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December 21, 2010

FILED

DEC 22 2010

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STATE OF MONTANA

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

RE: *Comment Re: Limited Scope Representation*

Dear Chief Justice and Associate Justices:

The State Bar Ethics Committee has carefully reviewed the proposed rule changes relating to limited scope representation. Consistent with our mandate, the Committee has issued a Formal Ethics Opinion.

Please consider the attached opinion as our comment relating to those proposed changes.

Thank you for your consideration.

Respectfully,


Michael G. Alterowitz
Chair, State Bar Ethics
Committee

MGA/xer

Enclosure

PC: Joe Sullivan, Chris Manos, Betsy Brandborg

DEC 22 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Facts: The Montana Supreme Court has requested members of the Bar comment about proposed changes to the Montana Rules of Professional Conduct and Civil Procedure. The proposed changes are to Rules 1.1, 1.2 and 4.2 of the Rules of Professional Conduct and Rule 11 of the Montana Rules of Civil Procedure, along with the addition of two new Rules of Civil Procedure, 4.2 and 4.3. The stated intent of the proposals is primarily to encourage limited scope representation as one means of addressing the unmet legal needs of low to moderate income Montanans.

The Ethics Committee offers the following Opinion pursuant to the mandate of Article III of the State Bar Constitution to review the Rules of Professional Conduct and recommend changes.

Questions Presented:

1. Are the proposed amendments to Montana Rules of Professional Conduct 1.1 and 1.2 necessary to meet the stated goal of the Court?
2. Does the proposed amendment to permit "ghostwriting" under Rule 11 of Montana's Rules of Civil Procedure reduce the standard of care by an attorney?
3. Are the proposed amendments consistent with the lawyer's traditional "functions" as an "advisor," "advocate," and "negotiator"? (See Preamble: A Lawyer's Responsibilities (3) of the Montana Rules of Professional Conduct.)

Short Answer:

1. No. The Ethics Committee believes that while the goal behind the proposed rules is commendable, the proposed amendments are unnecessary because Rule 1.2(c) and 1.5(b) already authorize limited scope representation "if the limitation is reasonable under the circumstances." Conversely, if the limitation is not "reasonable under the circumstances," it should not be permitted. The proposed amendments appear aimed at authorizing what otherwise would be "unreasonable" limited scope representations and insulating lawyers who agree to them. This, the

committee fears, could create a second tier of representation that could result in more confusion to clients and greater time and expense to the courts and clients of counsel serving opposite a pro se litigant utilizing a limited scope attorney. The current limited scope rule 1.2, in combination with the existing rules of conduct (specifically Rule 1.5 on fees), are sufficient to address the stated goal. Current rules provide a substantial amount of elasticity, raising questions about the need for revisions.

2. Yes. The proposed amendment to Rule 11 of Montana's Rules of Civil Procedure invites substandard attorney work and increased invalid filings that will only serve to clog already crowded Court dockets.

3. No. The proposed amendments, to the extent they promote the so-called "unbundling" of lawyer services, tend to diminish and de-value the lawyer's counseling or "advisor" role and instead emphasize the lawyer's scrivener role. While this changed emphasis arguably serves the client's "wants," it discourages qualitative attention to the client's "needs" and in that sense actually undermines the stated goal of the proposed amendments.

Discussion:

A recognized need to expand services to indigent Montanans has gone far beyond the stated purpose. If the goal is to expand services to indigent Montanans, there is no need to develop rules which only serve to dilute the ethical standards of Montana practice.

Historically, it has been presumed that clients are best served by attorneys who are fully informed of the facts and the law relating to the matters presented. The proposed Rules are a troubling step in the direction of "mass produced" or "drive through" representation which, in the Committee's view cannot help but reduce the quality of the services provided. The proposed Rules have already been the subject of a CLE titled "How to Grow Your Law Practice," with the pitch to those interested in "expanding your practice, marketing your practice and increasing your client base by tapping into a new pool of 'pay as you go' clients." The tail is wagging the entire legal profession dog, and the proposals before the Court have too many unintended consequences.

