September 17, 2010

Hon. Mike McGrath
Hon. Patricia Cotter
Hon. W. William Leaphart
Hon. Brian Morris
Hon. James C. Nelson
Hon. Jim Rice
Hon. Mike Wheat
Room 414, Justice Bldg.
215 N. Sanders
Helena, MT 59620-3001

RE: Petition for Rule Changes regarding
Limited Scope Representation (LSR) in Montana

Introduction

The Montana Supreme Court Equal Justice Task Force, the Montana Supreme Court Commission on Self-Represented Litigants, and the State Bar of Montana Access to Justice Committee unanimously adopted a motion to petition the Montana Supreme Court to adopt the following rule changes to encourage LSR in Montana.

Why LSR is Necessary

In 2004, many low to moderate-income Montanans were surveyed to assess their legal needs and the legal services they had access to. Based on the responses gathered, it was reported that low to moderate income Montanans had over 200,000 cases of legal need that went unmet every year.[1] Survey respondents thought the majority (53%) of the cases they reported were "extremely important" to their lives. Only 10% were considered not important.

Survey respondents had no legal representation in over 80% of the situations they reported.[2] The Montana Legal Services Association (MLSA), being the sole legal

services organization in the state, could meet only 9% of the need.[3] The private bar lent help in another 10% of the cases.

The most common legal issues were issues dealing with employment (18%), housing (10.7%), and domestic relations (10%).[4]

One way to foster growth in the supply of low-cost legal services is to encourage the use of LSR in Montana. Simply put, LSR allows more transactions to take place in the legal services market. Those who were previously priced-out of the market may enter and negotiate for discrete, or "unbundled," services.[5] Thus, rather than being forced to go it all alone, self-represented parties can, as consumers, choose the legal services they can afford and feel they need most.

LSR may benefit not just the self-represented parties, but Montana's justice system itself. First, court dockets could become more manageable for judges and administrators. Second, MLSA reported a marked difference in attitudes that survey respondents had towards the justice system, depending on whether they were able to procure legal assistance. Over 80% of those who were unsuccessful in retaining a lawyer had a negative view of the system. In stark contrast, only 37% of the respondents who had legal representation viewed the system negatively.[6] A solid majority of represented respondents viewed the system at least somewhat positively.

Finally, LSR benefits lawyers in the same way it benefits self-represented parties, by allowing higher volumes of transactions in the legal services market. Lawyers could enjoy new business drawn in from a wider client pool. The ABA reports first-time limited-service clients frequently come back as full-service clients.[7] Also, lawyers should be better able to compete against online information services, non-lawyer document preparation services, financial institutions, real estate companies, tax preparation services, accounting firms, and others.[8] As more and more people are representing themselves, these entities have become serious competitors for traditional full-service lawyers.

Three Proposed Modifications to the Montana Rules of Professional Conduct

Montana has already adopted, verbatim, the model rule set forth by the ABA in its effort to formulate policies that would encourage the use of LSR. However, a few further modifications are recommended. The right rules encourage more lawyers to provide LSR, as they reduce uncertainties and provide ethical "safe harbors."[9]

Three proposed changes to the Montana Rules of Professional Conduct are given below. For alternatives to the amendments suggested here, please consult the November 2009 white paper issued by the ABA's Standing Committee on the Delivery of Legal Services, titled "An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants."[10] The white paper offers an appendix of rules that various states have implemented to encourage LSR.

Modification 1: Amend Rule 1.2(c), M.R.P.C., as shown below, to require written consent. Most states that have addressed the issue do not require written consent. However, it would be a "best practice" that provides a measure of protection for both the lawyer and litigant. There would have to be specific exceptions for legal services delivered through telephone hotlines and electronic communications. Montana's vast lands and rural character give special importance to such services.

Below, the current rule is shown in regular font. The modifications are shown in italicized font.

> **Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer**
>
> ...
>
> (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 a 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.*
>
> ...
>
> *(See Iowa Rules of Professional Conduct, Rule 32:1.2)*

Modification 2: Clarify that the duty of competence under Rule 1.1 is circumscribed by Rule1.2(c). That is, the extent of competence is proportional to the extent of the

representation agreed to.[11] The duty to make further inquiry does not apply when a lawyer limits his role to providing the client with legal information (as opposed to actual legal advice).

The current rule is shown in regular font, and the modifications are shown in italicized font.

> **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 preparation reasonably necessary for the limited representation.*
>
> *(See Wyoming Rules of Professional Conduct, Comment 5 to Rule 1.1)*

Modification 3: Modify or add a comment to Rule 4.2 and Rule 4.3, such as set forth below, to delineate permissible communications between represented and self-represented parties in LSR situations. Specifically, the party receiving limited representation is to be considered an unrepresented party by opposing counsel, unless the opposing counsel is given written notice of the limited representation (approach followed by Florida, Utah, and Washington).

Below, the modifications to Rule 4.2 and Rule 4.3 are shown in italicized font. The currently existing language is in regular font.

