary or exposing themselves to malpractice claims. This is, of course, a win for the litigants, and also a win for the lawyers, who have paying clients they otherwise would not have had.

In the current climate, if lawyers are to maintain our monopoly on legal services, we must find ways for the legal needs of the public to be met *by lawyers*. As I often tell the lawyers I train, if we don't provide services to these people, someone less competent will.

Risk Management

No area of practice is entirely without risk. Some of the objections which have been raised to limited scope would apply to full service representation as well. Some object that limited scope exposes lawyers to greater risk than full service. That has not been my observation and experience. Starting with the first conference on unbundling in Oregon in 1997, I have prepared, revised, honed and tested a complete set of risk management materials, one version for family law, another for civil law. I used these materials, totaling approximately 60 pages, in my recent CLE in Montana. Those materials include four sample fee agreements, office forms, client handouts, best practices, and everything else a practitioner would need to offer limited scope services competently and ethically. This not new, the materials are available for free, and they have been tested over a period of more than a decade. As I often tell lawyers, if they will just use the risk management materials as instructed, they have to work really hard to mess it up. Interestingly, I recently saw that some of my risk management materials have been adopted verbatim by Lawyer's Mutual of North Carolina and posted on their website with a recommendation that their insureds use them when offering limited scope services.

Free training is also available. I have posted at least five three hour limited scope ethics trainings at various locations on the internet, and all include the risk management materials. There simply is no excuse for a lawyer to say they don't know or can't learn how to do it competently and safely.

While some argue that limited scope carries an increased risk of malpractice claims, that has not been my observation. I teach hundreds of lawyers every year. I always give them my contact information and tell them I want to know if they hear of any malpractice cases. There is one published limited scope malpractice case in California [Nicholls v. Keller, (1993) 15 Cal.App.4th 1672] where I agree the lawyer malpracticed, and I would have reached the same result as the Court of Appeal. In the past fifteen years, I have only heard of one other limited scope malpractice case (unpublished), and I believe that the lawyer in that case failed to meet the standard of care I teach and which is set forth in the risk management materials.

When I first started doing this work, I was told that insurance carriers would not cover it. That has also not turned out to be true. Limited scope representation is an attorney/client relationship carrying the same ethical and professional responsibilities of any other form of representation. Great care has been given to developing resources for attorneys to ensure that they do it competently and safely. Experience has demonstrated that limited scope clients tend to be more satisfied than traditional litigation clients, resulting in a lower percentage of claims.

Practical Aspects

Most of the issues that arise from limited scope are practical rather than ethical in nature, and involve communication between a lawyer and an opposing limited scope client, dealing with unrepresented parties, service of process and the like. I believe your task force has done an excellent job in rules 4.2 and 4.3 to anticipate and address the practical applications of limited scope. I wish that some of the other states I have dealt with had done such a clear job of addressing these potential issues in the

rules themselves.

Ghostwriting

As an active participant in the national debate, I can say with authority that the debate has moved beyond the discussion of whether ghostwriting should be allowed. The current debate is whether ghostwriting must be disclosed in the four corners of the document. Various states have adopted one of three answers to that question: the rule adopted by California and the states that follow it, which specifically does not require disclosure of document assistance (which I prefer as a less loaded term than ghostwriting), the rule adopted by Colorado, which requires disclosure of full contact information for the drafting attorney, and the rule adopted by New Hampshire, Florida and others which requires that the document simply state that it was prepared with the assistance of an attorney licensed by the state. I am pleased to see that Montana has followed the California rule and has not required disclosure. Our California task force in 2000 concluded that disclosure of document assistance was akin to any other disclosure of representation, and thus, a violation of the attorney/client privilege. While I understand the rationale of the New Hampshire rule, which is designed to ensure that the document assistance was in fact provided by a licensed attorney and not an unlicensed person, I believe the attorney/client privilege trumps that public policy. My observation is that in the states which require full disclosure of contact information, the rule has a chilling effect on the willingness of lawyers to offer document assistance for fear that they will be drawn into the broader case, and the limitation on the scope of their representation would not be honored by the court. This has a direct and negative impact on access to justice in those states which require full disclosure and contact information.

