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March 28, 2009

Chief Justice Mike McGrath
Montana Supreme Court
215 North Sanders
P.O. Box 203001
Helena, Montana 59620-3001

Re: Amendments to Montana Rules of Appellate Procedure
AF-07-0016

Dear Chief Justice McGrath:

I submit these comments in response to this Court's Order of January 22, 2009 requesting comments on proposed revisions to the Montana Rules of Appellate Procedure. I note that this Court has reserved the right "...to make further or additional revisions to the Rules after the comment period ends." My comments suggest further changes to the Rules. I do not oppose the proposed revisions.

Appellate Rule 10 (7) is self-contradictory and confusing. It should be changed. The first sentence requires the parties to redact all confidential personal information from documents presented for filing. "*References to confidential personal information shall be redacted from documents filed with the clerk of the supreme court by the party who files the document.*" The last sentence of Rule 10 (7) requires the parties to file one original document without redaction of confidential information. "*One original document without redaction of confidential personal information shall be filed with the clerk of the supreme court*" Anecdotally what I find from my conversations with the personnel of the Clerk of the Supreme Court and colleagues is that is lawyers are complying with the first sentence and not the last.

I should note that Rule 10 (6) more specifically provides privacy protection to children, parents and parties in a few limited categories of cases (abuse & neglect cases, adoption cases, etc.) All the rest of this Court's docket is filled with cases governed by Rule 10(7) which extends general privacy protection to Montana citizens. I recommend it be changed as follows:

(7) Redaction of confidential personal information. Parties shall file one original of each document containing confidential information under seal and a second original with all confidential information redacted to be published by the Court. Documents containing unredacted confidential information shall so state in the caption of the document. References to confidential personal information shall be redacted from documents filed with the clerk of the supreme court by the party who files the document.

Confidential personal information includes, by way of example, complete social security numbers, complete financial account numbers, full birth dates of any person, full names of minor children unless the law requires a child's name to be accessible to the public, and information that is not to be accessible to the public pursuant to state or federal law. The **One** original document without redaction of confidential personal information shall ~~be filed with the clerk of the supreme court and shall~~ remain under seal absent a request to obtain access granted under the Rules for Privacy and Public Access to Court Records in Montana or further order of the supreme court.

My comments are prompted by several recent orders from this Court sending briefs back to family law litigants. The Rules for Privacy and Public Access to Court Records in Montana ("Access Rules") require us to keep the full names of children out of public court records. The Access Rules say nothing about the names of parents. However, last summer this Court began requiring litigants in parenting plan cases and divorce cases involving children to use initials not only for children, but for their adult parents. See Order of July 9, 2008 in the case of In Re The Parenting of K.A.R., A Minor, D.R., A.R. and J.M.R., Petitioners and Appellees, and D.E.R. Respondent and Appellant. This case was decided March 11, 2009 and filed as 2009 MT 73N. On August 11, 2008 this Court returned the opening brief of an appellant in a divorce case with instructions to use initials for the parties:

"Furthermore, we realize that the [Access] Rules do not require the names of adult parties to be protected from public access; however, in order to comply fully with Section 4.50(c) (3), it is generally necessary that initials be used in place of the parents' names as well." See Order filed August 11, 2008, In Re Marriage of R.M. v. M.M. (DA 08-0186) decided as 2009 MT 52N on February 24, 2009.

The policy of requiring initials to be substituted for the names of adults in cases involving children was continued in the case of In Re The Parenting Of J.D.B AND J.R.D., Minor children, J.M.B., Petitioner and Appellant, and E.B. Respondent and Appellee and Cross-Appellant, in an Order filed January 8, 2009 under DA 08-0505. The Court has not issued its opinion in that case.

I expect these rulings to be applied to other cases as well. For example, if a father dies leaving a wife and minor children, this policy would forbid the caption of the estate from including the father's name -- only his initials -- as well as requiring the mother's name and the children's names to be reduced to initials in all pleadings and court records that are available to the public.

I don't know how we lawyers are going to apply this at the district court level. One of my colleagues attempted to file an action on behalf of a child and was told by our local Clerk that cases with initials only for the parties would be refused. Moreover, I don't know as well how title insurance companies will run a title search for judgment liens on my client's home when he wishes to sell, if his name does not appear in the final decree ending his marriage.

But in cases filed before the Supreme Court, my concern is that the widespread substitution of initials for names of adults whenever there is a reference to a child in a file will simply make the job of both lawyers and Justices alike more difficult.

For example, I personally find abuse and neglect opinions difficult to read. They are an alphabet soup of initials. By page 3 of the opinion I struggle to remember whether M.R.M. is the father and M.S.M. is the mother or the daughter -- or vice versa. More importantly, I cannot imagine a more wasteful use of the Supreme Court's time than to continue to struggle through redacted briefs where no one has a name -- only initials. And this does not address the cases in which the initials of the various family members are identical.

Why not require parties to file sealed original unredacted briefs with the full names of the parents, the full names of the children, and the other confidential information appearing in the original district court file? Why not require parties to make 7 sealed copies of unredacted original briefs for use internally by the 7 Justices and their clerks? The sealing of original brief and the 7 copies will protect the children and others whose privacy would otherwise be affected.

With this in mind, I recommend one additional amendment. Rule 13 (2) should be changed to require 7 copies of the original unredacted brief (for the Justices) and 2 copies of the redacted original (for public viewing at the State Law Library and the Clerk of the Supreme Court).

(2) Number of copies to be filed and served. For briefs containing no confidential information a signed original and 9 copies of each brief shall be filed with the clerk of the supreme court unless otherwise ordered by the supreme court, and 1 copy of each brief shall be served on each party. For briefs containing confidential information a signed unredacted original filed under seal and 7 copies of the unredacted original shall be filed along with 2 copies of the redacted brief for public access. 1 copy of the redacted and 1 copy of the unredacted versions of the brief shall be served on each party. The clerk of the supreme court will not accept a brief for filing unless it is accompanied by a certificate of service as required by rule 10.

These changes are philosophically consistent with Appellate Rule 12(8):

"References to parties by such formal designations as "appellant" and "appellee" shall be minimal. It promotes clarity to use names or descriptive terms such as "John," "Sue," "the employee," "the injured person," or "the taxpayer."

This Rule is one of those that this Court proposes to amend, although I note that the list of suggested descriptive terms remains the same. The use of initials in original briefs is simply inconsistent with both the letter and spirit of this Rule.

Thank you for considering my comments, your Honor.

Sincerely,

W. Corbin Howard