> **Rule 4.2 – Communication with Person Represented by Counsel**
>
> *(a)* In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
>
> *(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to*

be unrepresented for purposes of this Rule unless the opposing lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

(See Washington Rules of Professional Conduct, Comment 11 to Rule 4.2)
(Note: the LSR subgroup has recommended striking the words "knows of, or" after the words "opposing lawyer" on line 4 of subsection (b) above)

Rule 4.3 – Dealing with Unrepresented Person

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

(See Washington Rules of Professional Conduct, Comment 3 to Rule 4.3)
(Note: the LSR subgroup has recommended striking the words "knows of, or" after the words "opposing lawyer" on line 4 of subsection (b) above)

Proposed Modifications to the Montana Rules of Civil Procedure

In their current form, Montana's Rules of Civil Procedure make no provisions for LSR. In light of the experiences of other jurisdictions where LSR has been instituted, the three

major concerns relating to civil procedures are: 1) dealing with document preparation ("ghostwriting"), 2) giving express authorization to enter limited or special appearances, and 3) allowing a lawyer to withdraw without leave of court once the limited representation has been completed.[12]

As with the rules on professional ethics, having the right rules of civil procedure can encourage more lawyers to provide LSR, as it reduces uncertainties and allows lawyers to manage their liabilities. Based on the ABA's analysis of rules of civil procedure from numerous jurisdictions that address the above concerns, the following modifications warrant consideration. And again, for alternatives to the amendments suggested here, please consult the November 2009 white paper issued by the ABA, titled "An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants."[13] The white paper offers an appendix of rules that various states have implemented to encourage LSR.

Modification 1: Add a new subsection (b) to Rule 11, expressly allowing "ghost writing" and relaxing the current rule's requirement of reasonable inquiry. The rule should provide that an attorney, in ghostwriting a document, may in most instances rely on the otherwise self-represented person's representation of facts *without further inquiry* (followed by Colorado, Iowa, Missouri, and Washington).[14] Under Rule 11 as it now stands, a lawyer is required to sign the pleadings after reasonable inquiry. This obligation is inconsistent with the limited nature of document preparation.[15]

A new subsection (b) to Rule 11 may be added to the current rule as set forth below in italicized font.

> **Rule 11. Signing of Pleadings, Motions, and other Papers--Sanctions**
>
> *(a) ...*
> *(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.*
>
> *(See Washington Superior Court Civil Rule CR 11(b))*
> *(Note: the LSR subgroup has changed the Washington rule to expressly allow "ghost writing" and to delete the attorney certification requirement)*

An issue is whether Rule 11 should require disclosure of a lawyer's assistance with document preparation. Some states require disclosure of the lawyer's identity. Some only require disclosure of the fact of assistance. Others require no disclosure at all.[16] The ABA issued a formal opinion coming out in favor of no disclosure,[17] reasoning that a self-represented litigant would not gain an unfair advantage by receiving undisclosed assistance. The version of Rule 11 suggested above is based on Washington's Rule 11, which makes no mention of any disclosure requirement.

Modification 2: Ensure that a lawyer's limited representations remains in fact limited. This could be done by creating a new rule (i.e. "Rule 4.2, M.R.Civ.P."), which expressly authorizes the use of LSR. Then a lawyer, even if his assistance is disclosed, will not be entering a formal appearance before a court, thereby obligating himself to services beyond those he contracted for.

The new rule could be drafted as set forth below in italicized font.

> ***Rule 4.2. Limited Representation Permitted—Process***
>
> *(a) In accordance with Rule 1.2(c) of the Montana Rules of Professional Conduct, an attorney may undertake to provide limited representation to a person involved in a court proceeding.*
> *(b) Providing limited representation of a person under these rules shall not constitute an entry of appearance by the attorney for purposes of Rule 5(b) and does not authorize or require the service or delivery of pleadings, papers or other documents upon the attorney under Rule 5(b).*
> *(c) Representation of the person by the attorney at any proceeding before a judge or other judicial officer on behalf of the person constitutes an entry of appearance pursuant to § 25-3-401, MCA, except to the extent that a limited notice of appearance as provided for under Rule 4.3 is filed and served prior to or simultaneous with the actual appearance. Service on an attorney who has made a limited appearance for a party shall be valid only in connection with the specific proceedings for which the attorney appeared, including any hearing or trial at which the attorney appeared and any subsequent motions for presentation of orders.*
> *(d) The attorney's violation of this Rule may subject the attorney to sanctions provided in Rule 11(a).*
>
> *(See Washington Superior Court Civil Rule CR 4.2 and Rule CR 70.1)*

The suggested new rule above, Rule 4.2, also defines when service of pleadings and other papers on a limited representation attorney is valid. The rule says service is valid only for those court proceedings in which the attorney has actually entered a limited appearance. An attorney who merely assists with document preparation would not be served pleadings or other papers. Washington, Iowa, Utah, and Delaware have similar rules. However, some states require service in all matters until the limited appearance is withdrawn (New Hampshire, California, Arizona, and Missouri). In Maine, no service is required at all.

Modification 3: A new rule (i.e. "Rule 4.3(a), M.R.Civ.P.") is recommended to provide a procedure for entering a limited or special appearance at a specific court proceeding. In the filing, the lawyer may state the scope and subject matter of such appearance. Some courts have developed forms for lawyers to use (California, Delaware, Arizona, Maine).

