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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Re: Proposed Amendments to Privacy Rules

Dear Mr. Smith:

These comments are submitted on behalf of the Montana Newspaper Association and me concerning the proposed revisions to the Rules for Privacy and Public Access to Court Records in Montana.

On February 13, 2007, the Court adopted the Rules for Privacy and Public Access to Court Records in Montana (Rules) and ordered that the Rules would be effective on December 31, 2007. These Rules were developed by and in conjunction with a Task Force consisting of representatives from the courts, the media, clerks of court and other interested and affected parties. I attended most of the meetings and assisted in the development of the Rules.

On July 1, 2008, an order was issued amending the Rules by providing that records not be placed on the Internet by any court except for listings of litigant indexes, registers of actions and dockets of court proceedings. All other court records would be available for public inspection at the respective courthouses around the state, subject to statutory restrictions on access and restrictions imposed in the Rule to social security numbers, birth dates, financial account numbers and names of minor children.

On June 22, 2010, the State Law Librarian, Judy Meadows and the Montana Legal Services Association (MLSA) (hereinafter, "Proponents") requested the Court to modify the Rules regarding access to certain Court records. The proposed modifications generally arise from a concern that when the technology is sufficiently available to place court records on the Internet, Montanans would be vulnerable to "cyberstalkers" and identity thieves. The stated rationale for the change was also that there was no state-wide consistency in application of the Court's "Privacy Rules," clerks

of court don't have the resources to comply with the rules and self-represented litigants cannot properly assure that appropriately private records are kept confidential.

Under the existing rule (Rule 4.50), certain court records are made confidential as a matter of decree and may not be made available without leave of court. Those records include information made confidential under state or federal law and the aforementioned social security numbers, birth dates, financial account numbers and full names of minor children. Present Rule 4.60 established a procedure for placing any other information under seal. Under this rule, a party, an individual or the court, *sua sponte*, can move for an order restricting access. Rule 4.60 (c) establishes the motion and notice requirements with the court resolving the motion based on the balancing test set forth in Article II, Section 9 of the Montana Constitution.

The proposed modifications are submitted in the alternative. Version "A" contains an amendment to Rule 4.50 and an entirely new Section 4.60 which replaces the present Rule 4.60. The substantive change proposed to Rule 4.50(c) would make all "private information about a minor child, such as information relating to the child's best interest" confidential. The new proposed Rule 4.60 contains two subparts. The first, (4.60(a)) contemplates that any party may create a "sensitive data sheet" containing information listed in 4.50 (c) which the party deems private (social security numbers, financial account numbers and information about minor children). Thereafter, all parties to the proceeding, as well as the court and court staff must omit or redact information listed in the sensitive data sheet from any court records. The proposed rule then deals with waivers of the right to keep some information confidential, court reporter transcripts referring to sensitive information and methods to resolve disputes about whether certain information should be redacted in the court files.

The second part of the proposed Rule 4.60 deals with all other information which a party or individual deems private. The proposed Rule (4.60(b)) generally tracks the existing Rule 4.60 with several significant changes. First, the proposed rule requires the clerk to accept for filing any motion to seal and to seal it until it is acted on by the court. The old rule, which is more consistent with the constitutional right-to-know provision, requires motions to restrict access to be placed in a sealed envelope, but not filed, until the court has considered the motion. Under the present rule, if the court grants the motion, it is filed under seal. If the court denies the motion, the party may file the information with knowledge that it will become public.

Second, the proposed rule omits the required balancing test for determining whether the information shall remain private. The present rule requires the court to follow the balancing test: The court must determine "whether there are sufficient grounds to prohibit access by determining whether the demand of individual privacy clearly exceeds the merits of public disclosure." There is nothing in the proposed rule guiding the access determination to be made by the Court.

Third, the proposed rule contains loosely drafted language that forgives a party from meeting the procedural requirements of the rule “if he or she is attempting in good faith to comply with the rules.” This language is contained in its own separate subsection (4.60(c)) and is engrafted in the requirements for listing the source of a state or federal law upon which the restricted access motion is based. If the movant fails to identify the source of the requested closure of the document, the party is not prejudiced thereby.

Fourth, the proposed rule omits the balancing test contained in Rule 4.60(b) for public access to information to be placed or actually placed under seal. It also omits the notice requirements to other parties contained in the existing 4.60(c).

