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CLERK OF THE SUPREME COURT
STATE OF MONTANA

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STATE OF MONTANA

Montana Supreme Court
Room 323, Justice Bldg.
215 North Sanders
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Re: *PROPOSED RULE CHANGES TO THE MONTANA RULES OF CIVIL PROCEDURE and THE MONTANA RUL,ES OF PROFESSIONAL CONDUCT to encourage limited scope representation (LSR) in Montana*; Nos. AF 07-0157 and AF 09-0688

Dear Members of the Court:

Please accept this comment in opposition to the proposal to amend Rules 1.1, 1.2 and 4.2 of the Montana Rules of Professional Conduct and amend the Montana Rules of Civil Procedure through adoption of proposed rules 4.2 and 4.3 and added Rule 11 language. I urge the members of the Court to disapprove the proposed rule changes.

There has not been sufficient evidence to conclude that increased limited scope representation ("LSR") is an effective means of addressing unmet legal needs of low-to-moderate income Montanans or increasing fairness in the Montana justice system. While increased LSR may sometimes generate the statistical appearance of increased access, certain key substantive harms may be aggravated by the increased risks that necessarily attend weakened professional standards and increased commodification of legal services. Chief among these harms are domestic homicide, child sexual abuse, intimate partner violence and stalking --- though there are others. Thus the social harm that will likely result in Montana from increased LSR outweighs the more speculative benefit of adopting the proposed rule changes.

My judgments on this issue have grown from my family law practice and interest in legal ethics and philosophy. I have served on the Montana State Bar Ethics Committee for approximately 10 years, and I voted in favor of the final ethics opinion written in opposition to the proposed LSR rule changes. I served for two years as managing attorney in the Butte field office of the Domestic Violence Unit of Montana Legal Services Association. While in Butte, I helped to administer their *pro bono* program. I also completed all of my clinical legal work in law school at the Montana Legal Services Association. During law school I worked often on issues and projects related to serving low-income communities, including research for a law review article on the topic of "unbundled" legal services. I have served for more than 10 years on the Montana Criminal Justice Act Panel which furnishes legal services to indigent criminal defendants in federal court. From 2007 through 2010, I served on this Court's *Commission on Self-Represented Litigants*. Lastly, back in 1997, I helped to organize what I believe may have been the first self-help legal clinic in Missoula to serve survivors of intimate partner violence.

I believe that the goal of meeting unmet legal needs and removing arbitrary barriers to justice is one which is shared or which ought to be shared by all lawyers. However, I no longer believe LSR is a sufficiently effective way to meet unmet legal needs or to increase fairness in the justice system.

At the outset, one must distinguish between the better variety of low-income litigant focused, attorney-supervised LSR projects and the worse variety of LSR which is simply legal services commodified and "unbundled" for profit according to "consumer" demand. The first and better approach focuses --- at least nominally --- on the mostly unprofitable professional duty of lawyers to try to remove unfair obstacles to Montana courts faced by, for e.g., partner violence victims, the disabled, the incapacitated, the fixed-income elderly, disabled or abused children and racial minorities. The second approach is merely a commercial gambit to increase legal income and trim legal costs for all lawyers whether or not their clients' legal needs are currently met or unmet under the traditional system. If there is a justification for the proposed rule changes, it must surely rest with the overall need to help low-income Montanans and those who lack fair access to the courts. But the proposed rule changes fail to provide any meaningful way to distinguish and exclude the second variety of LSR legal services which is sufficient reason to reject the proposed rule changes as *per se* unethical.

There are also many cases which may be unsuitable for *any* sort of LSR legal services. Many such cases are just the sort of cases for which legal services organizations receive funding to handle. For example, which of the following matters would be sufficiently distinguished under the proposed rule changes to protect those would receive LSR legal services?

i) a retired couple on a fixed income being harassed by a debt collector.

ii) a disabled parent needing financial support for his children.

iii) a child of parents with diminished capacity needing receive supplemental security income benefits.

iv) a partner violence victim needing safe housing, employment and child support.

v) a medicaid recipient needing qualified domestic relations order payments without loss of means-tested medical services.

vi) a foster parent needing to adopt a child who is a tribal member.

vii) a young family fighting foreclosure on their home.

What is the likelihood that any of the foregoing cases could be favorably resolved LSR as opposed to traditional representation? What resources will Montana Legal Services Association and *pro bono* lawyers are left to devote to such cases after funding and legitimating LSR? And

--- the most troubling question --- what happens to the important work of the legal profession once LSR services becomes the further degraded standard by which competent legal work in such cases is judged in Montana.

