

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Fifth Judicial District**

A. PERSONAL INFORMATION

1. Full Name: Roberta R. Zenker
 - a. What name do you commonly go by? Bobbie Zenker
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED] Phone: [REDACTED]
4. Office Address: 1022 Chestnut, Helena, MT 59601 Phone: 406-449-2344
5. Length of residence in Montana: 36 years
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
05/2011 to present	Helena	MT
07/2009 – 05/2011	Cardwell	MT

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Bishop Watterson High School, Cols. OH		05/ 1976	HS Diploma
University of Dayton,	Dayton, OH	05/1980	BA
University of Montana,	Missoula, MT	05/1992	JD

8. List any scholarships, awards, honors and citations that you have received:

Montana Excellence in Leadership Award, 2006, Interagency Committee for Change by Women

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

NO

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Montana Supreme Court, all State District Courts, Courts of Limited Jurisdiction and Administrative Bodies	10/1992

11. Indicate your present employment. (List professional partners or associates, if any.)

Staff Attorney, Disability Rights Montana

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
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2009 - Staff Attorney, Disability Rights Montana: Litigate disability discrimination claims; supervise staff advocates who provide information and referral and short term assistance to persons who experience disability. Supervise Electronic Presence Unit and Core Services Unit.

2006 - 2009 Appellant Defender: Research and write appellate briefs involving both complex and straightforward criminal defense issues for presentation to the Montana Supreme Court.

1997-2006 Madison County Attorney: Elected Official involved in all phases of criminal prosecution, including investigation, pleading, pretrial motions and hearings, bench and jury trials; and, local government civil matters including involuntary mental health commitments, child dependent and neglect proceedings, declaratory judgment and civil rights actions. Provide legal advice to County Commissioners and officers, and all committees, boards and districts of local government. Numerous public appearances.

1992-1996 Associate, Tucker Law Firm/Deputy County Attorney: General Civil litigation & practice, including family law, probate, contracts, labor/wrongful discharge, real estate, mining, and business organizations. Criminal case load.

1990-1991 Legal Intern, Missoula City Attorney's Office: Prosecuted criminal cases, legal research.

1990-1992 Teaching Assistant, University of Montana, School of Law: Taught legal research & writing, provide direction to law students.

1991-1992 Intern, Montana Legal Services: Provided family law and social security representation to indigent clients.

13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

N/A

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

Disability Rights Montana is a civil rights law firm protecting the human, civil and legal rights of Montanans who experience disability. Sixty percent of my cases have involved discrimination issues, both in employment and public accommodation. Thirty percent of my cases have involved abuse and neglect petitions brought against parents with disabilities on the theory that they are unfit to adequately parent due to their disability. I also supervise advocates and conduct extensive training around the state involving legal issues and remedies surrounding disability rights.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

See above.

16. If you specialize in any field of law, what is your specialty?

I have specialized over the course of twenty four years of practice in family law, criminal law, Youth Court Act, involuntary mental health commitments, child dependent or neglect, tax deed quiet title, local government, employment discrimination, elections, and school law.

17. Do you regularly appear in court? Not presently, however, as County Attorney I appeared in District Court and Justice Court almost daily.

What percentage of your appearance in the last five years was in:

Federal court	_____ %
State or local courts of record	60%
Administrative bodies	30%

Other _____%

18. During the last five years, what percentage of your practice has been trial practice? 25%
19. How frequently have you appeared in court? 1 times per month on average.
20. How frequently have you appeared at administrative hearings?
I have appeared infrequently at administrative hearings, before the Human Rights Bureau and the Social Security Administration.
21. What percentage of your practice involving litigation has been:
- | | |
|----------|------|
| Civil | 30 % |
| Criminal | 60 % |
| Other | 10 % |
22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

I have not appeared before the Montana Supreme Court in the last five years, however, I had an extensive appellate practice as an appellate defender for the State Office of Public Defender. Following is a list of my appearances before the Montana Supreme Court:

1. **In re J.D.L.** (2008) 348 Mont. 1199 P.3d 8052008 MT 445. Involuntary mental health commitment. Opposing counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490) Montana Attorney General; John Paulson, (3092 S. Mountain View, Green Valley, AZ 85622, 449-3656) Assistant Attorney General, [Leo J. Gallagher](#), (Lewis & Clark County Courthouse, 228 Broadway, Helena, MT 59601 447-8221) Lewis & Clark County Attorney; [Mike Menahan](#), 228 Broadway, Helena, MT, 447-8205) Deputy County Attorney, Helena, Montana.
2. **In re A.S.F.** (2008) 348 Mont. 45, 199 P.3d 808, 2008 MT 450. . Involuntary mental health commitment. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490) Montana Attorney General; John Paulson, (3092 S. Mountain View, Green Valley, AZ 85622, 449-3656) Assistant Attorney General, [Leo J. Gallagher](#), (Lewis & Clark County Courthouse, 228 Broadway, Helena, MT 59601 447-8221) Lewis & Clark County Attorney, [Mike Menahan](#), 228 Broadway, Helena, MT, 447-8205) Deputy County Attorney, Helena, Montana.
3. **In re J.A.S.** (2008) 345 Mont. 189, 190 P.3d 299, 2008 MT 269. Dependent/Neglect. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490) [Tammy K. Plubell](#), (P.O. Box 201401, Helena, MT, 59620-1401, 444-2026) Assistant Attorney General, [Ed Corrigan](#), (920 Main St. Ste. 201, Kalispell, MT 59901, 758-5630) Flathead County Attorney, [Katie F. Shulz](#), (Deputy County Attorney, Kalispell, Montana.
4. **State v. Johnston** (2007) 339 Mont. 537, 169 P.3d 406, 2007 MT 209N. Criminal. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490) [Jonathan Mark Krauss](#), 215 N. Sanders, P.O. Box 201401, Helena, MT 59620-1401, 444-9514) Assistant Attorney General, [Robert Long](#), (Long Law Office, 201 4^h Ave. East, Polson, MT 59860 883-1363) County Attorney,

