MONTANA JUDGES' DESKBOOK

MUNICIPAL, JUSTICE, AND CITY COURTS

This DESKBOOK is the property of the STATE OF MONTANA

The DESKBOOK is designed for the official use of those assisting in the administration of justice in courts of limited jurisdiction and for municipal, justice, and city judges.

This DESKBOOK must be delivered to the successor in office whenever the tenure of any judge is terminated.

Revised April 2010 by John H. Duehr, City Judge, Retired

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SECTION 100 – INTRODUCTION

100.100 The Law. The law comes from several sources; constitutional law, statutory law and case law. The judge will also encounter references to annotations, unwritten and common laws and attorney general opinions. Attorneys will cite these various sources. Judicial decisions must be based on one or more of these laws.

100.101 Constitutional Law. The most binding of our body of laws are the provisions of the United States and Montana Constitutions. These constitutions spell out the most basic rights and duties of an American citizen. Neither congress nor the state legislature can enact a statute in violation of any principle of either constitution. When a judge of a court of limited jurisdiction is asked to declare any legislation or statute unconstitutional, the judge should be hesitant and very careful. This duty is generally performed by a district court or the Montana Supreme Court in our state. There is no constitutional or statutory prohibition for limited court judges to perform that function, however, it should be done with extreme discretion.

100.102 Statutory Law. The next source of the law a judge must follow is the "statutes" or the enactments of the legislature. New laws are adopted each legislative session and amendments are made to existing statutes. Enactments, each legislative year, are compiled into a temporary set of books entitled "Legislative Review" with the legislative session number and the year of the session also indicated.

These newly enacted laws, together with all existing laws, are then put into a permanent set of books, named the "Montana Code Annotated" or "MCA" for citation purposes.

The code is divided into titles, chapters, parts, and sections. A person wishing to "cite" a code section will do so by using the full notation: For example, 1-1-107 MCA. This means the provision is in Title 1, Chapter 1, Part 1 of the chapter and the 7th section in that part.

The MCA will be the law most often referred to in any Montana court. City courts and municipal courts will also have "ordinances" but even in city or municipal courts, the MCA provision will govern most, if not all, of the procedures.

History notes shown below each section of law will tell when the section was initially enacted and the dates of amendments. The last reference is the date of the most recent amendment to that particular section.

100.103 Case Law. In spite of the great number of statutes, much of our law is founded in the reported decisions of the Montana Supreme Court or the Supreme Court of the United States. These decisions establish precedents to be followed. The policy of following precedent is called "stare decisis," meaning "to stand with the decision." This body of law is known as "case law." The importance of case law is that when a particular provision of the constitution or of the statutes has been interpreted by the Supreme Court, all judges must thereafter apply that interpretation to a clearly comparable set of facts until a new statute is enacted or a new decision is made.

In recent years the "Miranda" case has become one of the most important examples of case law emerging from the United States Supreme Court. One important example of the Montana case law is *State vs. Braden, 154 Mont. 90*. This case applies to search and seizure. The cite means that in volume number 154 of the published reports of the Montana Supreme Court decisions you will find on page 90 the case of State vs. Braden. The full record of the written decision will appear. If a lawyer calls attention to a decision of the Montana Supreme Court, it will be cited as above. Each courthouse has one set of the Montana Reports and every judge should know where they are and how to use them. You can also obtain decisions of the Montana Supreme Court at website http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-36.

100.104 Annotations. Montana statutes are annotated. This means that every case, decided by the Supreme Court where a specific statute is quoted or followed, will appear in the annotations following the code section number. Annotations are in a separate set of loose-leaf books. These annotations are updated after each legislative session, as are the Montana Codes Annotated.

100.105 Unwritten and Common Laws. Three sections of the Montana Code Annotated state the Montana policy:

> MCA 1-1-107. Unwritten law defined. Unwritten law is the law that is not promulgated and recorded, as mentioned in 1-1-104, but that is, nevertheless, observed and administered in the courts of the country. It has no certain repository but is collected from the reports of the decisions of the courts and treatises of learned people.

MCA 1-1-108. Common law – applicability of In this state there is no common law in any case where the law is declared by statute. But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.

MCA 1-1-109. Common law of England – when rule of decision. The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or laws of this state, is the rule of decision in all the courts of this state.

100.106 Attorney General Opinions. Frequently the attorney general is called upon to give an opinion on a question of law. Pursuant to MCA 2-15-501(7), any opinion given by the attorney general is considered as the law (much like case law) until and unless a district court or the Supreme Court of Montana rules otherwise.

100.107 Substantive and Procedural Law. There are two general categories of law that apply in the operation of the Court – substantive law and procedural law. Black's Law Dictionary 7th Ed. Defines substantive law as "The part of the law that creates, defines, and regulates the rights, duties, and powers of parties." (contract law, criminal law, tort law, law of wills, etc.) as opposed to procedural law (law of pleading, law of evidence, law of jurisdiction, etc.). Black's defines procedural law as "The rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves."

100.200 THE ROLE OF JUDGES OF LIMITED JURISDICTION COURTS

100.201 The Judicial Image. The great majority of citizens receive their first exposure to our judicial system in the courts of limited jurisdiction. It is in these courts that the public's impression of justice and its administration is instilled. For this reason it is important that we, as judges, continually examine our courtroom procedures and strive to improve the public's view of the judicial process.

100.202 Dignified Surroundings. The 1972 constitution and the 1973 legislature began the process of improving the physical facilities for courts of limited jurisdiction. The following section was first enacted at that time:

MCA 3-10-103. County to provide facilities. The board of county commissioners of the county in which the justice of the peace has been elected or appointed:

(1) shall provide for the justice's court:

(a) the office, courtroom, and clerical assistance necessary to enable the justice of the peace and the clerk of justice's court, if any, to conduct business in dignified surroundings;

(b) the books, records, forms, papers, stationery, postage, office equipment, and supplies necessary in the proper keeping of the records and files of the court and the transaction of the business; and

(c) the latest edition of the Montana Code Annotated and all official supplements; and

(2) may provide a clerk of justice's court.

The dignified surroundings contemplated by the statute require that the judge have an elevated bench with an American flag on a floor standard on the right. Our system of justice derives its authority from the government and the constitution; the flag represents these concepts. Together, the elevated bench and the flag indicate that the judge is in a position of authority and is deserving of respect. With a raised bench, the judge will be at eye level, or above, anyone appearing before the court and this creates an appropriate setting for the court. Where possible, courtroom facilities should be comparable to those provided in the district court courtrooms, with a raised witness chair and a rail between spectators and counsel.

Another judicial symbol is the robe. Although there is no statutory requirement for a judge to wear one, the robe is a symbol of respect and authority. (See Title 25, chapter 24, Montana Uniform Rules for the Justice and City Courts, Rule 13(b).

100.203 Judge's Conduct on the Bench. No matter how beautiful or dignified the courtroom facilities are, the impression of justice will be negative if the conduct of the presiding judge does not conform to accepted judicial standards. The judge must be courteous, patient, attentive, possessed of a sense of humor, and most importantly, must have good common sense. Legal ability need not include admission to the Bar as a practicing attorney, but certainly it must include a good understanding of the basic rules of legal rights and duties. In 1985, with the support of the Montana Magistrates Association, the legislature enacted 3-1-1501 MCA through 3-1-1508 MCA. These sections require the training and certification of all judges in courts of limited jurisdiction.

This legislation is an important step in upgrading the judicial system and sets requirements of competency to assure judicial equality in our state. The judge must be ever aware that the eye of the public is focused on the court, including the judge and staff members of the court. It is extremely important that the action and attitude of all court personnel is one of professional courtesy and conduct.

Without a doubt, the multitude of matters that come before your court makes it very difficult to avoid impatience or boredom. No matter how tempting it may be, you must never forget that each litigant before you is having their day in court, and it may well be one of the most important things that has happened in their life. If you are not courteous, or if you fail to give your full attention to the problems presented, the litigant may walk out of the courtroom with a bad taste in his or her mouth, believing that courts are unsympathetic and unresponsive.

Another important duty of any judge is to control the courtroom. Don't let disruptions get started. This must be done with a minimum use of the voice or gavel. Each case must be given the full attention of the judge and that includes being in control of the litigants and witnesses who appear. It is difficult to fully "hear" a case if the presentation of the case is not done in an orderly fashion.

One important factor in preserving respect for the court is to start on time. If your court is supposed to convene at 9:30 – start on time – not at 10:00. If you expect litigants and lawyers to be on time, then you should demand no less from yourself. Showing courtesy and timeliness to staff, litigants, and attorneys should be a basic trait of a judge.

While conducting any hearing, avoid actions that might indicate that your role is that of prosecutor, defense counsel, law enforcement officer, or counselor. The role of the judge, during an appearance or a trial, is extremely important. The judge should remember that each action is essentially a search for the truth and you must be independent and neutral at all times.

One area that can be difficult is in the examination of witnesses, especially in a pro se situation. For a judge to question a witness actively can create problems for it is difficult to avoid giving the impression that you are cross-examining for one side or the other.

On the other hand, it is difficult to sit silently as a referee and wonder about unanswered questions. The best policy is to ask as few questions as possible, but never hesitate when it is necessary for you as the fact finder to ask a question for clarification of testimony.

