

April 15 2014

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA***Richard DeJana & Associates PLLC******RICHARD DEJANA, Esq.******120 4th Street West, Suite 6
Kalispell, Montana******Phone 406-752-4120
Fax 406-752-5015******Reply to
P. O. Box 1757
Kalispell, MT 59903
Email rdejana@montanasky.net***

April 12, 2014

Montana Supreme Court
c/o Ed Smith, Clerk
215 North Sanders, Room 323
Justice Building
Helena, MT 59620

FILED

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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Re: "In re Rule on Substitution of District Judges," A F 09-0289

Dear Chief Justice McGrath and Members of the Court:

Thank you for allowing us to comment on this proposed rule. It has taken me some time to digest all the ramifications of changes. Before addressing the various specific changes, I would like to make some observations.

Years ago I was on a church council. It was torn apart with disagreements. The Pastor and I reached a solution. Rather than placing the chairman at the head of the meeting table, a picture of Christ was placed there. I'm not asking you to become overly religious. I repeat this story to bring to mind that we all must address the real focus and not our own interests. While you review this matter picture the people of Montana. The picture should not be the district court judges. It should not be the convenience of the courts. It should be the people.

As I reviewed the district judges' submission and the proposed amendments, I kept thinking about Justice Sotomayor's nomination. Many pundits criticized her for the comment the court may have needed a Latino woman. The truth of that comment should be obvious to every judge. Judges are people made up of various backgrounds, understandings, prejudices, and abilities. As people, we perceive the world differently based upon our background. The current rule and actually the former version of the rule, protect the litigant from these biases which are not intended but rather are innate in the individual Judge.

There is one more preliminary comment to be made. It is essential we, the members of the bench and bar, maintain a total respect for the judiciary and not publicize those foibles

with could cause a loss in the confidence in the judiciary by the public. Every trial lawyer knows there are judges who do not do their work. Often, it is important to get the case to a trial judge who will resolve the controversy quickly. Contrary to the District Court Judges' claim, the existing rule is invoked often because it leads to a quicker decision. We need to avoid the necessity of formal attacks which may or may not succeed but will produce "news." Most regular litigators know there are certain judges who rule disproportionately in favor certain attorneys or law firms. There are judges that for one reason or another do not rule favorably toward certain attorneys. We've documented situations with attorneys who run 60-70% success of before most judges, but only 10 to 20% success in front of a particular judge. We can but hope that in both situations the personality of the Court responds to or against certain styles of presentation. One would certainly not claim some other type of basis. But disqualification for cause would mean claiming just that. Proof would be difficult. The proof would not be what should be made public.

The district judges contend we have the commission on judicial standards to deal with district judge issues. Frankly, the commission does not work. I had two separate clients file claims against one now retired judge. One involved a real estate case where the court had before it fundamental decisive motions for more than 4 years. In the other, the court had the motions before it for three years. In both the judge responded to the commission that he would get to the motions shortly. The commission determined that was an adequate reason to not go forward. There was no sanction placed on the judge. There was no admonishment of the judge. And there was no decision "shortly." In both cases frankly there was not a decision for over two more years. That is the effectiveness of the commission. It is much better when some judges cannot quickly handle certain types of cases quickly to avoid those judges.

The discussion by the proponents of abuse is totally inappropriate. The abuses are often on the judicial side and it is the litigant that is to be protected from abuse. Again one must focus on the purpose of the Judiciary. It serves the people of Montana and not the judges. You have had enough responses discussing the lack of support for the change from the statistical analysis. There is no need to belabor the point.

Turning now to the specific proposals:

Time changes: I do not know enough about criminal law because I don't practice in that area to make a comment on whether the changes proposed there are significant. My feeling is they are. I draw that feeling because of the attempted changes in section 1a. When the time is measured from filing the complaint, rather than the appearance of the defendant, and it is less time allowed than for the answer, it precludes a means to avoid those situations where there is a favored attorney. Under the proposed rules, judges who do this would have to be disqualified in every case on the possibility of opposing counsel turning out to be the favored attorney. This would have a much greater adverse effect on the judicial system than consciously removing the judge only when the question about his impartiality arises. It is wrong to force a decision on removal before we know all the attorneys.

Exclusion of types of cases: Just as said by Justice Sotomayor, each judge brings certain perspectives to the law. Some have facilities for handling certain matters and are weak on the handling of other matters. The cases listed in subsection C are sensitive. They require judgments of equal sensitivity. Although I respect our District Courts, it is untrue that each judge has equal sensitivity to these issues. Attorneys dealing with these sensitive cases need the ability to move the case before judges who have ability to properly handle them.

Acknowledgment by client: This is probably the most absurd suggestion before you. With all due respect to the proponents, should the client sign off of each affirmative defense? Should the client have to sign off on every answer? Should we return to verified complaints? Should the client have to certify in writing he determined every deposition to be taken, every interrogatory to be asked and every document to be sought? This proposed amendment is the same thing. This insults the relationship between the client and the attorney. As an attorney who is use the rules, I can assure you no one in their right mind would substitute a judge without the consent of the client.

Further, the "disclosures" are more an attempt to scare rather than to inform the client. Could a substitution complicate scheduling? It could, but most of us who use the rule also recognize that scheduling in our courts is not simple, not straightforward and not fast. This already is complicated. Furthermore one of the main reasons for substitutions is to remove judges who do not make prompt decisions. There is no lost time. These discussions must be held between the attorney and his client. It is not the business of the court what the communications between the attorney and client are. This is a step toward invading the sacred ground of that sacred privilege. It is unwarranted. It is sought because judges believe they have same rights as their constituents. Citizens have a right to a just, fair and prompt adjudication. Judges do not have the right to sit on a particular case.

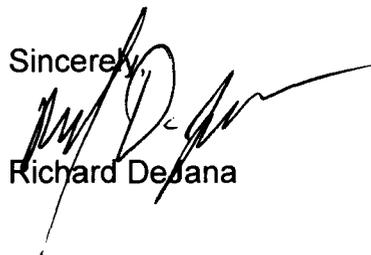
Price increase: This is nothing more than an attempt to run up the cost to use a valuable tool. What this does is make the remedy available to the rich, but less so for the average person and the poor. The discussion of raising the cost is also an admission that the proponents know that the client pays the price and therefore must have been informed about the reasons for substitution. This is an unfair arbitrary burden.

The minor changes: Besides the major changes, there are several minor ones which cut time limits again. For what reason? None. The 10 days difference in those times probably will not even begin to run before the scheduling of the case.

With all due respect to the Judicial Council, this is an unneeded abusive action stepping on the rights of individuals. This Court has stood against the US Supreme Court to protect the traditional rights of our voters. Our litigants have similar traditional rights that need to be protected. Now we face a clear possibility that restraints on the money contributed to judicial elections may well disappear. We have already lost the nonpartisan nature of those races. Is not our historic Montana approach better than sacrificing fair trials or at least the appearance fair trials? The proposal is a solution in search of a problem. It is an unfounded arbitrary and hardly appropriate change the traditional protection Montana has

afforded its people. Judges are people made up of various backgrounds, understandings and prejudice. People perceive the world differently based upon their background. The current rule more appropriately protects the citizen. That is whose picture that ought to be at the forefront of this discussion.

Sincerely,



Richard DeJana