- [Mitchell A. Young](#), (Lake County Courthouse, 106 4th Ave. East, Polson, MT 59860 883-7245) Deputy County Attorney, Polson, Montana.
5. **State v. Gaffield** (2009) 214 P.3d 789, 2009 MT 198N. Criminal. Opposing Counsel: Hon. [Steve Bullock](#), (1301 E. 6th St., P.O. Box 200801, Helena, MT 59620-0801 444-3111) Montana Attorney General, [Sheri K. Sprigg](#), (422 Harrison Ave. Helena, MT 59601 442-4667) Assistant Attorney General.
 6. **In re Declaring D.C.** (2008) 342 Mont. 550182 P.3d 761, 2008 MT 30N. Dependent/Neglect. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490) [Jonathan Mark Krauss](#), 215 N. Sanders, P.O. Box 201401, Helena, MT 59620-1401, 444-9514) Assistant Attorney General, [Fred R. Van Valkenburg](#), (200 West Broadway, Missoula, MT 59802 258-4737) Missoula County Attorney, [Leslie Halligan](#), (4th Judicial District Court, 200 West Broadway, Missoula, MT 59802 2583461) Deputy County Attorney, Missoula, Montana.
 7. **State v. White** (2007) 340 Mont. 380, 175 P.3d 305, 2007 MT 319N. Criminal. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490) [C. Mark Fowler](#) (P.O. Box 201401, Helena, MT 59601-1401 444-2026) Assistant Attorney General.
 8. **In re Custody and Parental Rights of E.C.** (2007) 339 Mont. 538169 P.3d 407, 2007 MT 248N. Dependent/Neglect. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490) Attorney General, [Mark W. Mattioli](#), (P.O. Box 201401, Helena, MT 59601-1401 444-2026) Assistant Attorney General, [Leo Gallagher](#), (Lewis & Clark County Courthouse, 228 Broadway, Helena, MT 59601 447-8221) County Attorney, [Carolyn A. Clemens](#), (814 Gilbert, Helena, MT 59601 465-1697) Deputy County Attorney.
 9. **In re B.B.** (2007) 337 Mont. 530, 168 P.3d 701, 2007 MT 27N. Dependent/Neglect. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490) Attorney General, [Mark W. Mattioli](#), (P.O. Box 201401, Helena, MT 59601-1401 444-2026) Assistant Attorney General, [Brant S. Light](#), (P.O. Box 201401, Helena, MT 59620-1401, 444-2026) County Attorney, [Sarah Corbally](#), (2504 Ridge Drive, Helena, MT 59601 422-5073) Deputy County Attorney, Great Falls, Montana.
 10. **State v. Henderson** (2008) 344 Mont. 371, 188 P.3d 1011, 2008 MT 230. Criminal. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490), [Tammy K. Plubell](#), (P.O. Box 201401, Helena, MT, 59620-1401, 444-2026) Assistant Attorney General, [Brant S. Light](#), (P.O. Box 201401, Helena, MT 59620-1401, 444-2026) County Attorney, [Joel Thompson](#), (P.O. Box 201401, Helena, MT 59620-1401, 444-2026) Deputy County Attorney, Great Falls, Montana.
 11. **In re D.B.** (2008) 345 Mont. 225190 P.3d 10722008 MT 272. Dependent/Neglect. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490), [C. Mark Fowler](#) (P.O. Box 201401, Helena, MT 59601-1401 444-2026) Assistant Attorney General, [Fred R. Van Valkenburg](#), (200 West Broadway, Missoula, MT 59802 258-4737) Missoula County Attorney, [Diane Conner](#), ((200 West Broadway, Missoula, MT 59802 258-4779) Deputy County Attorney, Missoula, Montana.
 12. **In re S.L.P.** (2007) 339 Mont. 538, 169 P.3d 407, 2007 MT 241N. Youth Court. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490), [C. Mark Fowler](#) (P.O. Box 201401, Helena, MT 59601-1401 444-2026) Assistant Attorney General, [Brant S. Light](#), (P.O. Box 201401, Helena, MT 59620-1401, 444-2026) County Attorney, [Matthew S. Robertson](#), 121 4th St. N., Ste. 2A, Great Falls, MT 59401 454-6915) Deputy County Attorney, Great Falls, Montana.
 13. **State v. Allum** (2009) 349 Mont. 49, 201 P.3d 776, 2009 MT 15. Criminal. Opposing Counsel: Hon. [Steve Bullock](#), (1301 E. 6th St., P.O. Box 200801, Helena, MT 59620-0801 444-3111), [Tammy K. Plubell](#), (P.O. Box 201401, Helena, MT, 59620-1401, 444-2026) Assistant Attorney General, [Katherine Aldrich](#), (P.O. Box 201706, Helena, MT 59620 444-3064) Legal Intern, [Fred R. Van Valkenburg](#), (200 West Broadway, Missoula, MT

59802 258-4737) Missoula County Attorney, [Susan E. Boylan](#), (200 West Broadway, Missoula, MT 59802 258-4737) Deputy County Attorney, Missoula, Montana.