Impact on the Courts

One of the common objections voiced about limited scope, and in particular document assistance, is that it is somehow misleading to the court when a *pro se* litigant obtains drafting help from an attorney. In practice, this has simply not materialized as a problem for a number of reasons. First, any experienced lawyer or judge can look at a pleading and know whether a professional was involved, so there is no misleading going on at all. In fact, the trial judges I talk to tell me they love it when they have well drafted pleadings, whether or not there is an attorney making an appearance. When pleadings are professionally drawn, they will raise legitimate defenses, and contain an appropriate recitation of relevant facts. They will be purged of the irrelevancies with which so many *pro se* litigants love to fill their pleadings, sparing the judge the time and effort required to separate the wheat from the chaff. The litigant will have been coached on procedures, deadlines, and service of process, so there are fewer continuances or multiple trips to the filing window, all of which waste precious judicial resources which cannot be recaptured.

One experienced judge told me that, done correctly, limited scope and particularly document assistance is "transparent to the court." Of course, a judge would always prefer to have a competent attorney appearing in every case. That isn't realistic in these challenging times, and trial judges are constantly telling me how well drafted pleadings assist them in working through their *pro se* dockets.

Rule 11

There has been much discussion around the country about the impact of Rule 11 issues in limited scope, particularly on the subject of whether an attorney who offers document assistance is required to do an independent inquiry into the accuracy of the client's representations and motives, which would effectively bar attorneys from being able to offer document assistance in a cost-effective manner, and raises a fear of sanctions or censure. I strongly support Montana's proposed addition to Rule 11, which does not require inquiry unless the lawyer has reason to believe the representations are false. The practical answer which I've observed around the country is that when an attorney has reason to suspect Rule 11 violations, s/he is unlikely to do the inquiry (for which the client is unlikely to pay in any event), but rather, declines the representation entirely. This is, of course, the common sense and safest course if there is reason for suspicion.

The Elephant in the Room

While few formal objectors state the concern directly, I find that many objections from lawyers to limited scope representation, while couched in other terms, are really economic in nature. Many traditional lawyers are afraid that if limited scope becomes common in their community, they will lose their full service clients. While I don't know if any of the objections the Court received express this concern, I feel it is important to address it directly.

This is simply not a problem in my experience. Many areas of law (criminal, complex civil litigation) do not lend themselves to limited scope. Even in those areas which do lend themselves (family law, consumer rights, small claims assistance, administrative proceedings, special needs advocacy, etc), there will always be clients who want and can afford to pay for full service representation. Frankly, even with superior document assistance and coaching, self representation is extremely challenging and difficult for most litigants. If they could afford to pay someone else to do it, they generally would make that choice. I have seen no evidence of any fall-off in full service practice either at home or in my travels to states which have adopted limited scope.

In fact, the opposite is true: limited scope representation allows lawyers to tap into a large and growing pool of potential clients who are currently *nobody's* clients. If lawyers could represent them profitably using traditional methods, they would already be doing so. They can't, and so these people are left with few alternatives. They may not be able to afford a full service lawyer, but they have meritorious claims, defenses, and legal issues, and they can afford to buy a few hours of a lawyer's time. And, since limited scope is, by definition, "pay as you go," lawyers continually report to me that their limited scope practices are, in fact, profit centers when done well. In fact, we often see clients asking for additional services when they are using limited scope. When they get a taste of how difficult it is to self represent, they have a better appreciation for what an attorney brings to the representation and often return to expand the scope of services.

I realize the economics of the practice are beyond the scope of the Court's request for comment, but since I hear this objection so often, and so frequently find it to be the real motivation hiding behind objections which are couched in other terms, I feel it is important to address the Elephant here.

Objections of the Montana State Bar Ethics Committee

While I don't know if the formal comments of the State Bar's Ethics Committee will include any or all of the objections they raised in their conference call with me of November 4, 2010, I would like to respond to those objections here.

Two Tiered Justice

One of the arguments made in our conference call was that limited scope creates a two tiered justice system, with one tier for full service and a second, lower tier for limited scope. This argument is without merit for a number of reasons. First, ethicists across the country have looked into this issue. Forty states have limited scope rules or ethics opinions which have been scrutinized by ethics experts in each jurisdiction. The standard of care for a task in the context of limited scope is exactly the same as the standard of care for that same task in the context of full service representation. Stated differently, the limitation is in scope, not liability, and there is no reduction in the standard of care or ethical requirements. Whatever would be malpractice in full service will also be malpractice in limited scope and vice versa.

