

MTA Commentary—Transparency and Accountability (in the practice of law)
April 15, 2009

Transparency and accountability are notions that have gained a lot of traction lately in public policy circles. Actually, they're precepts that have been around since the founding of the Republic; but with hundreds of billions of dollars suddenly infusing the economy, transparency and accountability have moved to the front row of the policy arena.

That is, unless you're writing rules pertaining to the practice of law—or more specifically, the “unauthorized practice of law.” Most government agencies, particularly those with rulemaking authority, go to considerable lengths to ensure that citizens have a right to be heard and that they are given all due process of law. And that's for good reason. First, it's in our Constitution. The First Amendment guarantees, among other things, that we have the right to petition our government. And the Fifth Amendment guarantees that “no person shall...be deprived of life, liberty or property, without due process of law...”

All sorts of procedural precedent has grown out of these fundamental principles. Fast-forward to Montana, 2009, and you'll find an entire Chapter in the Montana Code dedicated to administrative procedures, most of which pertain to allowing parties to participate in rulemaking proceedings. The Montana Administrative Procedures Act, or MAPA, requires that any proposed rules must be published by the Secretary of State in the Montana Administrative Register and the public must be given an opportunity to comment.

MAPA, however, applies only to Executive Branch agencies. The Judicial Branch does things a little differently.

So it is that members of the Commission on Unauthorized Practice petitioned the Montana Supreme Court in February to revise the current rules on the “Unauthorized Practice of Law.” Unlike the procedures under MAPA, the public notice of the proposed practice-of-law revisions was apparently posted on the State Bar of Montana website, the Judicial Branch website and in the hugely-popular *Montana Lawyer* magazine. These are not places that ordinary citizens,

let alone even policy wonks, are known to frequent. About the only people that hang out in these venues are, coincidentally enough, lawyers.

Fortunately, word gets around anyway. Helena's not that different than Washington, D.C., in this regard, where Ronald Reagan is reported to have said once that DC is the only place in the Universe where sound travels faster than light. So when I heard about the proposed rules, I pointed my browser to the Judicial Branch website. Now I admit I'm not as good at surfing the Net as, say, any of my children; but for an adult, I'm not incompetent either. And I couldn't find anything on the Judicial Branch website regarding this rule, or any other proposed rule for that matter. As far as I can tell, it's a secret.

But a few friends were able to purloin a copy of the proposed rule, which is both good news and bad news. The good news is that the stealth rule is making the rounds despite its discreet circulation. The bad news is that the proposed rules are...bad news.

The proposed revisions would add a number of indicators to help attorneys know when someone is practicing law when he or she shouldn't be. One indicator involves holding "one's self" [*sic*] out as an attorney when one in fact is not. That makes sense. I wouldn't want to hire an attorney who actually isn't one, any more than I'd want to hire a doctor who isn't actually a doctor.

But the proposed rule goes way further than that. Giving advice regarding legal rights or responsibilities or selecting, drafting, negotiating or completing legal papers, pleadings, agreements or other documents may also constitute unauthorized practice of law under the proposed rules.

So, back to the First Amendment and our right to petition the government. No longer could a non-attorney read the law or a proposed rule, provide advice or counsel to friends, associates, clients, or members without engaging in the unauthorized practice of law. No longer could employers negotiate contracts or other agreements to hire contractors or agents or even employees without engaging in the unauthorized practice of law. Realtors would need an attorney to sell a house. Accountants would be prohibited from providing tax advice without

an attorney. Telecom providers would need an attorney to hire engineers, and so on.

The proposed rules essentially were written by attorneys, distributed to attorneys, seeking comment from attorneys regarding how to implement rules for attorneys. How's that for transparency and accountability?

Oh, by the way. I'm not an attorney. I wonder if writing this column would constitute the unauthorized practice of law if the proposed rule were adopted?

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Contact: Geoff Feiss, General Manager
Montana Telecommunications Association
406.442.4316
gfeiss@telecomassn.org