14. **State v. Daffern** (2008) 348 Mont. 370, 211 P.3d 203, 2008 MT 392N. Criminal. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490), [Mark W. Mattioli](#), (P.O. Box 201401, Helena, MT 59601-1401 444-2026) Assistant Attorney General, [Fred R. Van Valkenburg](#), (200 West Broadway, Missoula, MT 59802 258-4737) Missoula County Attorney, [Kirsten Pabst](#), (200 West Broadway, Missoula, MT 59802 258-4737) Deputy County Attorney, Missoula, Montana.
15. **State v. Hardaway** (2009) 351 Mont. 488, 213 P.3d 776, 2009 MT 249. Criminal. Opposing Counsel: Hon. [Steve Bullock](#), (1301 E. 6th St., P.O. Box 200801, Helena, MT 59620-0801 444-3111), John Paulson, (3092 S. Mountain View, Green Valley, AZ 85622, 449-3656) Assistant Attorney General, [Dennis Paxinos](#), (2902 Terry Ave., Billings, MT 59102) Yellowstone County Attorney, [Sheila R. Kolar](#), (220 N. 27th St. P.O. Box 1178, Billings, MT 59103 744-7774) Deputy County Attorney, Billings, Montana.
16. **State v. Martz** (2008) 347 Mont. 47, 196 P.3d 1239, 2008 MT 382. Criminal. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490), [Micheal S. Wellenstein](#), (P.O. Box 201401, Helena, MT 59601-1401 444-2026) Assistant Attorney General.
17. **State v. Deserly** (2008) 344 Mont. 468, 188 P.3d 1057, 2008 MT 242. Criminal. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490), [Jesse A. Laslovich](#), (840 Helena Ave. Helena, MT 59601 444-2040) Assistant Attorney General, Helena, Montana, [Cyndee L. Peterson](#), (P.O. Box 8329 Missoula, MT 542-8851) Hill County Attorney; [Gina Bishop](#), Deputy County Attorney, Havre, Montana
18. **State v. Jones** (2008) 346 Mont. 173, 194 P.3d 86, 2008 MT 331. Criminal. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490), [David Ole Olson](#), (P.O. Box 201401, Helena, MT 59601-1401 444-2026) Assistant Attorney General, [Cyndee L. Peterson](#), (P.O. Box 8329 Missoula, MT 542-8851) Hill County Attorney, [Gina Bishop](#), Deputy County Attorney, Havre, Montana
19. **State v. Usrey** (2009) 351 Mont. 341, 212 P.3d 279, 2009 MT 227. Criminal. Opposing Counsel: Hon. [Steve Bullock](#), (1301 E. 6th St., P.O. Box 200801, Helena, MT 59620-0801 444-3111), [Sheri K. Sprigg](#), (422 Harrison Ave. Helena, MT 59601 442-4667) Assistant Attorney General, [Mike Weber](#), (300 12th Ave. N.W., Ste. 7, P.O. Box 1328, Sidney, MT 59270 433-2505) Richland County Attorney, Sidney, Montana.
20. **In re Z.M.** (2007) 337 Mont. 278, 160 P.3d 490, 2007 MT 122. Youth Court. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490), [Ilka Becker](#), (546 Diehl Dr., Helena, MT 59601-5467, 444-5225) Assistant Attorney General, Helena, Montana, [Coleen Magera](#), (Magera Law Office, P.O. Box 870, Plains, MT 59859 826-6339) County Attorney, Thompson Falls, Montana.
21. **State v. Tucker** (2008) 345 Mont. 237, 190 P.3d 1080, 2008 MT 273. Criminal. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490), [Tammy K. Plubell](#), (P.O. Box 201401, Helena, MT, 59620-1401, 444-2026) Assistant Attorney General, [Fred R. Van Valkenburg](#), (200 West Broadway, Missoula, MT 59802 258-4737) Missoula County Attorney, [Kirsten L. LaCroix](#), Deputy County Attorney; Missoula, Montana.
22. **In re J.C.** (2008) 343 Mont. 30, 183 P.3d 22, 2008 MT 127. Dependent/Neglect. Opposing Counsel: Hon. [Mike McGrath](#), (Montana Supreme Court P.O. Box 203001, Helena, MT 59620-3001, 444-5490), [Mark W. Mattioli](#), (P.O. Box 201401, Helena, MT 59601-1401 444-2026) Assistant Attorney General, [Joe Coble](#), (P.O. Box 899, Choteau, MT 59422 466-2860) Teton County Attorney, Choteau, Montana.
23. **State v. Schmidt** (2009) 354 Mont. 280, 224 P.3d 618, 2009 MT 450. Criminal. Opposing Counsel: Hon. [Steve Bullock](#), (1301 E. 6th St., P.O. Box 200801, Helena, MT 59620-0801 444-3111), [Mark W. Mattioli](#), (P.O. Box 201401, Helena, MT 59601-1401 444-2026) Assistant Attorney General, [Eileen Joyce](#), (155 W. Granite,

Butte, MT 59701 497-6230) Silver Bow County Attorney; [Samm Cox](#) , (155 W. Granite, Butte, MT 59701 497-6230) and [Molly Maffei](#), (155 W. Granite, Butte, MT 59701 497-6233) Deputy County Attorneys; Butte, Montana.

24. State the number of jury trials that you have tried to conclusion in the last ten years.

I have not tried any cases to a jury in the last ten years, however, as a prosecutor for 15 years, I did approximately 25 jury trials.