Going further, I would argue that a restriction on the availability of limited scope in appropriate circumstances does, itself, create a two tiered justice system. If only full service lawyers are available to litigants, then by definition, everyone who can't afford to pay for the service is excluded and left to stumble through a complex, confusing and often frightening labyrinth of process and procedure. That means that there would be access for citizens who can afford full service lawyers, or who qualify for and can find available legal services help, and either no access or substandard service for everyone else, who may comprise 50% or more of the population. The working poor and most of the middle class fall into this category. If that isn't two tiered justice, I don't know what is.

Changes to 1.2c are Unnecessary and Redundant

Two members of the Ethics Committee argued in our conference call that the proposed additions to Rule 1.2 are unnecessary and redundant since the rule, as drafted, already allows limited scope representation and document assistance. Response to this objection requires some background. I taught a CLE to lawyers in Billings on October 15th. Present at that time was Betsy Brandborg, counsel for the Montana State Bar. I advised the group that I believed document assistance was authorized under the current version of Rule 1.2c. Ms. Brandborg made a point of standing and addressing the assembled lawyers. She told them unequivocally that it was the position of the Montana State Bar that ghostwriting was *not* allowed by the rules and anyone in the room who offered document assistance services on a limited scope basis did so at their peril. Ms. Brandborg was also present for the conference call of November 4, 2010, when two members of the Ethics Committee argued that the amendments were unnecessary because the current version of 1.2c already authorized document assistance. She did not speak up and correct them or state that she had a different interpretation of the rule, nor did she indicate that she had unequivocally declared the opposite to be true at the CLE on October 15th. Given this set of facts, I believe the proposed amendments to 1.2 are not only appropriate but essential to insure that Montana lawyers have clear

and unambiguous guidance on their ethical responsibilities in connection with limited scope and document assistance.

Opportunity for Abuse

An objection was voiced that allowing limited scope creates an opportunity for abuse by an attorney who would abandon a client. This argument is specious. It has nothing to do with limited scope, but is a question of good lawyering v. bad lawyering. All practice has the potential of being abused by unscrupulous lawyers. Full service lawyers abandon their clients and are disciplined for doing so. If a limited scope attorney abandons a client, the consequences should be the same. This is one of the objections which I believe is motivated by other, unspoken concerns.

Increase in Malpractice Claims

I have already alluded to this. The experience in the many states which have adopted the practice of limited scope representation is the opposite. There has been no evidence of an increase in malpractice claims. Limited scope clients as a group tend to be more satisfied than full service litigation clients, and thus less likely to sue. Because they have done some of the work themselves, they also have a much more acute appreciation for how difficult it is to do legal work well.

Lawyers are More Likely to Act Outside their Area of Expertise

This argument was made by a member of the Ethics Committee. Like the "opportunity for abuse" argument, it has nothing to do with limited scope. Full service lawyers malpractice if they undertake a matter outside of their competence. The same rule would apply to limited scope lawyers. The best practices which are contained in my risk management materials (which were provided to the Montana lawyers who attended my CLE on October 15th) clearly state that a limited scope attorney should act within his or her expertise. If they stray beyond it, they are unlikely to spot related or nuanced issues, and more likely to malpractice. The proposed change to Montana rule 1.1 on competence correctly addresses this argument.

Overloading the Courts

Several members of the Ethics Committee opined that document assistance would increase the burden on the courts. This argument is not only directly contrary to the established experience of courts where ghostwriting has been encouraged, but is indefensible on policy grounds. The implication is that in the absence of limited scope, people who can't afford lawyers will stay out of court, even if they have legitimate claims, as if that is a good thing. Stated differently, how can it be good for society if the courts are "streamlined" by the fact that the majority of citizens who can't afford lawyers are denied meaningful access because they can't figure out how to place their legitimate claims properly before the court? Nevertheless, that argument forms the logical underpinning of this objection. I feel compelled to underscore the obvious: courts are here to serve the public, not just the lawyers and their clients. The argument that it is inappropriate to allow greater access to the courts by those who are disenfranchised under the current system due to their inability to afford full service lawyers is not worthy of serious consideration.

This has also been demonstrated to be untrue in practice. Judges who regularly see *pro se* litigants who have had professional assistance with their pleadings continually report that their dockets run more smoothly and they spend less time dealing with struggling litigants who can't state their case coherently, or provide intelligible and relevant pleadings.