The city, justice, or municipal court judge has the power of contempt to control the conduct of the parties, lawyers, and spectators during a hearing. This power should always be carefully and properly exercised. To indiscriminately use or threaten to use contempt is the quickest way to lose the respect of those attending your court. Contempt powers are given to a court for a specific purpose and should be used reasonably and judiciously.

It is the duty of the judge to disqualify oneself whenever a legal cause for disqualification exists. There are also situations where a legal cause may not exist but in fairness to the litigants, another judge should be called to preside. The court should never be open to the criticism that the judge was influenced by such things as personal associations and former business or professional associations. Sometimes the appearance of unfairness is more disastrous to the public image of the judiciary than a mistaken interpretation of the law or the facts. The **"Canons of Judicial Ethics"** are available to you and you should become familiar with them.

100.204 Judge's Conduct off the Bench. One of the truths we all must face is that when we become a judge, we cannot expect to lead the same carefree, uninhibited social existence of former times. People expect a judge to live by a standard above that of the average citizen. It is essential that as a judge, you should avoid presence at questionable places and affairs; that you strictly observe all general public rules such as traffic laws; and above all, that you not seek or expect any special treatment because of your position.

It is imperative that a judge maintains the proper relationships with peace officers, defendants, prosecutors and defense counsel. As a judge, you must perform your duty independent of other agencies, peoples, or prejudices. One of the mot damaging criticisms a court can receive is that it is controlled by another agency or group of people and has become a rubber stamp. This perception will affect the respect and efficiency of the court. Your actions will greatly contribute to a favorable concept of the court.

100.205 Immunities of the Judge. Judges are not liable for the consequences of their judicial acts **if** they have jurisdiction for the performance of such acts. If you, as the judge, have exceeded the limits of your jurisdiction, you may not be protected. General immunity is limited to recognized judicial acts and provides no protection for acts beyond the boundaries of your duty as a judge.

It is because of this limitation, the first question the judge must ask whenever called upon to perform a judicial act is, "Do I have jurisdiction to act?"

100.206 The Judge and the Adversary System. Our courts have been established as a forum where all parties can present their differences and seek a fair and just solution. The system functions under the adversary procedure, where each party to a dispute presents evidence and arguments in the manner most beneficial to that position. The case is then submitted to the Trier-of-fact. It is essential for the proper operation of the system that a trial or hearing be presided over by a judge who is impartial and thoughtful. The judge must also be attentive to make certain that the proper law is applied and proper rules of evidence and procedure are followed in each case. In no other way can the parties be assured of their basic constitutional right to a "fair trial". This ideal is the cornerstone of our judicial system.

SECTION 200 – COURT STRUCTURE

200.100 INTRODUCTION

By Article VII, the 1972 Montana Constitution established a three-level court system and set out the jurisdiction of each court.

> Section 1. Judicial Power. The judicial power of the state is vested in one Supreme Court, district courts, justice courts, and other such courts as may be provided by law.
>
> Section 5. Justices of the Peace. (1) There shall be elected in each county at least one justice of the peace with qualifications, training, and monthly compensation provided by law. There shall be provided such facilities that they may perform their duties in dignified surroundings.
> (2) Justice courts shall have such original jurisdiction as may be provided by law. They shall not have trial jurisdiction in any criminal case designated a felony except as examining courts.
> (3) The legislature may provide for an additional justice of the peace in each county.

➔Comment. Municipal courts and city courts are then established by legislative action.

> 3-1-101 MCA. The several courts of this state. The following are courts of justice of this state:
> (1) the court of impeachment, which is the senate;
> (2) the supreme court;
> (3) the district courts;
> (4) the municipal courts;
> (5) the justice courts;
> (6) the city courts and such other courts of limited jurisdiction as the legislature may establish in any incorporated city or town.
>
> 3-1-201 MCA What courts have seals. Each of the following courts shall have seals:
> (1) the supreme court;
> (2) the district courts;
> (3) the municipal courts.
>
> 3-6-101 MCA Establishment of court. (1) A city with a population of 4,000 or more, according to the last federal census, may have a court, known as the municipal court of the city of (designating the name of the city) of the state of Montana.

The court must be a court of record. The municipal court shall assume continuing jurisdiction over all pending city court cases in the city in which the municipal court is established.

(2) A city may have a municipal court only if the governing body of the city elects by a two-thirds majority vote to adopt the provisions of this chapter by ordinance, and, in the ordinance, provides the manner in which and time when the municipal court is to be established and is to assume continuing jurisdiction over all pending city court cases. If a city judge is not an attorney and the office is abolished because a municipal court is established, the ordinance must provide that the time when the establishment of the municipal court takes effect is the date on which the municipal court judge elected at the next election held under 3-6-201 begins the municipal court judge's term of office. The ordinance must be consistent with the provisions of this chapter.

3-10-101 MCA. Number and location of justices' courts – authorization to combine with city court – justice's court of record. (1) There must be at least one justice's court in each county of the state, which must be located at the county seat. The board of county commissioners shall designate the number of justices in each justice's court.

(2) The board of county commissioners of each county of the state may establish:

(a) one additional justice's court located anywhere in the county; and

(b) one additional justice's court located in each city having a population of over 5,000, as provided in subsection (3).

(3) A city having a population of over 5,000 may, by resolution, request the board of county commissioners to constitute a justice's court in the city. A justice's court must be established in the city if the board of county commissioners approves the request by resolution.

(4) A justice of the peace of a court constituted pursuant to subsection (3) may act as the city judge upon passage of a city ordinance authorizing such action and upon approval of the ordinance by resolution of the board of county commissioners. If the ordinance and resolution are passed, the city and the county shall enter into an agreement for proportionate payment of the justice's salary, as established under 3-10-207 and 3-11-202, and for proportionate reimbursement for the use of facilities.

(5) A county may establish the justice's court as a court of record. If the justice's court is established as a court of record, it must be known as a "justice's court of record" and, in addition to the provisions of this chapter, is also subject to the provisions of 3-10-115 and 3-10-116. The court's proceedings must be recorded by electronic recording or stenographic transcription and all papers filed in a proceeding must be included in the record. A justice's court established as a court of record may be established by a resolution of the county commissioners or pursuant to 7-5-131 through 7-5-137.

3-11-101 MCA. City court established. A city court is established in each city or town. A city judge shall establish regular sessions of the court. On judicial days, the court must be open for all business, civil and criminal. On no judicial days, as defined in 3-1-302, the court may transact criminal business only.

200.101 Disqualification and Substitution of Judges.

In 1981, the Montana Supreme Court, pursuant to the powers granted by the Montana Constitution, adopted a new rule relating to the disqualification of judges. The most important part of these rules, as it relates to our courts, has been amended as listed below:

Disqualification of a judge in a court of limited jurisdiction is limited to those cases where the judge feels there is a legal reason the judge should not sit on the case, and to those cases where an affidavit is filed charging the judge with actual bias and prejudice.

3-1-803 MCA. Disqualification of judges — all courts.

DISQUALIFICATION OF JUDGES

This section shall, in its application, apply to all courts listed in section 3-1-101 except a court of impeachment in the state senate.

Any justice, judge, justice of the peace, municipal court judge or city court must not sit or act in any action or proceeding:

1. To which he is a party, or in which he is interested.
2. When he is related to either party or any attorney or member of a firm of attorneys of record for a party by consanguinity or affinity within the third degree, computed according to the rules of law;
3. When he has been attorney or counsel in the action or proceeding for any party or when sitting in a case on appeal he as a judge in the lower court rendered or made the judgment, order, or decision appealed from.

DISQUALIFICATION FOR CAUSE

This section is limited in its application to judges presiding in district courts, justice of the peace courts, municipal courts, small claims courts, and city courts.

1. Whenever a party to any proceeding in any court shall file an affidavit alleging facts showing personal bias or prejudice of the presiding judge, the matter shall be referred to the Montana Supreme Court. If the affidavit is in compliance with subsections (a), (b), and (c) below, the Chief Justice shall assign a district judge to hear the matter. If the affidavit is filed against a judge of a municipal court, justice court, or city judge, any district judge presiding in the district of the court involved may appoint either a justice of the peace, a municipal judge or a city court judge, to hear any such proceeding.

(a) The affidavit for disqualification must be filed more than thirty (3) days before the date set for hearing or trial.

(b) The affidavit shall be accompanied by a certificate of counsel of record that the affidavit has been made in good faith. An affidavit will be deemed not to have been made in good faith if it is based solely on rulings in the case which can be addressed in an appeal from the final judgment.

(c) Any affidavit which is not in proper form and which does not allege facts showing personal bias or prejudice may be set aside as void.

(d) The judge appointed to preside at a disqualification proceeding may assess attorneys fees, costs and damages against any party or his attorney who files such disqualification without reasonable cause and thereby hinders, delays or takes unconscionable advantage of any other party, or the court.

200.102 Interim Disqualification.

3-1-1109 MCA. Interim disqualification of judicial officer. (1) A judicial officer must be disqualified from serving as a judicial officer, without loss of salary, while there is pending an indictment or an information charging the officer with a crime punishable as a felony under Montana or federal law.

(2) When the commission files with the supreme court a recommendation that a judicial officer be removed or retired, the judicial officer must be disqualified from serving as a judicial officer, without loss of salary, pending the supreme court's review of the record and proceedings.

