

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 06-0377

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IN THE MATTER OF TEMPORARILY SUSPENDING )  
 THE RULES FOR PRIVACY AND PUBLIC ACCESS ) ORDER  
 TO COURT RECORDS IN MONTANA )

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In October 2010, at the Court’s request, State Law Librarian Judy Meadows and Elaine Dahl of the Montana Legal Services Association filed a petition setting forth several alternative written recommendations to the Court regarding possible approaches to changes to the Rules for Privacy and Public Access to Court Records in Montana (the Privacy Rules). The goal is to address difficulties with interpreting, implementing, and enforcing the Privacy Rules, as more fully described in the petition. The Court published the recommendations set forth in the petition, and allowed a period of public comment. Comments have been filed reflecting various points of view. We thank Judy Meadows, Elaine Dahl, and all who have submitted comments for their insights.

The Court has now considered the alternative written recommendations and the comments thereto.

WHEREAS one of the alternative written recommendations is that the Privacy Rules be suspended temporarily until such time as electronic filing of court documents is available in Montana state courts; and

WHEREAS the Clerks of District Court, the Clerk of the Supreme Court, and several others who submitted comments support the proposal that the Privacy Rules be temporarily suspended until such time as Montana state courts allow e-filing; and

WHEREAS, in April of 2011, the Court adopted M. R. Civ. P. 5.2 and revised M. R. App. P. 10 (both effective October 1, 2011), which incorporate privacy protections for full birthdates, social security and tax identification numbers, financial account numbers, and all information that is not to be accessible to the public under state or federal law in all filings made with Montana district courts and this Court, respectively; and

WHEREAS, in light of the Court's revisions to the Rules of Civil Procedure and the Rules of Appellate Procedure and the continued work toward adoption of e-filing procedures, it is not the Court's intention to abandon consideration of privacy rules altogether, but to have them further considered, reviewed and refined in conjunction with the e-filing process, and

WHEREAS this Court's website has offered and will continue to offer forms to assist individuals filing documents with the courts of this state to comply with the privacy restrictions the Court has adopted,

IT IS ORDERED that the Privacy Rules are temporarily suspended, for an indefinite period of time, effective October 1, 2011.

IT IS FURTHER ORDERED that this Order shall be published on the Montana Supreme Court website, and that notice of this Order shall be posted on the website of the State Bar of Montana and in the next available issue of the *Montana Lawyer*.

The Clerk is directed to provide copies of this Order to the Montana State Law Library and the State Bar of Montana. The Clerk is further directed to provide copies of this Order to the clerk of each district court in Montana with a request that the clerk provide a copy to the district judge of that district; the judge of the Workers' Compensation Court; the Chief Judge of the Water Court; the Office of Court Administrator, who shall provide a copy to each of the judges of the Courts of Limited Jurisdiction; the Attorney General of the State of Montana; the chairperson of the Commission on Courts of Limited Jurisdiction; the State Appellate Defender and the Chief Public Defender; the Legislative Services Division; and the Executive Director of the Montana Legal Services Association.

DATED this 14<sup>th</sup> day of September, 2011.

/S/ MIKE McGRATH  
/S/ PATRICIA COTTER  
/S/ BETH BAKER  
/S/ MICHAEL E WHEAT  
/S/ BRIAN MORRIS  
/S/ JIM RICE

I have not signed the Court's Order which temporarily (but indefinitely) suspends the Rules for Privacy and Access to Court Records in Montana (the Rules) on October 1, 2011. In so doing, I acknowledge that the Rules have been somewhat controversial since they were adopted in February 2007 (effective December 31, 2007). The Rules have had their share of detractors and have generated no shortage of complaints, primarily from the clerks of court and from the family practice bar with respect to the extra work sometimes entailed in complying with the Rules in domestic relations and family law cases.

Rather than fixing some admitted problems with the Rules and requiring compliance, we are, unfortunately, putting the Rules on hold until the time when "e-filing" becomes a fact and not a fantasy. I say unfortunately because I believe that the constitutional interests which require protection now are not going to change two, three, five or ten years in the future. If anything, it will be even more difficult to protect those interests in a future, paperless, or web-based court system.

The Rules were hammered out in public meetings over a number of months by a task force comprised of a broad cross-section of stake-holders from the judicial branch, the public, affected offices and agencies, the Bar, and the media. The Task Force's mission was to draft rules to provide the maximum public accessibility to court records, consistent with constitutional or other provisions of the law, and taking into account that public policy interests are not always fully compatible with unrestricted access. Accordingly, as required by Article II, Section 9 of the Montana Constitution, the Rules started with the presumption of open public access to court records, but at the same time acknowledged that, in some specified instances, the right of individual privacy guaranteed under Article II, Section 10 of the Montana Constitution clearly outweighed the public's right to know.<sup>1</sup>

In my view, the Task Force's work product, along with various amendments to the Rules adopted since February 2007, remain a solid and workable platform from which to

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<sup>1</sup> See Task Force Commentary to Privacy and Access Rules, Section 1.00.

protect the public's right to know and the right of individual privacy in court records. I suggest that the tail is wagging the dog in this instance. And, I do not agree that we indefinitely suspend the Rules. Rather, we should continue to fine-tune the Rules—as functioning and extant Rules--recognizing that the important constitutional interests protected by the Rules presently will not be different—and, certainly, no less problematic—when e-filing becomes a reality some years in the future. Indeed, in my view, the transition to a paperless or web-based filing system will be less traumatic if the bench and bar become accustomed now to the sorts of requirements that e-filing will eventually dictate.

/S/ JAMES C. NELSON