The Committee is concerned that what is being presented as a means of assisting (primarily) low income clients would risk further legitimizing a

trend toward a reduced and qualitatively lesser form of legal representation. The Committee is further concerned that limited scope representation may be attractive to practitioners who, up to now, were reluctant to engage in various areas of practice, but now will be encouraged to do so without the necessary experience to engage in the area in a knowledgeable and ethical manner. If the Court adopts the proposed rule changes, the result will be a sea change for practice in Montana.

The Montana Ethics Committee deliberately chose to adopt the ABA Model Rules with certain, albeit important, exceptions. The goal was to rely on the uniform body of law that accompanies the Model Rules. The more Montana strays from the Model Rules, the more completely we lose the combined experience of other jurisdictions.

Montana's Rules of Professional Conduct were addressed by the Ethics Committee and adopted by the Supreme Court as a comprehensive system of professional ethics. Also, when assessing an ethical challenge, discussion usually involves an examination of several rules. The access community's Working Group clearly appreciated the challenge; hence their recommendation involves four Rules of Professional Conduct and the Rules of Civil Procedure.

The problem with the Working Group's product is that they have selected language from several states' sets of rules, citing even comments within the other states' rules, and have developed a purely unique set of recommendations for Montana. By doing so, the Working Group's proposals lose the context of the cited-state's set of rules. A reading of any of the literature associated with the unbundling issue establishes beyond question that the states have vastly different interpretations regarding the application of limited scope representation within the Model Rules. Most allow some form of limited representation, per Model Rule 1.2. But from there, the states go all over the unbundled map.

For example, the proposed changes to Rule 1.1 on Competence¹ are from a comment in Wyoming's Rules of Conduct, not from within Wyoming's Rule. Wyoming's Rule is identical to Montana's Rule on competence.

¹ Rule 1.1—Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A lawyer and client may agree, pursuant to Rule 1.2(c), to limit the scope of the representation. In such circumstances, competence means the knowledge, skill, thoroughness, and

If Montana is to add language, it must mean something. In the instant case, the apparent meaning of the proposed amendment is a second tier of competence for limited scope representation. The proposed rule seems to contemplate full attorney service and the level of competence that accompanies it, then limited scope service and the level of competence that comes with that.

The standard within Montana (and the ABA Model Rule) 1.2(c) is “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances...” If an attorney cannot meet the threshold of reasonableness, then the task should not be limited to that scope and an attorney should not do it. If the opinions cited by other states and counties are consistent on one point, it is that the level of competence for representation is the same in limited scope as with full service.²

It is this Committee’s opinion that there is only one level of competence. To dilute Montana’s rules with the proposed language is to do a disservice to limited scope clients and undermine the stated goal of the access to justice community of meeting unmet legal needs. The proposed changes to Rule 1.1 are redundant, use as a model language that was simply a comment, not a rule, and are completely unnecessary. If the language does not add context or meaning, then it should be rejected.

An important Montana distinction from the Model Rules is Montana’s requirement that “the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible *shall* be in writing...” The ABA Model Rule standard is “shall be communicated, *preferably* in writing.” The proposed Rule 1.2(c)³ details circumstances that

preparation reasonably necessary for the limited representation. The proposed language to the existing rule is in italics.

² Worth noting is that both the Colorado and Washington Rules, heavily cited by the Working Group, rely on ABA Model Rule 1.1 without amendment, explaining that an agreement to limit legal services does not exempt a lawyer from a duty to provide competent representation.