200.200 MUNICIPAL COURT JURISDICTION.

3-6-103 MCA. Jurisdiction. (1) The municipal court has jurisdiction coordinate and coextensive with the justices' courts of the county where the city is located and has exclusive original jurisdiction of all civil and criminal actions and proceedings provided for in 3-11-103. (2) Municipal courts have concurrent jurisdiction with the district court in actions arising under Title 70, chapters 24 through 27.

(3) Applications for search warrants and complaints charging the commission of a felony may be filed in municipal court. The municipal court judge has the same jurisdiction and responsibility as a justice of the peace, including holding preliminary hearings. The city attorney may initiate proceedings charging a felony if the offense was committed within the city limits, but the county attorney shall take charge of the action if an information is filed in district court.

➔Comment. 40-4-123 MCA gives concurrent jurisdiction to district courts, municipal courts, justice's courts, and city courts to hear and issue orders under 40-4-121. The 1989 Legislature gave authority to all courts, including city courts for the issuance of temporary restraining orders, preliminary injunctions, and orders of protection. These statutes were updated in 1995 and Statute 40-15-301 grants the same jurisdiction for protective orders listed in 40-15-201.

➔Comment. Municipal court judges have the authority to perform marriages as provided for in 40-1-301 MCA.

200.201 Term of Office.

3-6-201 MCA. Number of judges — election — term of office — chief judge — duties of chief judge — assistant judge. (1) The governing body of a city shall determine by ordinance the number of judges required to operate the municipal court.

(2) A municipal court judge who is not a part-time assistant judge appointed under subsection (6) must be elected at the general election, as provided in 13-1-104(2). The judge's term commences on the first Monday in January following the election. The judge shall hold office for the term of 4 years and until a successor is elected and qualified.

(3) Except as provided in subsection (2), all elections of municipal court judges are governed by the laws applicable to the election of district court judges.

(4) If there is more than one municipal court judge, the judges shall adopt a procedure by which they either select a chief municipal court judge at the beginning of each calendar year or by which the position of chief municipal court judge rotates among the judges in order of seniority at the beginning of each calendar year, with the most senior judge serving during the first year of the rotation.

(5) The chief municipal court judge shall provide for the efficient management of the court, in cooperation with the other judge or judges, if any, and shall:

(a) maintain a central docket of the court's cases;

(b) provide for the distribution of cases from the central docket among the judges, if there is more than one judge, in order to equalize the work of the judges;

(c) request the jurors needed for cases set for jury trial;

(d) if there is more than one judge, temporarily reassign or substitute judges among the departments as necessary to carry out the business of the court; and

(e) supervise and control the court's personnel and the administration of the court.

(6) A municipal court judge may, with the approval of the governing body of the city, appoint a part-time assistant judge, who must have the same qualifications as a judge pro tempore under 3-6-204, to serve during the municipal court judge's term of office. An order by a part-time assistant judge has the same force and effect as an order of a municipal court judge.

200.202 Qualifications/Bonds/Restrictions.

3-6-302 MCA. Qualifications — certification — training. (1) A municipal court judge must have the same qualifications as a judge of a district court, as set forth in Article VII, section 9, of the Montana constitution, except that a municipal court judge need only be admitted to the practice of law in Montana for at least 3 years prior to the date of appointment or election.

(2) A municipal court judge shall reside in the county in which the court is located and shall meet the residency requirements provided in 3-10-204.

(3) The commission on courts of limited jurisdiction, upon finding compliance with subsections (1) and (2), shall issue a certificate, as required in 3-1-1502, prior to the municipal court judge assuming office. The certificate must be conditioned upon continued compliance with the minimum judicial education requirements provided for in this section. The certificate must be filed with the clerk and recorder as provided in 3-1-1502.

(4) A municipal court judge shall complete a minimum of 15 hours of continuing judicial education requirements each year or a greater number established by the supreme court. Attendance at the two annual training sessions under 3-10-203 may fulfill the requirement provided for in this subsection.

(5) Completion of a course approved for continuing judicial or legal education hours applies to the judicial education requirements under subsection (4).

(6) A municipal court judge is entitled to reimbursement by the city in which the judge holds or will hold court for all actual and necessary expenses and costs incurred in attending a continuing judicial or legal education course.

(7) On or before December 31 of each year, a municipal court judge shall file an affidavit of compliance with the continuing judicial education requirements established in this section with the commission on courts of limited jurisdiction. The supreme court may sanction a municipal court judge or declare a vacancy in the office of the judge for failure to meet the training requirements established in this section.

Art. VII, Sec. 9, Mont. Const. Qualifications. . . . (4) Supreme court justices shall reside within the state. During his term of office, a district court judge shall reside the district and a justice of the peace shall reside in the county in which he is elected or appointed. The residency requirement for every other judge must be provided by law.

2-9-802 MCA. Bonds — amount. All elected or appointed city or town officers and employees must be bonded in the amount required by ordinance. The amount for which a city or town officer or employee must be bonded must be based on the amount of money or property handled and the opportunity for defalcation.

3-1-604 MCA. Restrictions on municipal court judges. A municipal court judge may not practice law before the judge's own municipal court or hold office in a political party during the judge's term of office.

200.203 Election.

See 200.201.

200.204 Official bond.

7-4-4109 MCA. Official bond. Each officer of a city or town who is required to give bond shall file the bond, duly approved, within 10 days after receiving notice of election or appointment or, if notice is not received, then on or before the date fixed for the assumption of the duties of the office to which the officer is elected or appointed.

200.205 Training/Certification.

3-11-204 MCA. Training sessions for judges. (1) There must be two mandatory annual training sessions supervised by the supreme court for all elected and appointed city judges. One of the training sessions may be held in conjunction with the Montana magistrates' association convention. Actual and necessary travel expenses, as provided in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed judge for attending the sessions. Whenever the office of city judge is held by a justice of the peace, the costs imposed by this subsection are the joint responsibility of the county and the municipality, with the costs to be allocated and charged in proportion to the work done for each governmental entity. In all other cases, the costs must be paid by the city or town in which the judge holds or will hold court and must be charged against that city or town.

(2) Each city judge shall attend the training sessions. Failure to attend disqualifies the judge from office and creates a vacancy in the office. However, the supreme court may excuse a city judge from attendance because of illness, a death in the family, or any other good cause.

3-1-1502. Training and certification of judges. Except as provided in 3-1-1503, a judge selected for a term of office may not assume the functions of the office unless the judge has filed with the county clerk and recorder in the jurisdiction a certificate of completion of a course of education and training prescribed by the commission.

3-1-1503. Exception — temporary certificate. (1) Section 3-1-1502 does not apply to a judge who has received a temporary certificate issued by the commission as provided for in subsection (2).

(2) The commission may issue a temporary certificate enabling a judge to assume the functions of the office pending completion of a course as required by 3-1-1502. The temporary certificate must be in a form and subject to the terms and conditions prescribed by the commission.

(3) The commission may issue a temporary certificate only if:

(a) the judge is appointed or elected after the course is offered; or

(b) the commission grants an excuse because of a personal illness, a death in the family, or other good cause.

(4 The appointing authority for an appointed judge shall notify the commission of the person appointed, and the person appointed must be certified as provided in 3-1-1502 or this section prior to assuming office.

3-1-1508 MCA. Credit toward annual training. Attendance of a training course prescribed by 3-1-1502 shall apply toward fulfillment of mandatory annual training requirements provided in 3-10-203 and 3-11-204.

➔Comment. 3-1-1501 MCA defines the term "judge" to mean a municipal court judge, a justice of the peace, or a city judge. "Commission" means the Commission on Courts of Limited Jurisdiction established by the Supreme Court.

200.206 Salary and Expenses.

3-6-203 MCA. Salary. The salary of the municipal court judge must be set by ordinance or resolution and is payable monthly by the city treasurer. Actual and necessary expenses for the municipal court judge are expenses, as defined and provided in 2-18-501 through 2-18-503, incurred in the performance of official duties.

3-11-204 MCA. Training sessions for judges. (1) . . . Actual and necessary travel expenses, as provided in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed judge for attending the session.

3-1-1506 MCA. Expenses. Each judge is entitled to reimbursement for all actual and necessary travel expenses and other costs incurred in attending a course of training education pursuant to 3-1-1502. Such reimbursement must be paid as provided for in 3-10-203 and 3-11-204.

200.207 Court Facilities and Sessions:

3-6-105 MCA. Courtroom and supplies. A room for the municipal court, with the necessary furniture, fixtures, and supplies, shall be provided by the city wherein the court is located.

3-6-106 MCA. Sessions of court— departments . (1) The municipal court must be in continuous session from 9 a.m. to noon and from 1 p.m. to 4 p.m. on every day except nonjudicial days. The judge may designate additional hours as the judge believes necessary. If there is more than one judge, each judge may hold a session of the court and may designate additional hours as the judge believes necessary.

(2) If there is more than one judge, the chief municipal court judge shall divide the court into departments, make rules for the government of the court, and describe the order of the court's business.. Each department must be numbered, and a judge must be assigned to each department.

3-1-301 MCA. Days on which courts may be held. Courts of justice may be held and judicial business transacted on any day, except as provided in 3-1-302.