25. State the number of non-jury trials that you have tried in the last ten years.

I have not tried any cases to a judge in the last ten years, however, as a prosecutor for 15 years, I did 100s of non-jury trials.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

A. In Re S.R.M., A Youth in Need of Care, MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY, **Cause No.: CDN-2015-72**. Hon. Kathy Seeley (447-8205). Opposing counsel: Anne Peterson, Deputy County Attorney, Lewis & Clark County Attorney's Office Courthouse, 228 Broadway, Helena, MT 59601, apeterson@lccountymt.gov (447-8221)

B. DOUGLAS CHYATTE, #3004524, Charging Party, v. DEPARTMENT OF CORRECTIONS - MONTANA STATE PRISON, LEROY KIRKEGARD, TOM WILSON, AND MONTANA CORRECTIONAL ENTERPRISES, Respondents. BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY OFFICE OF ADMINISTRATIVE HEARINGS. IN RE: OFFICE OF ADMINISTRATIVE HEARINGS CASE NOS. 1669-2015; 1670-2015; 1671-2915; 1672-2015: HRB Case Nos. 0141017056; 7057; 7058; & 7059. Opposing counsel: Robert Lishman (459-7748) Colleen E. Ambrose (444-9894) Special Assistant Attorneys General, Montana Dept. of Corrections, P.O. Box 201301 Helena, MT 59620, RLishman2@mt.gov

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I have appeared before the Montana Human Rights Bureau involving discrimination in employment and public accommodations under the Montana Human Rights Act, the Governmental Code of Fair Practices, and the Americans with Disabilities Act. I have filed complaints and numerous pre-hearing motions, and conducted contested hearings.

26. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

June 4, 1997, Montana Law Enforcement Academy, Virginia City, Domestic Violence Statutes and Evidence Supporting Prosecution

May 16, 2003, Montana State Bar Professionalism Committee, Road Show, Dillon Bar

July 7-9, 2004, Montana County Attorney's Association, Polson, Role of Crime Victim's Advocate

April 29, 2009, Practicing Legal Ethics in the Electronic Law Office, Helena

June 18, 2010, Travel Lodge Hotel Employees, Kalispell, Public Accommodations and Disability Discrimination

June 25, 2010, Montana State Bar Professionalism Committee, Road Show, Bozeman Bar.

November 5, 2010, Montana State Bar Professionalism Committee, Road Show, Missoula Bar.

November 25, 2013, Montana State University, Billings, Employment Discrimination & Reasonable Accommodations

December 18, 2014, Missoula College, Applied Arts & Sciences, Paralegal Studies Course, Employment Discrimination & Reasonable Accommodations

October 10, 2015, National Federation of the Blind, Third Annual Conference, Great Falls, Disability Rights

October 8, 2015, St. Patrick's Hospital, Missoula, Psychiatric Advanced Care Directives

October 23, 2015, NAMI Mental Health Conference, Billings, Psychiatric Advanced Care Directives.

November 20, 2015, Peer Counseling Network, Livingston, Psychiatric Advanced Care Directives

November 20, 2015, Summit Independent Living, Missoula, Psychiatric Advanced Care Directives

December 3, 2015, Flathead Community College, Kalispell, Employment Discrimination & Reasonable Accommodations

April 21, 2016, Libby, Employment Discrimination & Reasonable Accommodations

May 12, 2016, Employment Discrimination & Reasonable Accommodations

September 21, 2016, Beyond the Classroom, Main Street Montana Project, Butte
Employment Discrimination & Reasonable Accommodations

C. PROFESSIONAL AND PUBLIC SERVICE

27. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

1998 – 2014 State of Montana Bar Association; Professionalism Committee, Unauthorized Practice of Law Commission, Lawyers Helping Lawyers.

1992 – 2006 Montana County Attorneys Association; Officer (2003 – 2006)

1996 – 2006 National District Attorneys' Association

1992 – 1996 Governor's Child Support Advisory Task Force

28. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

2016 Pride Foundation, Scholarship Awards Committee

2013 – 2014 Helena Attitude of Gratitude, Chair

2009 – 2014 Pride Foundation, Leadership Action Team

2009 – 2013 Montana Human Rights Network Board of Directors

2009 – 2010 Walk to Emmaus Board of Directors

2000 – 2001 American Legion Baseball, Dillon Cubs, Board of Directors

1994 – 1995 Whitehall Habitat for Humanity Board of Directors

30. Have you ever run for or held public office? If so, provide the details.

Madison County Attorney, 1997 – 2006.

31. Explain your philosophy of public involvement and practice of giving your time to community service.

“Our prime purpose in this life is to help others.” Dalai Lama. Every one of the world's major religions has service to others as one of its most basic tenets. I have believed in this philosophy since I came to

Montana in 1980 as a Jesuit Volunteer freshly out of college. Because I had been given so many things, so generously, I felt it important to give back.

This philosophy has led me to a career in public service as the Director of an Indian Child Youth Treatment program (St. Labre Indian Youth Home), the Madison County Attorney, a criminal appellate defender and a disability rights attorney. I have dedicated my career to being of service to others.

I also believe in giving of my time when I am not working. Toward this end, I have announced baseball games for the Dillon cubs, been a hospital visitor in Helena, and a driver for the elderly for St. Paul's in Helena. Service and giving is just a part of my life, and has been for many years.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

I was convicted in 2005 of a misdemeanor offense of removing firewood from federal land without a permit.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No

36. Is there any circumstance or event in your personal or professional life that would, if brought to the attention of the Commission, Governor or Montana Supreme Court, affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

No

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

N/A

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

Author, *de minimis* income.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.

No

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? Yes No

If not, please explain.

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?
 Yes No

If yes, please explain.