Ghostwriting

The bulk of the objections of the Ethics Committee expressed to me non November 4th centered on fears about document assistance. As I've previously discussed, one of the comments was that the rules shouldn't be changed because current Rule 1.2c already allows ghostwriting, so it is redundant to amend the rules to make the allowance of ghostwriting more explicit. The person making this assertion followed it by a litany of reasons why ghostwriting was inherently a bad thing and shouldn't be allowed at all. The logical disconnect woven through this objection is obvious. If document assistance is already so embedded in the Montana rules as to make further rule changes redundant, why launch into an argument about why it shouldn't be allowed, combined with a recitation of all the evils it will unleash in the State? I won't repeat here my comments about why document assistance is such an essential component of improving access to justice, and simply refer the Court back to my earlier comments about ghostwriting and the Elephant in the Room.

Limited Scope Representation Isn't Fool Proof

The practice of law isn't fool proof. That's why we have ethics rules and regulatory bodies. Anything can be done badly. That doesn't mean the thing itself is inherently harmful to the profession or the public.

There are areas of the law where limited scope doesn't work. It is not for every legal issue, not for every client, not for every court. There will always be litigants who are incapable of self representation, regardless of how good their coaching might be. There are always complicated legal issues which require the hand of a qualified professional. There are areas of the law which should never be unbundled. For example, it is inconceivable that an attorney would say to a client, "you defend the robbery and I'll defend the burglary." That being said, these and similar ridiculous objections are often raised as straw men. I hear them frequently from lawyers who are unwilling to admit that their objections are based on fear of losing full service clients. Few lawyers are willing to admit that they are afraid limited scope will take food out of the mouths of their children, but some have told me so.

Limited Scope Encourages "Drive Thru Law"

This objection relates back to my earlier discussion about the standard of care. There is no reduction in the standard of care for tasks which fall within the limited scope. There is no limitation on liability for those tasks, and every lawyer is responsible for the quality of his or her work, whether limited in scope or not.

This argument also begs the question. The issue is not whether limited scope is better than full service. The question is whether *some* legal assistance is better than none, and whether that

assistance should be offered by qualified, competent lawyers or unqualified lay people, faceless strangers on the internet, or paraprofessionals. As has been repeatedly demonstrated in other jurisdictions, when competent lawyers are free to offer limited scope representation and document assistance, that acts as a buffer against and an alternative to the unauthorized practice of law.

Self Represented Litigants are a Nuisance

One member of the Ethics Committee argued in our conference call that self represented litigants increase the cost of representation for opposing parties, clog the courts, and complicate litigation. He contended that the proposed changes to the rules would make it easier for people to represent themselves, thus adding to the problem, and, by implication, increasing legal fees for represented litigants and inconveniencing their attorneys. It is difficult to take this argument seriously. It clearly has nothing to do with ethics. The argument that "they can't afford us, we don't want to represent them, and therefore, they should be prevented from mucking up the court system with their problems" simply left me speechless.

A legal system which considers self represented litigants a nuisance has failed the people, and if lawyers don't get this message, they fail do so at their peril. Any monopoly of licensing carries with it an obligation and that obligation is to not exclude those who cannot afford to pay. An individual needing medical treatment who can't afford medical insurance is not turned away from the emergency room. In order to preserve their monopoly, lawyers have to be willing to find ways to make essential legal services available to those in need. This is an essential component of faith and confidence in the legal system, which is the bedrock of civilized society and the rule of law.

Means Testing

Although the topic was not discussed specifically in our conference call, I am aware that at least some of the members of the Ethics Committee have suggested that limited scope, and particularly ghostwriting, should be limited to pro bono and the indigent. They would prevent the working poor and the struggling middle class from obtaining limited scope assistance in the interest of maingaing a full service monopoly. This suggestion violates all aspects of procedural due process and equal protection and is indefensible as a matter of policy and constitutionality. Interestingly, I'm informed that some of the same people who suggested disapprovingly that limited scope creates a two tiered justice system simultaneously support means testing for document assistance. See my prior comments regarding the Elephant in the Room and two tiered justice above.

Conclusion

I apologize for the length of my remarks, but felt it was essential to be thorough.

In conclusion, I would like to thank the Court for the opportunity to comment, reiterate my strong

support for the swift adoption of the proposed rules changes as drafted, and leave you with my favorite access to justice quote:

> Lest the citizenry lose faith in the substance of the system and the procedures we use to administer it, we can ill afford to confront them with a government dominated by forms and mysterious rituals and then tell them they lose because they did not know how to play the game or should not have taken us at our word.
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> Moore v. Price, 914 S.W. 2d 318, 323 (Ark. 1996), Mayfield, J., Dissenting

Respectfully Submitted,

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