3-1-302 MCA. Nonjudicial day. (1) No court may be open nor may any judicial business be transacted on legal holidays, as provided for in 1-1-216, and on a day appointed by the president of the United States or by the governor of this state for a public fast, thanksgiving, or holiday, except for the following purposes:

(a) to give, upon its request, instructions to a jury when deliberating on its verdict;

(b) to receive a verdict or discharge a jury;

(c) for the exercise of the powers of a magistrate in a criminal action or in a proceeding of a criminal nature.

(2) Injunctions, writs of prohibition, and habeas corpus may be issued and served on any day.

3-1-312 MCA. Sitting of court to be public. The sittings of every court of justice must be public, except as provided in 3-1-313.

3-1-313 MCA. Sittings of court — when private. (1) in an action for dissolution of marriage, criminal conversation, or seduction, the court may direct the trial of any issue of fact joined therein to be private and exclude all persons except the officers of the court, the parties, their witnesses, and counsel.

(2) During the examination of a witness in any cause, the court may, in its discretion, exclude some or all of the other witnesses in the cause.

200.208 Acting Judge.

3-6-204 MCA. Disqualification — judge pro tempore. When a judge of a municipal court has been disqualified or is sick or unable to act, the judge shall call in a sitting or retired judge of a court of record or an attorney who has been a member of the state bar of Montana for 5 or more years to act as a judge pro tempore. The judge pro tempore has the same power and authority as the municipal court judge.

200.209 Forfeiture of a Judicial Position.

Art. VII, Sec. 10, Mont. Const. Forfeiture of judicial position. Any holder of a judicial position forfeits that position by either filing for an elective public office other than a judicial position or absenting himself from the state for more than 60 consecutive days.

200.210 Vacancy/Removal/Resignation.

7-4-4111 MCA. Determination of vacancy in municipal office. An office becomes vacant on the happening of any of the following events before the expiration of the term of the incumbent:

(1) the death of the incumbent;

(2) a determination pursuant to Title 53, Chapter 21, Part 1, that the incumbent is mentally ill;

(3) the incumbent's resignation;

(4) the incumbent's removal from office;

(5) the incumbent's absence from the city or town continuously for 10 days without the consent of the council;

(6) the incumbent's open neglect or refusal to discharge duties;

(7) the incumbent's ceasing to be a resident of the city or town or, in the case of a city council member, ceasing to be a resident of the city council member's ward. This subsection does not apply to an appointed municipal officer who resides outside the city or town limits with the approval of the city or town governing body and within a distance of the city or town approved by the governing body.

(8) the incumbent's ceasing to discharge the duty of the office for a period of 3 consecutive months, except when prevented by illness or when absent from the city or town by permission of the governing body;

(9) the incumbent's conviction of a felony or of any offense involving moral turpitude or a violation of official duties;

(10) the incumbent's refusal or neglect to file an official bond within the time prescribed;

(11) the decision of a competent tribunal declaring void the incumbent's election or appointment.

7-4-4113 MCA. Removal of appointed officer. The council, upon written charges to be entered upon their journal, after notice to the party, and after trial by the council may remove any nonelected officer by vote of two-thirds of all members-elect.

3-11-204 MCA. Training sessions for judges. …(2) Each city judge shall attend the training sessions. Failure to attend disqualifies the judge from office and creates a vacancy in the office. However, the supreme court may excuse a city judge from attendance because of illness, a death in the family, or any other good cause.

3-1-1507 MCA. Disqualification. Each judge shall complete a course of training and education as required by 3-1-1502. Subject to 3-1-1503, failure to obtain a certificate of completion disqualifies the elected or appointed judge from assuming office and creates a vacancy in the office.

Art. V, Sec. 13, Mont. Const. Impeachment. (1) The governor, executive officers, heads of state departments, judicial officers, and such other officers as may be provided by law are subject to impeachment, and upon conviction shall be removed from office. Other proceedings for removal from public office for cause may be provided by law.

Art. VII, Sec. 10, Mont. Const. Forfeiture of judicial position. (See 200.209.)

Art. VII, Sec. 11, Mont. Const. Removal and discipline. (1) The legislature shall create a judicial standards commission consisting of five persons and provide for the appointment thereto of two district judges, one attorney, and two citizens who are neither judges or attorneys.
(2) The commission shall investigate complaints, and make rules implementing this section. It may subpoena witnesses and documents.
(3) Upon recommendation of the commission, the supreme court may:

(a) Retire any justice or judge for disability that seriously interferes with the performance of his duties and is or may become permanent; or

(b) Censure, suspend, or remove any justice or judge for willful misconduct in office, willful and persistent failure to perform his duties, violation of canons of judicial ethics adopted by the supreme court of the state of Montana, or habitual intemperance.

(4) The proceedings of the commission are confidential except as provided by statute.

2-16-502 MCA. Resignations. (1) Resignations must be in writing and made as follows: . . .

(d) by all county and township officers not commissioned by the governor, to the clerk of the board of commissioners of their respective counties.

(e) by all other appointed officers, to the body or officer that appointed them; . . .

200.300 JUSTICE COURT JURISDICTION

3-10-301 MCA. Civil jurisdiction. (1) Except as provided in 3-11-303 and in subsection (2) of this section, the justices' courts have jurisdiction:

(a) in actions arising on contract for the recovery of money only if the sum claimed does not exceed $7,000, exclusive of court costs;

(b) in actions for damages not exceeding $7,000, exclusive of court costs, for taking, detaining, or injuring personal property or for injury to real property when no issue is raised by the verified answer of the defendant involving the title to or possession of the real property;

(c) in actions for damages not exceeding $7,000, exclusive of court costs, for injury to the person, except that, in actions for false imprisonment, libel, slander, criminal conversation, seduction, malicious prosecution, determination of paternity, and abduction, the justice of the peace does not have jurisdiction;

(d) in actions to recover the possession of personal property if the value of the property does not exceed $7,000;

(e) in actions for a fine, penalty, or forfeiture not exceeding $7,000 imposed by a statute or an ordinance of an incorporated city or town when no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine;

(f) in actions for a fine, penalty, or forfeiture not exceeding $7,000 imposed by a statute or assessed by an order of a conservation district for violation of Title 75, chapter 7, part 1;

(g) in actions upon bonds or undertakings conditioned for the payment of money when the sum claimed does not exceed $7,000, though the penalty may exceed that sum;

(h) to take and enter judgment for the recovery of money on the confession of a defendant when the amount confessed does not exceed $7,000, exclusive of court costs;

(i) to issue temporary restraining orders, as provided in 40-4-121, and orders of protection, as provided in Title 40, chapter 15;

(j) to issue orders to restore streams under Title 75, chapter 7, part 1, or to require payment of the actual cost for restoration of a stream if the restoration does not exceed $7,000.

(2) Justices' courts do not have jurisdiction in civil actions that might result in a judgment against the state for the payment of money.

➔Comment: 40-4-123 gives concurrent jurisdiction to district courts, justice courts, municipal courts, and city courts to hear and issue orders under 40-4-121. These sections were updated in 1995 and section 40-15-301 grants the same jurisdiction for protective orders listed in 40-15-201.

➔Comment. City judges and justices of the peace have the authority to perform marriages as provided for in 40-1-301.

3-10-302 MCA. Jurisdiction over forcible entry, unlawful detainer, and residential landlord/tenant disputes. The justices' courts have concurrent jurisdiction with the district courts within their respective counties in actions of forcible entry and unlawful detainer and in actions brought under Title 70, chapter 24.

3-10-303 MCA. Criminal jurisdiction. (1) The justices' courts have jurisdiction of public offenses committed within the respective counties in which the courts are established as follows:

(a) except as provided in subsection (2), jurisdiction of all misdemeanors punishable by a fine not exceeding $500 or imprisonment not exceeding 6 months or both;

(b) jurisdiction of all misdemeanor violations of fish and game statutes punishable by a fine of not more than $1,000 or imprisonment for not more than 6 months or both;

(c) concurrent jurisdiction with district courts of all misdemeanors punishable by a fine exceeding $500 or imprisonment exceeding 6 months, or both;

(d) concurrent jurisdiction with district courts of all misdemeanor violations of fish and game statutes punishable by a fine exceeding $1,000 or imprisonment exceeding 6 months, or both;

(e) jurisdiction to act as examining and committing courts and for that purpose to conduct preliminary hearings;

(f) jurisdiction of all violations of Title 61, chapter 10; and

(g) all misdemeanor violations of Title 81, chapter 8, part 2.

(2) In any county that has established a drug treatment court or a mental health treatment court, the district court, with the consent of all judges of the courts of limited jurisdiction in the county, has concurrent jurisdiction of all misdemeanors punishable by a fine not exceeding $500 or imprisonment not exceeding 6 months, or both.

16-6-201 MCA. Jurisdiction of courts. (1) As to misdemeanor actions, the districts courts of this state have concurrent jurisdiction with justice of the peace courts in all prosecutions under the Montana Alcoholic Beverage Code described in 16-1-101.

(2) The jurisdiction provided for in subsection (1) is in addition to the jurisdiction of:

(a) justices' courts, as provided in 3-10-303;

(b) municipal courts, as provided in 3-6-303;

(c) city courts, as provided in 3-11-102.

200.301 Term of Office.

3-10-205 MCA. Term of office. The term of office of justices of the peace is as provided in 7-4-2205.