The trend represented by the proposed rule changes has already caused too much unintended harm. Like many Montana lawyers, as part of my practice I handle some matters on a *pro bono* basis. Many of my *pro bono* cases are contested family law cases which involve an issue of partner violence or stalking. Most of my *pro bono* cases are referred to me by YWCA of Missoula, but some are referred to me by (my former employer) Montana Legal Services Association. In that connection, I recently had a firsthand experience with the darker side of a LSR which I would like to share with the members of this Court.

Last month, I returned a call from our local Montana Legal Services Association office in Missoula. I was asked to accept a "brief services" case. The term "brief services" is a synonym within Montana Legal Services Association for a type of LSR legal services that generally consists of advice that stops short of full or direct representation. It is often viewed within Montana Legal Services Association as a preferable *pro bono* request to make of a private attorney who may be reluctant to accept full representation of a *pro bono* client. In this instance, I was told by Montana Legal Services Association that the individual in question needed help drafting a letter or a motion to trigger a mandatory mediation clause in a final parenting plan. I agreed to to meet with the individual who needed the legal help.

I met the individual who needed the help at the courthouse. Legal documents were presented to me for review. I read that the final parenting plan did include a mandatory mediation provision which required the parties to complete mediation prior to filing a motion with the district court to modify the parenting plan. I also read that the district court had also adopted a Guardian *ad litem* recommendation to expand the parent's parenting time after three months. From correspondence, I read that the opposing party disputed the recommendation of the Guardian *ad litem* and saw that the recommended expansion of residential parenting time had not occurred. The procedure to address the issue of whether to expand the individual's residential parenting time per the Guardian *ad litem* recommendation and district court order seemed straightforward.

Then I was told some additional information:

Before I received the call from Montana Legal Services Association, the individual had filed two *pro se* motions. The individual claimed that the motions were filed after consulting with the local self-help law clinic and that someone staffing the clinic actually assisted to prepare the second motion. As those who practice family law in the 4th district might expect, both of the individual's motions were denied summarily based on failure to first follow the mandatory mediation provision. As one might also fear, the individual was also ordered to pay over $2,000 in attorney fees and costs to the other side for ignoring the mandatory mediation provision. Bear in mind this is an individual for whom income is in short enough supply that the district court

had previously waived filing fees. My conclusion after talking with the individual for more than an hour and reviewing the documents was that "brief services" would not be appropriate and would create an additional risk of a contempt order or further attorney fees.

After talking with the individual, I then talked to the coordinator at the self-help clinic (with consent from the individual). I confirmed that the clinic maintains no records as to which attorneys speak to which clinic participants. The self-help clinic also confirmed that all participants sign an agreement prior to receiving any legal help in which they acknowledge that they are not receiving legal advice. I was told that clinic participants on opposing sides of the same case can and do talk to the same attorneys about the same cases. Even though the attorney is likely to receive what would otherwise constitute confidential information during the course of the consultations --- sometimes from opposing parties --- no ethical issue is supposedly raised since no legal advice has been given. And little to no systematic screening is done for issues which would otherwise signal that a case was inappropriate for LSR. For example, there is no lethality assessment and there is no investigation whether a prior child protective services investigation or determination was filed or pending. There is no independent investigation of any kind. And to the extent that the advice received does not fit the needs of the clinic participant, there appears to be no remedy. Under the proposed rule changes, I understand that none of these procedures would be problematic.

I did decide to represent the person *pro bono* for purposes of making sure that the mandatory mediation provision would be triggered correctly and that no further legal fees or other penalties would be assessed. But it was a decision over which I felt some conflict --- especially when I contemplate the proposed rule changes currently being considered by this Court. I consider myself very sympathetic to the Montana Legal Services Association mission. Nevertheless, I believe the LSR approach is currently receiving far too much emphasis and is not sufficiently helping the people who most need help nor making the system more fair. If the proposed rule changes are approved, I believe that LSR will actually have made the system less fair. For these reasons, I urge the members of this Court to reject the proposed rule changes and to investigate other means of meeting unmet legal needs.

Thank you for kind attention to this comment and for your service on the Court.

Sincerely,

MONTE JEWELL, PC

By: 
Monte Jewell

MJ
c: Montana State Bar Ethics Committee