44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No

G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

I have always done my own legal research, and enjoy doing so. My appellate work involved extensive research in a given area of criminal law or procedure, evidence, etc., Youth Court offenses, Involuntary Mental Health Commitments, and Child Dependent/Neglect law. My work as a disability rights attorney has involved writing briefs for the District Court and the Human Rights Bureau including procedural as well as substantive motions.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

I have drafted attorney-client retainer agreements, of course, as well as settlement agreements.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

48. What percentage of your practice for the last five years has involved research and legal writing?
75 %

49. Are you competent in the use of Westlaw and/or Lexis?

I am skilled in the use of Westlaw and Lexis.

H. MISCELLANEOUS

50. Briefly describe your hobbies and other interests and activities.

I have a very creative side. I write. I have had several one-person photography shows in Helena, Boulder and Missoula. I love music – both listening and playing music. I often play guitar for the Walk to Emmaus program. I love college football – the Montana Grizzlies and the Ohio State Buckeyes. I enjoy hiking, hunting, shopping and movies. I especially enjoy time with numerous friends.

51. Describe the jobs that you have held during your lifetime.

I started out in the food service business as a dishwasher, cook, wait person, and bartender. I sometimes worked as many as three jobs in college and law school. I have worked in real estate, construction, youth employment, youth drug treatment, sexual molestation of children treatment, and residential treatment of youth behavioral disorders.

As an attorney, I was an intern for Montana Legal Services, the Montana Department of Administration, Tort Claims Division, and the Montana City Attorney's office. I have worked as an associate in a private law firm, doing all manner of legal work for just about whoever walked in the door. I have been a government lawyer, a prosecutor, a criminal appellate lawyer, and a civil rights lawyer.

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

100% of the legal work I have done during the last five years has been free of charge. DRM is a non-profit law firm.

53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

Two people at the Missoula City's Attorney's Office influenced my career very early. Jim Nugent, said the prosecutor should always win. This was not because righteousness or policy, but because the prosecutor usually has the law and the facts on their side, and are uniquely in the position to choose whether to go forward with prosecution or dismiss the charge. The defendant does not have that luxury.

Judy Wang suggested, with respect to questions of ethics, that I should "do the right thing." Doing the right thing meant to err on the side of caution when it came to Rules of Professional Responsibility. It meant taking the moral high ground, even if it was harder. Many prosecutors have a reputation for being overly aggressive, for always wanting to win. I have always believed that a prosecutor's job is to seek after the ends of justice. I am reminded of Morgan Freeman's great line in the *Bonfires of the Vanities*: "Justice is decency." Decency demands choosing the right course over even the winning course.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

I believe that persons who come into contact with our legal system are entitled to dignity, courtesy and respect. A district court judge should exemplify these characteristics in his or her own bearing and countenance. Litigants are entitled to their day in court. They are entitled to have their case fully and fairly heard. A district court judge must be patient and willing enough to lend their ear and attention to each case, even in the face of an overly crowded docket. A district court judge should have varied experience in wide array of legal issues. He or she should possess general knowledge of many areas of law as well, and be adept at legal analysis and research. Finally, a measure of wisdom is invaluable. In the 5th Judicial District, a love of Montana road trips is a plus.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

The District Courts of Montana are bound by the doctrine of *stare decisis* to follow the law as established by statute and Montana and the United States Supreme Court case law. However, it is the challenge of good lawyering to push the boundaries and interpretations of this established body of law. It is the role of the court to find the balance between the two. Reasoning and analysis is key. The application of case law to a given set of facts must be well reasoned and logical. The parties must present the argument to support their position, and it is not the job of the court to do so for them to reach a conclusion. This tug-of-war that arises when settled law is applied to new sets of facts, or when new interpretations of statutes arise, provides for the flexibility in American jurisprudence. The party that presents the better reasoned analysis according to the weight of settled legal authority should prevail.

56. In the space provided, state the reasons why you are seeking office as a district court judge.

Not unlike other candidates and sitting judges, becoming a judge has been a personal goal since I started law school. The goal arises from a fundamental believe in our justice system which relies upon the rule of law. We are a society ordered by law. And, at the center of it all is the judge and the court. I believe in our system of justice that involves creation of laws by the legislature and application and interpretation of those laws by the courts. The judge is the arbiter of justice, and I cannot think of a better way to “act justly, love mercy and walk humbly with your God.” Micah 6:8. Without wishing to wax religiously, in the end, I still believe that this is what it’s all about.

57. What items or events in your career have distinguished you or of which you are most proud?

I am most proud that I have been able to steadfastly continue a career in public service for many years. I have worked with diverse groups of people without judgment or prejudice. I have been a dedicated public servant, serving the ends of justice rather than seeking personal gain or prestige. I have been fair and impartial, as demonstrated by my work on behalf of both the state as a prosecutor, and criminal defendants as an appellate defender. I have thus developed a unique ability to consider both sides of matters I encounter. I have the courage to carry through with my convictions even the face of opposition and ridicule. Mostly, I am proud that I have kept service to others as my avocation.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

I have wealth of knowledge and experience with the people, schools, hospitals, and government and civic services of the communities that comprise the 5th Judicial District. I have lived, worked and played in those communities and know them well. My children graduated from high school in Twin Bridges.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

I lived and worked in many of the communities that comprise the 5th Judicial District, the court for which I am seeking nomination as judge. I have appeared countless times in the courts of Madison, Beaverhead, and Jefferson Counties. I have shared time and activities with many of the people who live, work, and play there. I know them. I know how they make their living, the churches and schools they attend, and the recreation they enjoy. I am also intimately aware of many of the legal problems they

encounter. I have considered many of them from all angles because I have been both a private practitioner and a government official. I have learned to balance each case fairly, fully and impartially. My combination of experience, knowledge, openness, patience, wisdom and willingness to hear those who would come before me uniquely qualifies me to serve as judge of the 5th Judicial District Court.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 5th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

(Date)

(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Monday, October 31, 2016.