200.302 Qualifications/Bonds.

7-4-2201 MCA. General qualifications for county office. A person is not eligible for a county office who at the time of election is not:
(1) of the voting age required by the Montana constitution;
(2) a citizen of the state; and
(3) (a) an elector of the county in which the duties of the office are to be exercised; or
(b) in the case of an office consolidated between two or more counties, an elector in one of the counties in which the duties of the office are to be exercised.

3-10-204 MCA. Residence requirements. (1) A justice of the peace must reside in the county in which the justice's court is held.
(2) A person is not eligible for the office of justice of the peace unless the person is a citizen of the United States and has been a resident of the county in which the person is to serve for 1 year preceding election or appointment.

3-10-202 MCA. Oath — proof of certification. (1) Each justice of the peace, elected or appointed, after receipt of the certificate of election or appointment, shall, before entering upon the duties of office, take the constitutional oath of office, which must be filed with the county clerk.
(2) Before the county clerk may file the oath, the elected or appointed justice shall satisfy the clerk that the justice is certified as provided in 3-1-1502 or 3-1-1503.

2-9-701 MCA. County officers and employees to be bonded. (1) All county officers and employees must be bonded for the faithful performance of all official duties required by law.
(2) A bond may cover an individual officer or employee, or a blanket bond may cover all officers and employees or any group or combination of county officers and employees.

2-9-703 MCA. Purchase. (1) The board of county commissioners shall purchase all surety bonds for all county officers and employees. . . .

200.303 Election/Appointment.

3-10-201 MCA. Election. (1) Each justice of the peace must be elected by the qualified electors of the county at the general state election immediately preceding the expiration of the term of office of the justice of the peace's predecessor.
(2) A justice of the peace must be nominated and elected on the nonpartisan judicial ballot in the same manner as judges of the district court.

(3) Each judicial office must be a separate and independent office for election purposes, each office must be numbered by the county commissioners, and each candidate for justice of the peace shall specify the number of the office for which the candidate seeks to be elected. A candidate may not file for more than one office.
(4) Section 13-35-231, prohibiting political party endorsement for judicial officers, applies to justices of the peace.

3-10-206 MCA. Vacancies. If a vacancy occurs in the office of a justice of the peace, the county commissioners of the county must appoint an eligible person to hold the office until the next general election and until a successor is elected and qualified.

3-1-1501 MCA. Definitions. As used in this part, the following definitions apply:
(1) "Commission" means the commission on courts of limited jurisdiction established by the supreme court.
(2) "Judge" means:
(a) a municipal court judge;
(b) a justice of the peace; or
(c) a city judge.

200.304 Oath of Office.

3-10-202 MCA. Oath — proof of certification. (1) Each justice of the peace, elected or appointed, after receipt of the certificate of election or appointment, shall, before entering upon the duties of office, take the constitutional oath of office, which must be filed with the county clerk.
(2) Before the county clerk may file the oath, the elected or appointed justice shall satisfy the clerk that the justice is certified as provided in 3-1-1502 or 3-1-1503.

200.305 Training/Certification.

3-10-203 MCA. Orientation course — annual training. (1) Under the supervision of the supreme court, a course of study must be presented as soon as is practical following each general election. Actual and necessary travel expenses, as defined in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed justice of the peace for attending the course by the county in which the justice of the peace holds or will hold court and must be charged against that county.
(2) There must be two mandatory training sessions supervised by the supreme court for all elected and appointed justices of the peace. One of the training sessions may be held in conjunction with the Montana magistrates' association convention.

Actual and necessary travel expenses, as defined in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed justice of the peace for attending the sessions by the county in which the justice of the peace holds or will hold court and must be charged against that county.

(3) Each justice of the peace shall attend the training sessions provided for in subsection (2). Failure to attend disqualifies the justice of the peace from office and creates a vacancy in the office. However, the supreme court may excuse a justice of the peace from attendance because of illness, a death in the family, or any other good cause.

3-11-204 MCA. Training sessions for judges. (1) There must be two mandatory annual training sessions supervised by the supreme court for all elected and appointed city judges. One of the training sessions may be held in conjunction with the Montana magistrates' association convention. Actual and necessary travel expenses, as provided in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed judge for attending the sessions. Whenever the office of city judge is held by a justice of the peace, the costs imposed by this subsection are the joint responsibility of the county and the municipality, with the costs to allocated and charged in proportion to the work done for each governmental entity. In all other cases, the costs must be paid by the city or town in which the judge holds or will hold court and must be charged against that city or town.

(2) Each city judge shall attend the training sessions. Failure to attend disqualifies the judge from office and creates a vacancy in the office. However, the supreme court may excuse a city judge from attendance because of illness, a death in the family, or any other good cause.

3-11-205 MCA. Justice of the peace or judge of another city as city judge. (1) In a town or third-class city, the council may designate a justice of the peace or the city judge of another city or town to act as city judge. The justice of the peace or city judge must reside in the county in which the town or city is situated. The city or town may by ordinance fix the funding for the judge and enter into an agreement with the county, the other city or town, or the justice of the peace or the judge for payment of salaries and training expenses. The justice of the peace or other city judge shall, after agreeing to the designation and after approval by the board of county commissioners or governing body of the city or town, act in that capacity and is the city judge in all cases arising out of violations of statutes or ordinances. If the justice of the peace or city judge of another city or town is required to travel from the justice's or judge's place of residence to hold court, the justice or judge must be paid the actual and necessary travel expenses, as provided in 2-18-501 through 2-18-503, by the town or city in which the court is held.

(2) The offices of city judge and justice of the peace may be combined if a justice of the peace is authorized in a city pursuant to 3-10-101.

3-1-1502 MCA. Training and certification of judges. Except as provided in 3-1-1503, a judge selected for a term of office may not assume the functions of the office unless the judge has filed with the county clerk and recorder in the jurisdiction a certificate of completion of a course of education and training prescribed by the commission.

3-1-1503 MCA. Exception ─ temporary certificate. (1) Section 3-1-1502 does not apply to a judge who has received a temporary certificate issued by the commission as provided for in subsection (2).
(2) The commission may issue a temporary certificate enabling a judge to assume the functions of the office pending completion of a course as required by 3-1-1502. The temporary certificate must be in a form and subject to the terms and conditions prescribed by the commission.
(3) The commission may issue a temporary certificate only if:
(a) the judge is appointed or elected after the course is offered; or
(b) the commission grants an excuse because of a personal illness, a death in the family, or other good cause.
(4) The appointing authority for an appointed judge shall notify the commission of the person appointed, and the person appointed must be certified in 3-1-1502 or this section prior to assuming office.

3-1-1508 MCA. Credit toward annual training. Attendance of a training course prescribed by 3-1-1502 shall apply toward fulfillment of mandatory annual training requirements provided in 3-10-203 and 3-11-204.

2-16-501 MCA. Vacancies created. An office becomes vacant on the happening of any one of the following events before the expiration of the term of the incumbent:
(1) the death of the incumbent;
(2) a determination pursuant to Title 53, chapter 21, part 1, that the incumbent suffers from a mental disorder and is in need of commitment;
(3) resignation of the incumbent;
(4) removal of the incumbent from office;
(5) the incumbent's ceasing to be a resident of the state or, if the office is local, of the district, city, county, town, or township for which the incumbent was chosen or appointed or within which the duties of the incumbent's office are required to be discharged;
(6) except as provided in 10-1-1008, absence of the incumbent from the state, without the permission of the legislature, beyond the period allowed by law;
(7) the incumbent's ceasing to discharge the duty of the incumbent's office for the period of 3 consecutive months, except when prevented by sickness, when absent from the state by permission of the legislature, or as provided in 10-1-1008;
(8) conviction of the incumbent of a felony or of an offense involving moral turpitude or a violation of the incumbent's official duties;

(9) the incumbent's refusal or neglect to file the incumbent's official oath or bond within the time prescribed;
(10) the decision of a competent tribunal declaring void the incumbent's election or appointment.

200.306 Salaries and Expenses.

3-10-207 MCA. Salaries. (1) Subject to subsections (2) through (4), the board of county commissioners shall set salaries for justices of the peace by resolution and in conjunction with setting salaries for other officers as provided in 7-4-2504.
(2) The salary of the justice of the peace may not be less than the salary for the district clerk of the court in that county.
(3) If the justice's court is not open for business full time, the justice's salary must be commensurate to the workload and office hours of the court. The salary of a justice of the peace may not be reduced during the justice's term of office.
(4) The salary of the justice of the peace for a justice's court of record may not exceed 90% of the salary of a district court judge determined as provided in 3-5-211.

3-1-1506 MCA. Expenses. Each judge is entitled to reimbursement for all actual and necessary travel expenses and other costs incurred in attending a course of training and education pursuant to 3-1-1502. Such reimbursement must be paid as provided for in 3-10-203 and 3-11-204.

3-10-203 MCA. Orientation course ─ annual training. (1) Under the supervision of the supreme court, a course of study must be presented as soon as is practical following each general election. Actual and necessary travel expenses, as defined in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed justice of the peace for attending the course by the county in which the justice of the peace holds or will hold court and must be charged against that county.
(2) There must be two mandatory training sessions supervised by the supreme court for all elected and appointed justices of the peace. One of the training sessions may be held in conjunction with the Montana magistrates' association convention. Actual and necessary travel expenses, as defined in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed justice of the peace for attending the sessions by the county in which the justice of the peace holds or will hold court and must be charged against that county.
(3) Each justice of the peace shall attend the training sessions provided for in subsection (2). Failure to attend disqualifies the justice of the peace from office and creates a vacancy in the office. However, the supreme court may excuse a justice of the peace from attendance because of illness, a death in the family, or any other good cause.