The new rule could be drafted as set forth below.

> ***Rule 4.3. Notice of Limited Appearance and Application to Withdraw as Attorney***
>
> *(a) Notice of limited appearance. If specifically so stated in a notice of limited appearance filed and served prior to or simultaneous with the proceeding, an attorney's role may be limited to one or more individual proceedings in the action.*
>
> ...
>
> *(See Washington Superior Court Civil Rule CR 70.1)*

Modification 4: A subsection (b) should be added to Rule 4.3 above, providing that a lawyer may withdraw his limited appearance without leave of court, or as a matter of course. Some states have "de facto" withdrawals: a lawyer is deemed to have withdrawn once he fulfills the duties of the limited entry of appearance (Wyoming, Maine, Vermont). Other states require the lawyer to file a notice of completion or termination (Washington, Florida, Iowa, and Alaska).

> ***Rule 4.3. Notice of Limited Appearance and Application to Withdraw as Attorney***
>
> *(a)....*
> *(b) At the conclusion of such proceedings the attorney's role terminates without the necessity of leave of court, upon the attorney filing notice of completion of limited appearance.*

Thank you for your consideration of these rule changes.
Submitted this 17th day of September, 2010

Montana Supreme Court Equal Justice Task Force

Prof. Andrew King-Ries
Nancy Sweeney
Rep. Shannon Augare
Rick Bartos
Deb DuMontier
Bernadette Franks-Ongoy
Ann Gilkey
Mary Jane Knisely
Hon. Kurt Krueger
Judy Meadows
Alison Paul
Tammy Plubell
Peggy Probasco
Molly Shepherd
Klaus Sitte

Montana Supreme Court Commission on Self-Represented Litigants

Hon. Russell C. Fagg
Judy Meadows
Peg Allison
Shirley Faust
Corbin Howard
Ed Higgins
Monte Jewell
Hon. Michele Snowberger
Hon. Karla M. Gray (Liaison)

Access to Justice Committee

Patricia Fain
Peggy Probasco
Deborah Anspach
Elizabeth Baker
Ed Bartlett
Hon. John C. Brown
Gary Connelley
Tammie Fagan
Susan Gobbs
Stacey Gordon
Charles Hail
Travis Kinzler
Meghan Lulf-Sutton
Christine Mandiloff
Douglas Marshall
Hon. Brian Morris
Klaus Sitte
Nancy Sweeney
Marjorie Thomas
Tara Veazey
Peter L. Helland (Liaison)

[1] MLSA report (2005), *"Legal Needs of Low Income Households in Montana,"* available at http://www.lawhelp.org/documents/326071Full_Report[1].pdf?stateabbrev=/MT/.

[2] The ABA found similar rates of participation in legal services market by low-to-moderate income families nationwide. *See ABA Handbook on Limited Scope Legal Assistance (2003)*, at http://www.abanet.org/litigation/taskforces/modest/report.pdf.

[3] In early 2009, MLSA had to reduce staff by 10 FTE positions and close one office. Although its funding is expected to be stable, MLSA will no doubt serve fewer clients in the future. *See* Statement of MLSA Board of Trustees (Mar. 2009), at http://www.montanalawhelp.org/Program/575/showdocument.cfm?doctype=dynamicdoc&ichannelprofileid=42312&idynamicdocid=4472.

[4] MLSA report, supra note 1, at 5.

[5] *See* Althoff, *"Ethical Issues Posed by Limited-Scope Representation—The Washington Experience,"* 2004 ABA Prof. Law. 67 (Jun. 2004).

[6] MLSA report, supra note 1, at 19.

[7] *ABA Handbook*, supra note 2, at 11.

[8] *Id.*, supra note 2.

[9] *Id.*, supra note 2, at 16.

[10] White Paper by the ABA Standing Committee on the Delivery of Legal Services (Nov. 2009), *An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants*, at http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf.

[11] The Ethics Committee of the Colorado Bar Association wrote: "A lawyer engaged in unbundled legal services must clearly explain the limitations of the representation, including the types of services which are not being provided and the probable effect of limited representation on the client's rights and interests. Where it is foreseeable that more extensive services probably will be required the lawyer may not accept the engagement unless the situation is adequately explained to the client. The lawyer's disclosure to the self-represented litigant ought to include a warning that the litigant may be confronted with matter he or she will not understand. That, however, is the trade-off which is inherent in unbundled legal services." *Id* (internal citations omitted).

[12] *See Id.*, supra note 3.

[13] *See* White Paper by the ABA Standing Committee on the Delivery of Legal Services (Nov. 2009), *An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants*, at http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf. The ABA provides an appendix of ethical and procedural rules that various states have implemented in instituting the use of LTR.

[14] *Id.* at 15.

[15] *See Althoff,* supra note 5.

[16] ABA Formal Opinion 07-446 (May 2007), *Undisclosed Legal Assistance to Pro Se Litigants*, at http://www.abanet.org/media/youraba/200707/07-446_2007.pdf.

[17] *Id.* at 3.