³ Rule 1.2—Scope of Representation and Allocation of Authority Between Client and Lawyer. [Existing subsections (a) and (b)]. (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent *in writing*. (1) *The client’s informed consent must be confirmed in writing unless: (i) the representation of the client consists solely of telephone consultation; (ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit court-annexed legal services program and the lawyer’s representation consists solely of providing information and advice or the preparation of court-approved legal forms; or (iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.* (2) *If the client gives informed consent in writing signed by the client, there shall be the*

are already addressed in Montana's Rule 1.5. Further, the proposed rule comes from Iowa, which adopted the ABA language using the *preferably* standard. Adding 30 lines as exceptions to an "in writing" requirement adds nothing. Montana's Rule 1.5 mandates written fee agreements and exceptions thereto. Read in context of existing Montana Rule 1.2, Rule 1.5 suffices to define an attorney's obligation concerning fee agreements. Montana's Rule 1.2, as written, fully contemplates limited scope representation. The stated goal of enhancing representation of indigent Montanans is already accomplished within Montana's Rules. Creating exceptions to a writing requirement for limited scope seems only to add a layer of confusion.

Proposed Rule 1.2(c) also expands the notion of "limited scope representation after informed consent." Perhaps the whole notion of informed consent in this context ought to be reviewed. This Committee is concerned that particularly unsophisticated clients are generally bewildered by being asked to sign consent documents and are apt not to understand them. When especially vulnerable clients are asked to sign such documents, they will sign them primarily because they do not have any real alternative.

The Ethics Committee also is disturbed by the proposed amendment to Rule 11 of the Rules of Civil Procedure to allow ghostwriting and full reliance on representations by a client "unless the attorney has reason to believe that such representations are false or materially insufficient."⁴

While the mt.gov website (http://courts.mt.gov/cao/ct_services/probono) on limited task representation/unbundling lists opinions favoring ghostwriting within limited task representation, it falls short of mentioning the lengthy series of federal cases and other ethics opinions advising caution or prohibitions. In Montana, there is a Bankruptcy Court opinion, *Ellingson v. Monroe*, 230 B.R. 426, 435 (Bankr. D. Mont. 1999) in which the court found

presumption that: (i) the representation is limited to the attorney and the services described in the writing; and (ii) the attorney does not represent the client generally or in matters other than those identified in the writing. [existing subsections (c) and (d) are re-designated as (d) and (e)]. The proposed language to the existing rule is in italics.

⁴ Rule 11. Signing of Pleadings, Motions, and other Papers—Sanctions. *(b) An attorney may help to draft a pleading, motion, or document filed by the otherwise self-represented person, and the attorney need not sign that pleading, motion, or document. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.* The proposed language to the existing rule is in italics.

ghostwriting in violation of court rules and ABA ethics. At the time the *Ellingson* opinion was written, the ABA had in place Informal Opinion 1414 from 1978, which advised that at a minimum a lawyer must make the court aware of the fact that a document was drafted by a lawyer. That opinion stated “[e]xtensive undisclosed participation by a lawyer...that permits the litigant falsely to appear as being without substantial professional assistance is improper.” The ABA’s own publication, the *Annotated Model Rules of Professional Conduct*, presents the current national tone as follows:

“Such surreptitious representation, especially when it involves a lawyer “ghostwriting” a document filed in court by a pro se litigant, is not looked upon favorably. It results in the litigant representing to the court that he or she is acting without the assistance of counsel when this is not true, and permits a lawyer to evade the responsibilities imposed by Rule 11 of the Federal Rules of Civil Procedure (requiring lawyers to certify that there are grounds to support the allegations made in court filings.)”

This statement is followed by citations from the federal courts in California, Virginia, Colorado, South Carolina and the 1st and 10th Circuit Courts [*Annotated Model Rules of Professional Conduct*, 6th Edition, p. 39].