200.307 Court Facilities and Sessions.

3-10-103. County to provide facilities. The board of county commissioners of the county in which the justice of the peace has been elected or appointed:

(1) shall provide for the justice's court:

(a) the office, courtroom, and clerical assistance necessary to enable the justice of the peace and the clerk of justice's court, if any, to conduct business in dignified surroundings;

(b) the books, records, forms, papers, stationery, postage, office equipment, and supplies necessary in the proper keeping of the records and files of the court and the transaction of the business; and

(c) the latest edition of the Montana Code Annotated and all official supplements; and

(2) may provide a clerk of justice's court.

3-10-102 MCA. When courts open. A justice's court is always open for the transaction of business, except on legal holidays and nonjudicial days.

3-1-301 MCA. Days on which court may be held. Courts of justice may be held and judicial business transacted on any day except as provided in 3-1-302.

3-1-302 MCA. Nonjudicial day. (1) No court may be open nor may any judicial business be transacted on legal holidays, as provided for in 1-1-216, and on a day appointed by the president of the United States or by the governor of this state for a public fast, thanksgiving, or holiday, except for the following purposes:

(a) to give, upon its request, instructions to a jury when deliberating on its verdict;

(b) to receive a verdict or discharge a jury;

(c) for the exercise of the powers of a magistrate in a criminal action or proceeding of a criminal nature.

(2) Injunctions, writs of prohibition, and habeas corpus may be issued and served on any day.

3-1-312 MCA. Sittings of court to be public. The sittings of every court of justice must be public, except as provided in 3-1-313.

3-1-313 MCA. Sittings of court — when private. (1) In an action for dissolution of marriage, criminal conversation, or seduction, the court may direct the trial of any issue of fact joined therein to be private and exclude all persons except the officers of the court, the parties, their witnesses, and counsel.

(2) During the examination of a witness in any cause, the court may in its discretion, exclude some or all of the other witnesses in the cause.

3-1-314 MCA. Proceedings to be in English language. Every written proceeding in a court of justice in this state must be in the English language, and judicial proceedings must be conducted, preserved, and published in no other.

3-10-208 MCA. Office hours of justices. In the resolution providing for the salary, the county commissioners shall designate the office hours for each justice's court. Office hours shall be commensurate with the salary provided.

➔Comment: Attorney General Opinion, Vol. 35, No. 99, dated December 6, 1974, held as follows: "The justice of the peace who is located at the county seat cannot close that court one day a week in order to hold justice court in another city."

200.308 Acting Justice.

3-10-231 MCA. Circumstances in which acting justice called in— by whom. (1) Whenever a justice of the peace is disqualified from acting in any action because of the application of the supreme court's rules on disqualification and substitution of judges, 3-1-803 and 3-1-805, the justice of the peace hall either transfer the action to another justice's court in the same county or call a justice from a neighboring county to preside.

(2)(a) The following requirements must be met to qualify a substitute for a justice of the peace:

(i) Within 30 days of taking office, a justice of the peace shall provide a list of persons who are qualified to hold court in the justice's place during a temporary absence when another justice is not available. The persons listed must be of good moral character and have community support, a sense of community standards and a basic knowledge of court procedure.

(ii) The sitting justice of the peace shall request and obtain from the commission on courts of limited jurisdiction established by the supreme court a waiver of training for the substitutes.

(iii) Each person on the list, provided for in subsection (2)(a)(i), shall subscribe to the written oath of office as soon as possible after the person has received a waiver of training from the supreme court. The oath may be subscribed before any member of the board of county commissioners or before any other officer authorized to administer oaths.

(b) The list of qualified substitutes, the written oath, and the commission's written approval and waiver of training for those substitutes, pursuant to subsection (2)(a)(ii), must be filed with the county clerk as provided in 3-10-202.

(c) A county clerk may provide a current list of qualified and sworn substitutes to local law enforcement officers.

(3) Whenever a justice is sick, disabled, or absent, the justice may call in another justice, if there is one readily available, or a city judge or a person from the list provided for in subsection (2) to hold court for the absent justice until the absent justice's return. If the justice is unable to call in a substitute, the county commissioners shall call in another justice, a city judge, or a person from the list provided for in subsection (2).

(4) During the time when a justice of the peace is on vacation or attending a training session, another justice of the peace of the same county is authorized to handle matters that otherwise would be handled by the absent justice. When there is no other justice of the peace in the county, the justice of the peace may designate another person in the same manner as if the justice were sick or absent.
(5) A justice of the peace of any county may hold the court of any other justice of the peace at that justice's request.

200.309 Forfeiture of Judicial Position.

Art. VII, Sec. 10, Mont. Const. Forfeiture of judicial position. Any holder of a judicial position forfeits that position by either filing for an elective public office other than a judicial position or absenting himself from the state for more than 60 consecutive days.

7-4-2208 MCA. Absence of county officers from state. (1) Subject to subsection (2) and except as provided in 10-1-1008, if a county officer is absent from the state for a period of more than 30 consecutive days without the consent of the board of county commissioners, the officer forfeits the office.
(2) If the county officer who is seeking consent to be absent from the state for more than 30 consecutive days is a member of the board of county commissioners, the officer may participate in the vote on the question of providing consent for the absence.

200.310 Vacancy/Removal/Resignation.

2-16-501 MCA. Vacancies created. An office becomes vacant on the happening of any one of the following events before the expiration of the term of the incumbent:
(1) the death of the incumbent;
(2) a determination pursuant to Title 53, chapter 21, part 1, that the incumbent suffers from a mental disorder and is in need of commitment;
(3) resignation of the incumbent;
(4) removal of the incumbent from office;
(5) the incumbent's ceasing to be a resident of the state or, if the office is local, of the district, city, county, town, or township for which the incumbent was chosen or appointed or within which the duties of the incumbent's office are required to be discharged;
(6) except as provided in 10-1-1008, absence of the incumbent from the state, without the permission of the legislature, beyond the period allowed by law;
(7) the incumbent's ceasing to discharge the duty of the incumbent's office for the period of 3 consecutive months, except when prevented by sickness, when absent from the state by permission of the legislature, or as provided in 10-1-1008;
(8) conviction of the incumbent of a felony or of an offense involving moral turpitude or a violation of the incumbent's official duties;
(9) the incumbent's refusal or neglect to file the incumbent's official oath or bond within the time prescribed;

(10) the decision of a competent tribunal declaring void the incumbent's election or appointment.

3-10-203 MCA. Orientation course ─ annual training. (1) Under the supervision of the supreme court, a course of study must be presented as soon as is practical following each general election. Actual and necessary travel expenses, as defined in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed justice of the peace for attending the course by the county in which the justice of the peace holds or will hold court and must be charged against that county.
(2) There must be two mandatory training sessions supervised by the supreme court for all elected and appointed justices of the peace. One of the training sessions may be held in conjunction with the Montana magistrates' association convention. Actual and necessary travel expenses, as defined in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed justice of the peace for attending the sessions by the county in which the justice of the peace holds or will hold court and must be charged against that county.
(3) Each justice of the peace shall attend the training sessions provided for in subsection (2). Failure to attend disqualifies the justice of the peace from office and creates a vacancy in the office. However, the supreme court may excuse a justice of the peace from attendance because of illness, a death in the family, or any other good cause.

3-1-1507 MCA. Disqualification. Each judge shall complete a course of training and education as required by 3-1-1502. Subject to 3-1-1503, failure to obtain a certificate of completion disqualifies the elected or appointed judge from assuming office and creates a vacancy in the office.

Art. V, Sec. 13, Mont. Const. Impeachment. (1) the governor, executive officers, heads of state departments, judicial officers, and such other officers as may be provided by law are subject to impeachment, and upon conviction shall be removed from public office for cause may be provided by law . . . .

Art. VII, Sec. 10, Mont. Const. Forfeiture of judicial position. Any holder of a judicial position forfeits that position by either filing for an elective public office other than a judicial position or absenting himself from the state for more than 60 consecutive days.

Art. VII, Sec. 11, Mont. Const. Removal and discipline. (1) The legislature shall create a judicial standards commission consisting of five persons and provide for the appointment thereto of two district judges, one attorney, and two citizens who are neither judges or attorneys.
(2) The commission shall investigate complaints, and make rules implementing this section. It may subpoena witnesses and documents.

(3) Upon recommendation of the commission, the supreme court may:

(a) Retire any justice or judge for disability that seriously interferes with the performance of his duties and is or may become permanent; or

(b) Censure, suspend, or remove any justice or judge for willful misconduct in office, willful and persistent failure to perform his duties, violation of canons of judicial ethics adopted by the supreme court of the state of Montana, or habitual intemperance.

(4) The proceedings of the commission are confidential except as provided by statute.

3-1-602 MCA. Restrictions on justices practicing law or taking claims for collection. (1) Except as provided in subsection (2), a justice of the peace may not:

(a) practice law;

(b) draw contracts, conveyances, or other legal instruments or documents;

(c) take any claim or bill for collection or act as a collection agent in any sense; or

(d) perform any legal duties other than those prescribed by law as the justice's official duties in the conduct of cases and proceedings in the justice's court.