Mail the signed original to:

**Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005**

Send the electronic copy to: mtsupremecourt@mt.gov

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DISABILITY RIGHTS MONTANA
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WRITING SAMPLE

Attorney for Petitioner

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

DISABILITY RIGHTS MONTANA, INC.,)
)
Petitioner,)
-vs-)
)
ANNA WHITING SORRELL, in her)
official capacity as Director of the Montana)
Department of Public Health and Human)
Services, and the MONTANA)
DEPARTMENT OF PUBLIC HEALTH)
AND HUMAN SERVICES, GENE HAIRE,))
in his official capacity as Superintendent of)
the Montana Developmental Center, and the)
MONTANA DEVELOPMENTAL)
CENTER,)
)
Respondents.)
_____)

Cause No. CDV-2012-27

PETITIONER'S ANSWER BRIEF TO
DPHHS BRIEF IN SUPPORT OF
MOTION TO STRIKE AND TO
DISMISS

COMES NOW, attorney for Petitioner, and files its Answer to Respondents' Brief in Support of Motion to Strike and to Dismiss filed by Respondents on December 24, 2012.

...

A. Interference with Records Access and Delay.

While Respondents have correctly stated some provisions of the PADD Act, they have excluded others which courts interpreting the Act have emphasized, including the statement that,

“[t]he State shall have in effect a system to protect and advocate the rights of individuals with developmental disabilities. 42 U.S.C.A. § 15043(a)(1). The state cannot satisfy the requirements of the [PADD Act] by establishing a protection and advocacy system which has this [access] authority in theory, but then taking action which prevents the system from exercising that authority.” *Mississippi Protection & Advocacy System, Inc. V. Cotten*, 929 F.2d 1054, 1059, C.A.5 (Miss.),1991.

The dichotomy which the state sets up between “individual” records and those which happen to contain references to “other” third parties is a self serving and illusory limitation on the PADD access authority. Respondents misinterpret the scope, effect and intent of that authority. The mere use of the word “individual” with respect to PADD records access authority provides no authority to take away from that individual’s records any reference to others, particularly when the other individual is likely a witness or participant in the matter under investigation. Such a limitation flies in the face of the congressional intent.

Furthermore, the next subsection, 42 U.S.C. § 15043(a)(2)(J) states that the protection and advocacy system shall “have access to the records of individuals described” in subparagraph (I) and “other records that are relevant to conducting an investigation.” Thus, the statutory mandate for production of records is intentionally broad.

Iowa Protection and Advocacy Services, Inc. v. Rasmussen, 521 F.Supp.2d 895, 904-05 (S.D. Iowa, 2002). Given this “intentionally broad” mandate, it is clear that records that happen to refer to “other” individuals are “other records that are relevant to conducting an investigation” particularly since those “other” individuals are part of the internally created investigative record. Further, for DPHHS, a state agency, to exercise the kind of discretion it asserts here, it must first have some kind of administrative rule or enabling legislation. Yet, Respondents point to none

here. Accordingly, given the broad congressional mandate and the lack of any state law or rule limiting that mandate,¹ Respondents' effort to limit the PADD Act in accord with its own interpretation exceeds its authority.

Moreover, the PADD Act provides access to *all* records of an individual without regard to the identity of other individuals whose personal information may appear in those records. (*Emphasis added; See* subsection (a)(1)(I)). The State's position is particularly troubling when the records sought are the internal investigative reports of MDC who created them. It is meaningless to put a third party's name in the report and then redact it prior to disclosure, particularly when the agency knows, or should know that it *must* disclose all investigative records to the P&A.

¹Preemption would prohibit the State from enacting such limiting rule or statute in this field already occupied by federal legislation. "By virtue of the Supremacy Clause of the United States Constitution, federal law—which "encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization," *City of New York v. Federal Communications Comm'n*, 486 U.S. 57, 63 (1988)—can preempt state law. In some cases, federal law may expressly preempt state or local law, *see Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354 (8th Cir.1993), or federal law may so "occupy the field" of a given area that state law is deemed preempted, *see Heart of Am. Grain Inspection Serv., Inc. v. Missouri Dep't of Agric.*, 123 F.3d 1098 (8th Cir.1997). Even if, as in this case, Congress has not occupied the field, "state law is naturally preempted to the extent of any conflict with a federal statute, ... [or] where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372–73, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (citations and brackets omitted)." *Iowa Protection and Advocacy Services, Inc.* at 905-06.

Coincidentally, this is also the subsection that requires access “not later than 3 business days after the system makes a written request for the records involved,” which is causing Respondents some consternation. (See Respondents brief at 10; *Id.*) DRM does acknowledge that the three day access provision “is satisfied by permitting DRM to inspect and copy records on site within three days.” The problem here is that Respondents’ redaction efforts have thwarted even this PADD requirement, for as long as two months in one case. (*See First Amended Complaint*, ¶¶ 12-22). The bottom line is that Respondents have no authority to redact investigative or other documents prior to disclosing them to DRM, nor to delay such disclosure by the self imposed assertion of the need to do so.

B. Interrelationship Between HIPAA and The PADD Act.

The argument set out in Respondents’ paragraph 4. on page 11 regarding the applicability of the Health Insurance Portability Accountability Act (HIPAA) to records requested under the PADD act lies at the heart of Count One of this dispute. It permeates the redaction policy and resulting delay problems. The issue has been squarely addressed by the courts and the federal agency responsible for administering HIPAA. The simple, clear and overarching answer is that *HIPAA does not apply to the PADD Act.* (Emphasis added).