The Working Group cites ABA Formal Opinion 07-446, which addresses the challenges presented above head on:

“State and local ethics committees have reached divergent conclusions on this topic. Some have opined that no disclosure is required [in the footnote, states include Arizona, Illinois, Maine and Virginia]. Others, in contrast, have expressed the view that the identity of the lawyer providing assistance must be disclosed on the theory that failure to do so would both be misleading to the court and adversary counsel, and would allow the lawyer to evade responsibility for frivolous litigation under applicable court rules.” [The footnote lists Colorado, Connecticut, Delaware, Kentucky and New York].

The ABA opinion goes on to state:

“In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation.”

We on the Montana Ethics Committee disagree. Our Bar in Montana is small. We generally know opposing counsel. To have a practitioner who deliberately chooses to walk a fine line regarding professional conduct

involved as a ghost only serves to create chaos for the courts and retained opposing counsel.

The ABA opinion counters:

“[T]he fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage.”

The pro se who retained an attorney to ghostwrite a document that the tribunal deems ineffective is an unhappy pro se. The potential for a disciplinary or malpractice complaint is significant, and any efficiency realized in the judicial system by allowing ghostwriting is undone. The ABA also uses the counter above to parry the argument that by having a lawyer secretly ghostwrite pleadings, the unrepresented litigant gets the best of both worlds—trained lawyer assistance and judicial leeway. But again, small help exacerbates issues, it does not resolve them. Even a limited scope lawyer is more inclined to tell a client “Quit being a damn fool and go home”⁵ than a ghost lawyer doing a discrete task. Cheap, fast lawyers do not serve as counselors at law, but as draftsmen, and there is no doubt that given the opportunity, abuse will follow. The Committee is concerned that complaints will be filed that should never be filed, but for the \$1,000 paid to a ghost lawyer to draft a complaint for which he or she is not responsible to the Court for the matters alleged.

In addition to the above, it is the experience of this Committee, all practicing lawyers who have billed clients for their services, that documents filed by ghostwriters cost their clients, whether full or limited service, more in the end. It is their experience that the represented client’s lawyer will be asked by the Judge to draft the necessary documents, and they find themselves responding to arguments that have no merit, with no dispassionate individual standing between the Court and their brief in response to a peculiar motion. Again, it seems the potential for increasing the workload of the Courts is high.

The Committee notes that several states, including Colorado, require disclosure. Where is the harm in having a lawyer write in any documents: “Prepared within the Rules governing Limited Scope by Attorney X”?

⁵ Former U.S. Supreme Court Chief Justice Charles Evan Hughes notorious quote.

Finally, we note that the Working Group indicates that it changed the Washington rule, on which it relies for the amendments to Rule 11, to expressly allow ghostwriting and to delete the attorney certification requirements. The certification requirements of Washington's Rule 11(b) are set forth in the footnote below.⁶ Again, the context of the full rule and set of rules in Washington is important. While ghostwriting may be permitted, Washington has imposed standards far beyond those included in the rules proposed in Montana. Also notable is the fact that Iowa, cited above as the source for the proposals on Rule 1.2, has opined that "ghostwriting of pleadings is deception on the court, where the pleading is represented as pro se, but the party has received counseling and advice from a lawyer." See Iowa Ethics Opinion 94-35. Further, Iowa's Ethics Opinion 98-1 held that a lawyer may provide limited background advice and counseling to a pro se litigant, but may not provide more extensive services such as drafting ("ghostwriting") litigation documents, which would generally be misleading to the court and other parties.

The members of the Working Group have clearly been working to address the issue of representation for indigent Montanans for a long time. The Ethics Committee respects the time and attention paid and admires their resolve. The goal of meeting unmet legal needs and removing arbitrary barriers to justice is one shared by all lawyers. But the Ethics Committee suggests that to a significant extent the stated goal is accommodated by the existing rules. The Ethics Committee would welcome an opportunity to meet with the Working Group to develop language within the Montana Rules of Professional Conduct that would address the need identified, without invoking a sea change to full or limited service representations.

THIS OPINION IS ADVISORY ONLY

⁶ Washington Superior Court Civil Rule CR 11(b) provides: In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact, (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.