(2) A justice of the peace who is an attorney and who is admitted to practice law before the supreme court of the state of Montana may engage in the general practice of law and practice law in all courts in the state of Montana, except that the justice, the justice's law partner or associate, or a member, may not represent a party involved in a case that is filed or tried in the justice's court or in any justice's court or that is appealed from a justice's court in that county.

(3) A justice of the peace who violates any of the provisions of this section is guilty of malfeasance in office and must be removed from the office of justice of the peace and is disqualified from holding that office.

3-1-606 MCA. Justice of the peace or constable not to purchase judgment. (1) A justice of the peace may not purchase or be interested in the purchase or be interested in the purchase of any judgment or part of a judgment on the justice's docket or on any docket in the justice's possession. A constable may not purchase or be interested in the purchase of any judgment or part of a judgment on the docket of a justice of the peace of the county of which the person is a constable or on a docket in the possession of a justice of the peace in that county.
(2) A violation of subsection (1) is a misdemeanor.

7-4-2520 MCA. Misconduct concerning official fees to result in vacancy of office. Upon receiving a certified copy of the record of conviction of any officer for receiving illegal fees or upon proof that the officer collected fees and failed to account for the fees, the board of county commissioners must declare the office vacant and appoint a successor.

3-10-602 MCA. Penalty. A justice of the peace violating 3-10-601 is guilty of a misdemeanor, punishable by a fine not exceeding $1,000 or imprisonment not exceeding 6 months in the county jail, or both. The violator is also guilty of malfeasance in office and, in the discretion of the court, may be removed from office. A person removed from office is disqualified from holding the office of justice of the peace.

➔Comment. 3-10-601 MCA is the section covering collection and disposition of fees and their itemized statements. 45-7-401 MCA is the statute of official misconduct.

2-16-502 MCA. Resignation. (1) Resignations must be in writing and made as follows: . . . .

(d) by all county and township officers not commissioned by the governor, to the clerk of the board of county commissioners of their respective counties;

(e) by all other appointed officers, to the body or officer that appointed them; . . . .

200.400 CITY COURT JURISDICTION

3-11-102 MCA. Concurrent jurisdiction. (1) The city court has concurrent jurisdiction with the justice's court of all misdemeanors and proceedings mentioned and provided for under Chapter 10, Part 3, of this title.

(2) Applications for search warrants and complaints charging the commission of a felony may be filed in the city court. When they are filed, the city judge has the same jurisdiction and responsibility as a justice of the peace, including the holding of a preliminary hearing. The city attorney may file an application for a search warrant or a complaint charging the commission of a felony when the offense was committed within the city limits. The county attorney, however, must handle any action after a defendant is bound over to district court.

3-11-103. Exclusive jurisdiction. Except as provided in 3-11-104, the city court has exclusive jurisdiction of:

(1) proceedings for the violation of an ordinance of the city or town, both civil and criminal;

(2) when the amount of the taxes or assessments sought does not exceed $5,000, actions for the collection of taxes or assessments levied for any of the following purposes, except that no lien on the property taxed or assessed for the nonpayment of the taxes or assessments may be foreclosed in any such action:

(a) city or town purposes;

(b) the erection or improvement of public buildings;

(c) the laying out, opening, or improving of a public street, sidewalk, alley, or bridge;

(d) the acquisition or improvement of any public grounds; and

(e) public improvements made or ordered by the city or town within its limits;

(3) actions for the collection of money due to the city or town or from the city or town to any person when the amount sought, exclusive of interest and costs, does not exceed $5,000;
(4) when the amount claimed, exclusive of costs, does not exceed $5,000, actions for;
(a) the breach of an official bond given by a city or town officer;
(b) the breach of any contract when the city or town is a party or is in way interested;
(c) damages when the city or town is a party or is in any way interested;
(d) the enforcement of forfeited recognizances given to, for the benefit of, or on behalf of the city or town; and
(e) collection on bonds given upon an appeal taken from the judgment of the court in any action mentioned in subsections (4)(a) through (4)(d);
(5) actions for the recovery of personal property belonging to the city or town when the value of the property, exclusive of the damages for the taking or detention, does not exceed $5,000; and
(6) actions for the collection of a license fee required by an ordinance of the city or town.

40-1-301 MCA. Solemnization and registration. (1) A marriage may be solemnized by a judge of a court of record, by a public official whose powers include solemnization of marriages, by a mayor, city judge, or justice of the peace, by a tribal judge, or in accordance with any mode of solemnization recognized by any religious denomination, Indian nation or tribe, or native group. Either the person solemnizing the marriage or, if no individual acting alone solemnized the marriage, a party to the marriage shall complete the marriage certificate form and forward it to the clerk of the district court.
(2) If a party to a marriage is unable to be present at the solemnization, the party may authorize in writing a third person to act as proxy. If the person solemnizing the marriage is satisfied that the absent party is unable to be present and has consented to the marriage, the person may solemnize the marriage by proxy. If the person solemnizing the marriage is not satisfied, the parties may petition the district court for an order permitting the marriage to be solemnized by proxy.
(3) The solemnization of the marriage is not invalidated by the fact that the person solemnizing the marriage was not legally qualified to solemnize it if either party to the marriage believed that person to be qualified.
(4) One party to a proxy marriage must be a member of the armed forces of the United States on federal active duty or a resident of Montana at the time of application for a license and certificate pursuant to 40-1-202. One party or a legal representative shall appear before the clerk of court and pay the marriage license fee. For the purposes of this subsection, residency must be determined in accordance with 1-1-215.

3-11-104 MCA. Exceptions to civil jurisdiction. City courts do not have jurisdiction in civil actions that might result in a judgment against the state for the payment of money.

40-4-123 MCA. Jurisdiction and venue. (1) District courts, municipal courts, justices' courts, and city courts have concurrent jurisdiction to hear and issue orders under 40-4-121.
(2) The municipal judge, justice of the peace, or city court judge shall on motion suspend all further proceedings in the action and certify the pleading and any orders to the clerk of the district court of the county where the action was begun if an action for declaration of invalidity of a marriage, legal separation, or dissolution of marriage or for parenting is pending between the parties. From the time of the certification of the pleadings and any orders to the clerk, the district court has the same jurisdiction over the action a if it had been commenced in district court.
(3) An action brought under 40-4-121 may be tried in the county in which either party resides or in which the physical abuse was committed.
(4) The right to petition for relief may not be denied because the plaintiff has vacated the residence or household to avoid abuse.

200.401 Term of Office.

3-11-201 MCA. Number of judges — term of office. (1) The governing body of a city may determine by ordinance the number of judges required to operate the city court.
(2) An elected or appointed city judge shall hold office for a term of 4 years and until the qualification of a successor.
(3) A justice of the peace designated to act as city judge for a city or town under 3-11-205 shall serve as city judge for the duration of the justice of the peace's term as justice of the peace or until the agreement provided for in 3-11-205 terminates.

200.402 Qualifications.

7-4-4104 MCA. General qualifications for municipal office. No person is eligible to any municipal office elective or appointive:
(1) who is not a citizen of the United States; and
(2) who has not met the qualifications prescribed by law or by ordinance adopted by the governing body of a city or town.

3-11-202 MCA. Salary — qualifications. (1) A city judge, at the time of election or appointment must:
(a) meet the qualifications of a justice of the peace under 3-10-202;
(b) be a resident of the county in which the city or town is located; and
(c) satisfy any additional qualifications prescribed by ordinance.
(2) The annual salary and compensation of city judges must be fixed by ordinance or resolution.

(3) Each city judge shall receive actual and necessary travel expenses, as provided in 2-18-501 through 2-18-503, incurred in the performance of official duties.

200.403 Election/Appointment.

In a city of first class, 7-4-4101 MCA provides that one city judge shall be elected. In a city of second class, 7-4-4102 MCA provides that one city judge shall be elected. 7-4-4102 MCA also allows a city of third class to determine, by ordinance, whether the city judge shall be appointed or elected or may appoint a justice of the peace or a city judge of another city as judge of the city as provided in 3-11-205 MCA. In a town, the governing body may appoint a city judge or the position may be filled by election or the governing body may appoint a justice of the peace of another city to act as city judge as provided in 3-11-205 MCA. The offices of city judge and justice of the peace may be combined if a justice of the peace is authorized in a city pursuant to 3-10-101 MCA.

200.404 Official Bond.

7-4-4109 MCA. Official bond. Each officer of a city or town who is required to give bond shall file the bond, duly approved, within 10 days after receiving notice of election or appointment or, if notice is not received, then on or before the date fixed for a assumption of the duties of the office to which the officer is elected or appointed.

200.405 Training and Certification.

3-11-204 MCA. Training sessions for judges. (1) There shall be two mandatory annual training sessions supervised by the supreme court for all elected and appointed city judges. One of the training sessions may be held in conjunction with the Montana magistrates association convention. . . . (2) Each city judge shall attend the training sessions. . . .

3-1-1502 MCA. Training and certification of judges. Except as provided in 3-1-1503, a judge selected for a term of office may not assume the functions of the office unless the judge has filed with the county clerk and recorder in the jurisdiction a certificate of completion of a course of education and training prescribed by the commission.

3-1-1503 MCA. Exception — temporary certificate. (1) Section 3-1-1502 does not apply to a judge who has received a temporary certificate issued by the commission as provided for in subsection (2).