The Office of Civil Rights (OCR), a bureau of the United States Health and Human Services Department (HHS) is the federal agency designated by the United States Congress to administer HIPAA. HHS does so through OCR. OCR receives and prosecutes all HIPAA complaints and is the *de facto* expert on all things HIPAA.

Here, DRM asked for and received technical assistance from OCR to help MDC move past its position. (HHS/OCR Regional Manager Letter dated November 1, 2012, attached as Exhibit

“1”). OCR refers to its publication of FAQ #909 published by HHS in August, 2005.² The Training and Advocacy Support Center (TASC - a centralized repository for training and technical assistance, information, and coordination for the federally mandated P&A system is a federal interagency project of the Administration on Developmental Disabilities) has incorporated the HHS FAQ into its training publications verbatim. (Attached as Exhibit “2”).

TASC states:

The HIPAA issue was finally put to rest when the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS) - which is the federal agency charged with enforcing HIPAA - clarified that HIPAA does not preclude P&A access to records as long as access requirements of the P&A statutes are satisfied.

Thus, HIPAA does not restrict DRM from access to records at MDC. The TASC bulletin also walks through the decisions of Federal Courts that have already heard and resolved this challenge in favor of the PADD Act and the P&As. *See, i.e. Ohio Legal Rights Service v. Buckeye Ranch, Inc.*, 365 F. Supp.2d 877 (S.D. Ohio 2005); (hereinafter *OLRS*). In *OLRS*, the Buckeye Ranch argued that HIPAA prohibited it from disclosing records to the P & A. *OLRS* (The Ohio P&A) responded that disclosure of the records fits within two exceptions to HIPAA's prohibition against disclosure; the “required by law” exception and the “health oversight activities” exception. The first exception is found in 45 C.F.R. § 164.512(a), which provides:

(a) Standard: Uses and disclosures required by law.

(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is *required by law* and the use or disclosure complies with and is limited to the relevant requirements of such law.

The *OLRS* Court stated:

²**May a covered entity disclose PHI to a Protection and Advocacy system where the disclosure is required by law?** (FAQ #909, published by the Department of Health and Human Services, last updated 8/08/05 <http://www.hhs.gov/hipaafaq/permitted/require/909.html>).

The Court finds the Buckeye Ranch's interpretation of paragraph (a) to be unpersuasive. Subparagraph (1) is an exception that stands on its own, allowing a covered entity to make a disclosure otherwise prohibited by HIPAA if that disclosure is required by another law. In disclosing the information, the covered entity must simply comply with the requirements of the other law-HIPAA imposes no further conditions.

A reading of the final commentary accompanying the HIPAA regulations confirms that the Court's interpretation is correct. The commentary notes that the phrase "required by law" "is intended to be read broadly to include the full array of binding legal authority, such as constitutions, statutes, rules, regulations [I]t encompasses federal, state or local actions with legally binding effect" 65 Fed. Reg. 82462, 82668. The commentary states that § 164.512(a) was generally meant not to interfere with, or add onto, the requirements of those other laws:

Albeit in the context of the Developmental Disabilities Bill of Rights Act [PADD Act], *the commentary specifically states that HIPAA does not hinder the ability of protection and advocacy systems to investigate abuse and neglect.* "[C]overed entities may make these disclosures under § 164.512(a) without first obtaining an individual's authorization, except in those circumstances in which the [Developmental Disabilities] Act requires the individual's authorization. Therefore, the rules below will not impede the functioning of the existing Protection and Advocacy System." 65 Fed. Reg. 82462, 82594.

OLRS vs. Buckeye Ranch, Inc., at 889-890)(Emphasis added).

While it is true that the Court in *OLRS* found that *OLRS* had not complied with the probable cause requirement for requests without consent, here DPHHS fails to appreciate the import and applicability of the Court's complete ruling. To summarize, the *OLRS Court* recognizes that a P&A has records access under the HIPAA "required by law" and "health oversight activities"³ exceptions in accord with its PADD/PAIMI access authority. The P&A request must be accompanied by either a signed consent/release form⁴ or a statement that probable cause exists. In nearly all DRM records requests made to MDC in 2012 DRM has had signed

³ The *OLRS Court* deferred its decision on the "health oversight" exception pending further briefing, however, laid the legal groundwork to support its conclusion that a covered entity could disclose otherwise protected health care information to the P&A. See *OLRS*, at 890-92.

⁴No requirement is stated that the release/consent form be HIPAA compliant.

releases, thus obviating the probable cause determination. DRM complied with the PADD Act, and the requests were thus excepted from HIPAA. DRM was entitled to the un-redacted records.

Protection and Advocacy System, Inc. V. Freudenthal, 412 F. Supp. 2d 1211 (D. Wy. 2006) (*P & A Systems, Inc.*), a later case, sets out the above HSS commentary on this issue at length. In adopting that commentary, the court stated: “Accordingly, the Court specifically finds as a matter of law that the HIPAA Privacy Rule does not bar the State Hospital and State Training School from disclosing “protected health information” without the authorization of the individual to P & A if such disclosure is required by a P & A act, and that P & A complies with the requirements set forth in the act.” *Id.* At 1218.

Thus, the bright line rule to be distilled from these cases is that MDC must disclose the records requested by DRM pursuant to either a signed authorization by DRM’s client, or a statement that DRM has probable cause to believe that an individual has been abused or neglected.