Finally, the proposed rule omits the “least restrictive means” requirement of the present rule 4.60(b). Under the existing rule the court must use the least restrictive means in achieving the purposes of the rule and the needs of the person requesting confidentiality.

Version “B” simply makes confidential all of the court records of the following categories of litigation, except for final judgments:

- Divorce, legal separation and Annulment proceedings;
- Paternity proceedings;
- Parenting plan proceedings;
- Grandparent visitation proceedings;
- Minor children name change proceedings; and
- Guardianship and conservatorship proceedings.

Under Version “B” the existing Rule 4.6 would be retained, except for the least restrictive means requirement and the procedure for dealing with a motion to restrict access.

Comments.

A prefatory note is in order. It appears from the four corners of the comments submitted by Proponents that their proposal arises from a concern that sensitive court information will be placed on the Internet. As the matter now stands, the Court’s Rule 4.00(b) and 4.20 restrict placement of court records on the Internet until rules for electronic filing of court documents have been developed and implemented. While most of the concerns raised by the Proponents will eventually be dealt with and resolved at the time the Court adopts remote access/Internet rules, it is entirely unnecessary to deal with them at this time.

Version B. Dealing with the proposals in reverse order, regardless of the rationale behind the proposed changes, Version B is simply constitutionally infirm. Under this Court’s existing jurisprudence, all documents possessed by a public body

are presumed to be open and may only be closed upon a showing that the demands of individual privacy clearly exceed the merits of public disclosure. Version "B" turns this presumption on its head and declares that all family-court-type records are confidential and may only be opened upon motion of a person who seeks access to the records. It deletes the least restrictive means requirement of the existing rule and creates a constitutionally deficient process by requiring the filing with the clerk motions under seal that may be filed without merit.

Version A. If this proposal were limited to the amendments to existing Rule 4.50(c)(3), it would not be so objectionable. Although expanding the confidentiality provisions of the existing rule from names of minor children to "private information about a minor, such as information relating to the child's best interests" may not be facially significant, it is likely that all information in a court record concerning a minor will be rendered inaccessible under the proposed rule. This is so, because virtually all information contained in a court document can be considered "relating to the child's best interest."

Since the rationale for this change is unclear, it is difficult to suggest a more narrowly drafted rule. However, making all court records of minors inaccessible without benefit of the balancing test has questionable constitutional underpinnings. Moreover, it makes no sense to have a five subsection set of rules governing "sensitive data sheets" when the rule, itself, makes everything listed in 4.50(c) inaccessible. In other words, it is difficult to see why a party would use a "sensitive data sheet" to restrict access to 4.50(c) information, when the rule, itself, makes all of that information inaccessible.

The provisions for obtaining access to "other information" in the proposal (4.60 (b)-(e)) suffers from the constitutional defects listed above. The method of filing a motion to seal before a judicial determination is made to seal the information is violative of the Constitution because no balancing test has been conducted. At least, under the present rule the motion to seal is not in the custody of the clerk until after the court determines whether or not to seal the information.

The proposed rule has deleted the balancing test contained in the present rule. While it can be argued that the Constitutional provision trumps the rule, it makes no sense to leave the balancing test out of the rule.

The provisions which forgive procedural mistakes are not limited to *pro se* litigants. It forgives represented parties, as well. The proposed changes go well beyond what the drafters hope to accomplish and promote sloppy litigation.

Finally, the "least restrictive means" provision is an important part of assuring adherence to the right-to-know provision of the Constitution and omitting the test is not supported by any of the rationale made by the Proponents.

In sum, the existing rule was crafted after participation by a good cross section of interests. There is no solid evidence that the rules are being abused or inconsistently applied. There is not even anecdotal evidence presented by the Proponents that courts are inconsistent in applying the Rules or that clerks don't enforce them. Moreover, there already is a significant tradition in Montana of courts dealing with statutory confidentiality provisions. As the task force noted in its commentary on the rule, the legislature has adopted various statutes to protect private information in court files. The courts have been implementing these provisions for most of the last century.