C. Access to Residents.

In *Cotten, supra*, the Mississippi state agency for people who experience developmental disability adopted regulations that limited access to residents which in turn prevented the state P&A from furnishing protection and advocacy services. Here, we have many of the same circumstances including limitations on visitation, staff pre & post patient interview conditions, meeting with the MDC Clinical Director for instructions, and guardian consent restrictions and/or court appointed attorney restrictions. (See ¶¶ 24-34, First Amended Complaint). These restrictions, even more restrictions than those in *Cotten*, have the same effect of preventing DRM from performing its protection and advocacy function. The restrictions continue to grow in scope and effect which have become so overreaching as to resemble the same “eerie atmosphere of never-never land” referred to in *Cotten. Id.* at 1059. The Court held as follows:

The mandatory provisions of section 6042 relating to authority to investigate incidents of abuse and neglect are rendered nugatory by the Center's restrictions on MP & A. § 6042(a)(2)(B). Similarly, MP & A is prevented from performing its statutory duty of establishing a grievance procedure for clients or prospective clients. § 6042(a)(2)(D). The regulations are such that MP & A has virtually no access to clients not retained prior to the change in the regulations. Most importantly, the Center's regulations render the state's requirement to "have in effect a system to protect and advocate the rights of persons with developmental disabilities" comatose if not moribund. § 6042(a)(2). The trial court did not err in finding a violation of the Act.

Cotten at ¶¶ 4, 5. For the past year, the P&A system mandate in Montana has been equally "comatose if not moribund" at MDC. This Court should reach the same result as *Cotten*, and order MDC to allow unrestricted access to residents by the P&A.

D. DRM Access to MDC Staff.

Respondents raise two defenses in their brief to the allegations contained in ¶¶36-43 of the First Amended Complaint involving DRM's access to MDC employees. The defenses are the Sixth Amendment right to counsel (*Respondent's Brief*, at 16), and M. R. Prof. Resp. Rule 4.2 (*Respondent's Brief*, at 17). They are addressed in turn below.

The Sixth amendment right to counsel arises only in criminal proceedings initiated against the person asserting the right.

As we read *Kirby*, it is only when criminal proceedings have been instituted against a defendant that a Sixth Amendment right to an attorney attaches. The Supreme Court also said that it is only then that the government has committed itself to prosecute, and it is only then that the adverse positions of the government and the defendant have solidified. When the DSS filed the petition alleging abuse and neglect, the State was not committed to prosecute the defendant. The filing of a petition alleging abuse and neglect commences a civil proceeding. By its terms, the Sixth Amendment applies only to criminal cases. We cannot say, as did the Court

of Appeals, that the civil and criminal proceedings are so intertwined that the commencement of a civil proceeding triggers the protection involved in a criminal case. We are bound to hold, pursuant to *Kirby*, that the defendant's Sixth Amendment right to an attorney did not attach at that time.

State v. Adams, 345 N.C. 745, 748, 483 S.E.2d 156 (N.C.,1997), citing *Kirby v. Illinois*, 406 U.S. 682 (1972); see also, *United States v. Wade*, 388 U.S. 218, 227 (1967); *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Thus, an employee has no “right to counsel” when DRM seeks to interview such employee under the authority of the PADD Act.

Respondent’s reliance on M. R. Prof. Resp. Rule 4.2 to inhibit DRM’s access to MDC employees is equally misplaced. (See Exhibit attached to First Amended Complaint). MDC/DPHHS/OLA asserted that Rule 4.2 is implicated any time DRM communicates with MDC employees on behalf of a resident or all of them. This is not correct. MDC/DPHHS/OLA asserted too, that MDC employees are OLA clients “for all purposes” when a “matter” exists. This is an overly broad reading of both the rule and OLA’s role. Even if an MDC is arguably covered by Rule 4.2, its staff are not for “all purposes.” The rule extends only to the purpose, or “matter,” that is the specific subject of the representation. See *People v. Santiago*, 925 N.E. 2d 1122 (Ill. 2012). But, MDC/DPHHS/OLA believes that anytime there is even a potential for litigation, a “matter” has arisen. However, Rule 4.2 does not attach during pre-litigation investigation. *Jorgensen v. Taca Bell Corp.*, 58 Cal Rptr. 2d 178 (At. App. 1996). Rule 4.2 attaches only when litigation commences. See, *Wider Sports Equipment Co., Ltd. V. Fitness First, Inc.*, 912 F. Supp. 502 (D. Utah 1966).

Moreover, DRM is specifically granted reasonable unaccompanied access to facilities for people who experience developmental disabilities for the purpose of conducting abuse and neglect monitoring and investigation. See 45 C.F.R. ¶1386.22(f). This reasonable unaccompanied

access includes the opportunity to interview employees. Also, DRM is entitled to keep the identities of reporters confidential. *See* 45 C.F.R. ¶1386.22(e)(3). Finally, Rule 4.2 does not apply by its own terms where communications are otherwise provided by law as they are under the PADD Act and federal implementing regulations. All of this was pointed out to MDC in June, 2011 to no avail. (*See* Exhibit “3,” attached). DRM must turn to the Court for relief. Thus, ¶¶36-43, and 51-53, establish with particularity the threatened interference with DRM’s right and authority to interview MDC employees in its abuse and neglect investigations, and are sufficient to state a claim under Rule 12(b)(6).

CONCLUSION

DRM has pleaded allegations in the complaint which clearly demonstrate that it has a cause of action for declaratory relief. Given the broad intent of the PADD act, together with the disfavor for motions to dismiss, this court should deny Respondents’ motion.

DATED this _____ day of January, 2013.

DISABILITY RIGHTS MONTANA
1022 Chestnut Street
Helena, MT 59601

By: _____
Roberta R. Zenker
Attorney for Petitioner