They include records of the following civil proceedings made confidential by statute:

1. Child abuse and neglect proceedings and proceedings brought to terminate parental rights based upon abuse or neglect of the child under Title 41, Chapter 3. (Section 41-3-205(2), MCA.)
2. Involuntary commitment proceedings pursuant to Title 53, part 21, mental illness. (Section 53-21-103, MCA.)
3. Formal and informal youth court records. (Section 41-5-216, MCA.)
4. Conciliation court proceedings. (Section 40-3-116, MCA.)
5. Parentage proceedings. (Section 40-6-120, MCA.)
6. Adoption proceedings. (Section 42-6-101, MCA.)
7. Proceedings regarding the abuse or neglect of elderly persons and persons with developmental disabilities. (Section 52-3-813, MCA.)
8. Proceedings under parental notice of Abortion Act. (Section 50-20-212, MCA.)
9. Guardianship and conservatorship proceedings. (Section 72-5-315, MCA.)
10. Grand jury proceedings. (Section 46-11-307, MCA.)
11. Investigative subpoena proceedings. (Section 46-4-304, MCA.)
12. Dissolution of Marriage, Criminal Conversation or Seduction. (Section 3-1-313(2), MCA.)
13. Supervision proceedings by insurance commissioner. (Section 33-2-1323, MCA.)

Certain other information is contained in court records that are not sealed, but which state law recognizes as sufficiently private to prohibit public access. Those records include:

1. The address, telephone number, or place of employment of a victim of a criminal offense or a member of the victim's family if the victim requests confidentiality, unless this information "is of the location of the crime scene" or disclosure of this information "is required by law, is necessary for law enforcement purposes, or is authorized by a district court upon a showing of good cause." (Section 44-5-311(1), MCA.)
2. All information identifying the victim of certain sexual crimes, unless that information "is of the location of the crime scene" or the disclosure of this information "is required by law, is necessary for law enforcement purposes, or is authorized by a district court upon a showing of good cause." (Section 44-5-311(3), MCA.) These crimes are sexual assault, (§ 45-5-502, MCA), sexual intercourse without consent, (§ 45-5-503, MCA), indecent exposure, (§ 45-5-504, MCA), and incest, (§ 45-5-507, MCA).
3. A defendant's DNA information disclosed during a criminal proceeding. (Section 44-6-106, 108, MCA.)
4. Videotapes that are part of the record in cases involving sexual offenses. (Section 46-15-403, MCA.)
5. Pre-sentence investigation reports, pursuant to Section 46-18-113, MCA.
6. Notice by prosecutor of other crimes, wrongs or acts. Notice must be filed and sealed until the time of trial or until a plea of guilty or *nolo contendere* is entered by the defendant. (Section 46-13-109(3), MCA.)
7. Confidential criminal justice information. Dissemination of confidential criminal justice information is restricted to criminal justice agencies, to those authorized by law to receive it, and to those authorized by court order upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure. (Section 44-5-303, MCA.)
8. Will filed with court. A will filed with the court must be sealed and kept confidential during the testator's lifetime. (Section 72-2-535, MCA.)
9. Writs of attachment. The fact of the filing of the complaint or the issuing of such attachment cannot be disclosed to the public until after the filing of return of service of attachment. (Section 27-18-111, MCA.)

10. Medical information provided for marriage license. All medical certificates, laboratory statements and reports and information provided pursuant to § 40-1-203, MCA, through §40-1-209, MCA, are confidential and may not be disclosed to anyone other than state or local health officials. (Section 40-1-208, MCA.)
11. Confidential information in certificate of marriage or dissolution of marriage. Disclosure of confidential information in certificate of marriage or dissolution of marriage for statistical purposes is prohibited unless disclosure is specifically authorized by law for statistical or research purposes or unless ordered by a court. (Section 50-15-121(6), MCA.)
12. Confidential information in birth records. Disclosure of “confidential information” in birth records for medical or health use is prohibited unless disclosure is specifically authorized by law for statistical or research purposes or unless ordered by a court. (Section 50-15-121(6), MCA.)

As can be seen from the foregoing listing, most of these confidentiality provisions cover the “family law” concerns registered in the Proponents’ rationale. Adding more rules restricting access is simply not justified, particularly in light of the considerable protections afforded under the foregoing statutory provisions.

The Court is respectfully requested to decline to amend the existing Privacy Rules as submitted by Proponents.

Sincerely,



PETER MICHAEL MELOY

cc: John Barrows, MNA