(2) The commission may issue a temporary certificate enabling a judge to assume the functions of the office pending completion of a course as required by 3-1-1502. The temporary certificate must be in a form and subject to the terms and conditions prescribed by the commission.

(3) The commission may issue a temporary certificate only if:

(a) the judge is appointed or elected after the course is offered; or

(b) the commission grants an excuse because of a personal illness, a death in the family, or other good cause.

(4) The appointing authority for an appointed judge shall notify the commission of the person appointed, and the person appointed must be certified as provided in 3-1-1502 or this section prior to assuming office.

3-1-1508 MCA. Credit toward annual training. Attendance of a training course prescribed by 3-1-1502 shall apply toward fulfillment of mandatory annual training requirements provided in 3-10-203 and 3-11-204.

➔Comment: 3-1-1501 defines the term "judge" to mean a municipal court judge, a justice of the peace, or a city judge. "Commission" means the Commission on Courts of Limited Jurisdiction established by the Supreme Court.

200.406 Salary and Expenses.

7-4-4201 MCA. Salary of officers. The council shall determine by ordinance or resolution the salaries and compensation of elected and appointed city officers and all city employees.

3-11-202 MCA. Salary — qualifications. (1) A city judge, at the time of election or appointment must:

(a) meet the qualifications of a justice of the peace under 3-10-202;

(b) be a resident of the county in which the city or town is located; and

(c) satisfy any additional qualifications prescribed by ordinance.

(2) The annual salary and compensation of city judges must be fixed by ordinance or resolution.

(3) Each city judge shall receive actual and necessary travel expenses, as provided in 2-18-501 through 2-18-503, incurred in the performance of official duties.

3-11-205 MCA. Justice of the peace or judge of another city as city judge. (1) In a town or third-class city, the council may designate a justice of the peace or the city judge of another city or town to act as city judge. The justice of the peace or city judge must reside in the county in which the town or city is situated. The city or town may by ordinance fix the funding for the judge and enter into an agreement with the county, the other city or town, or the justice of the peace or the judge for payment of salaries and training expenses. The justice of the peace or other city judge shall, after agreeing to the designation and after approval by the board of county commissioners or governing body of the city or town, act in that capacity and is the city judge in all cases arising out of violations of statutes or ordinances. If the justice of the peace or city judge of another city or town is required to travel from the justice's or judge's place of residence to hold court, the justice or judge must be paid the actual and necessary travel expenses, as provided in 2-18-501 through 2-18-503, by the town or city in which the court is held.
(2) The offices of city judge and justice of the peace may be combined if a justice of the peace is authorized in a city pursuant to 3-10-101.

> 3-11-204 MCA. Training sessions for judges. (1) There must be two mandatory annual training sessions supervised by the supreme court for all elected and appointed city judges. One of the training sessions may be held in conjunction with the Montana magistrates' association convention. Actual and necessary travel expenses, as provided in 2-18-501 through 2-18-503, and the costs of registration and books and other materials must be paid to the elected or appointed judge for attending the sessions. Whenever the office of city judge is held by a justice of the peace, the costs imposed by this subsection are the joint responsibility of the county and the municipality, with the costs to allocated and charged in proportion to the work done for each governmental entity. In all other cases, the costs must be paid by the city or town in which the judge holds or will hold court and must be charged against that city or town.
> (2) Each city judge shall attend the training sessions. Failure to attend disqualifies the judge from office and creates a vacancy in the office. However, the supreme court may excuse a city judge from attendance because of illness, a death in the family, or any other good cause.

3-1-1506 MCA. Expenses. Each judge is entitled to reimbursement for all actual and necessary travel expenses and other costs incurred in attending a course of training education pursuant to 3-1-1502. Such reimbursement must be paid as provided for in 3-10-203 and 3-11-204.

200.407 Court Facilities/Sessions.

3-11-206 MCA. City to provide facilities— conduct of court business — electronic filing and storage of court records. (1) The governing body of the city in which the judge has been elected or appointed:

(a) shall provide for the city court:

(i) the office space, courtroom, and clerical assistance necessary to enable the judge and the clerk of city court, if any, to conduct business in dignified surroundings;

(ii) the books, records, forms, papers, stationery, postage, office equipment, and supplies necessary for the proper keeping of the records and files of the court and the transaction of business; and

(iii) one copy of the latest edition of the Montana Code Annotated and all official supplements or immediate access to the code and supplements; and

(b) may provide a clerk of city court.

(2) The provisions of 3-6-302(1) and 3-6-303 concerning conduct of municipal court business apply to the city court.

(3) The records of the court may be kept by means of electronic filing or storage, or both, as provided in 3-114 and 3-115, in lieu of or in addition to paper records.

3-1-301 MCA. Days on which courts may be held. Courts of justice may be held and judicial business transacted on any day, except as provided in 3-1-302.

3-1-302 MCA. Nonjudicial day. (1) No court may be open nor may any judicial business be transacted on legal holidays, as provided for in 1-1-216, and on a day appointed by the president of the United States or by the governor of this state for a public fast, thanksgiving, or holiday, except for the following purposes;

(a) to give, upon its request, instructions to a jury when deliberating on its verdict;

(b) to receive a verdict or discharge a jury;

(c) for the exercise of the powers of a magistrate in a criminal action or in a proceeding of a criminal nature.

(2) injunctions, writs of prohibition, and habeas corpus may be issued and served on any day.

3-11-101 MCA. City court established. (1) A city court is established in each city or town. The city judge shall establish regular sessions of the court. On judicial days, the court must be open for all business, civil and criminal. On nonjudicial days, as defined in 3-1-302, the court may transact criminal business only.

3-1-312 MCA. Sittings of court to be public. The sittings of every court of justice must be public, except as provided in 3-1-313.

3-1-313 MCA. Sittings of court — when private. (1) In an action for dissolution of marriage, criminal conversation, or seduction, the court may direct the trial of any issue of fact joined therein to be private and exclude all persons except the officers of the court, the parties, their witnesses, and counsel.
(2) During the examination of a witness in any cause, the court may, in its discretion, exclude some or all of the other witnesses in the cause.

3-1-314 MCA. Proceedings to be in English language. Every written proceeding in a court of justice in this state must be in the English language, and judicial proceedings must be conducted, preserved, and published in no other.

200.408 Acting Judge.

3-11-203 MCA. When substitute for judge called in. (1) The city judge or mayor may call in a city judge, a justice of the peace, or some qualified person to act in the judge's place whenever the judge is:

(a) a party in a case;
(b) interested in a case;
(c) the spouse of or related to either party in a case by consanguinity or affinity within the sixth degree; or
(d) sick, absent, or unable to act.

(2) The city judge may call in a city judge, justice of the peace, or some qualified person to act in the city judge's place when a disqualifying affidavit is filed against the judge pursuant to the supreme court's rules on disqualification and substitution of judges.
(3) A city judge of any city or a justice of the peace of any county may sit as city judge at the city judge's request.

200.409 Forfeiture of Judicial Position.

Art. VII, Sec. 10, Mont. Const. Forfeiture of judicial position. Any holder of a judicial position forfeits that position by either filing for an elective public office other than a judicial position or absenting himself from the state for more than 60 consecutive days.

200.410 Vacancy/Removal/Resignation.

7-4-4111 MCA. Determination of vacancy in municipal office. An office becomes vacant on the happening of any of the following events before the expiration of the term of the incumbent:
(1) the death of the incumbent;
(2) a determination pursuant to Title 53, Chapter 21, Part 1, that the incumbent is mentally ill;
(3) the incumbent's resignation;
(4) the incumbent's removal from office;
(5) the incumbent's absence from the city or town continuously for 10 days without the consent of the council;
(6) the incumbent's open neglect or refusal to discharge duties;
(7) the incumbent's ceasing to be a resident of the city or town or, in the case of a city council member, ceasing to be a resident of the city council member's ward.

This subsection does not apply to an appointed municipal officer who resides outside the city or town limits with the approval of the city or town governing body and within a distance of the city or town approved by the governing body.
(8) the incumbent's ceasing to discharge the duty of the office for a period of 3 consecutive months, except when prevented by illness or when absent from the city or town by permission of the governing body;
(9) the incumbent's conviction of a felony or of any offense involving moral turpitude or a violation of official duties;
(10) the incumbent's refusal or neglect to file an official bond within the time prescribed;
(11) the decision of a competent tribunal declaring void the incumbent's election or appointment.

7-4-4113 MCA. Removal of appointed officer. The council, upon written charges to be entered upon their journal, after notice to the party, and after trial by the council, may remove any nonelected officer by vote of two-thirds of all the members-elect.

3-11-204 MCA. Training sessions for judges. . . . (2) Each city judge shall attend the training sessions. Failure to attend disqualifies the judge from office and creates a vacancy in the office. However, the supreme court may excuse a city judge from attendance because of illness, a death in the family, or any other good cause.

3-1-1507 MCA. Disqualification. Each judge shall complete a course of training and education as required by 3-1-1502. Subject to 3-1-1503, failure to obtain a certificate of completion disqualifies the elected or appointed judge from assuming office and creates a vacancy in the office.

Art. V, Sec. 13, Mont. Const. Impeachment. (1) the governor, executive officers, heads of state departments, judicial officers, and such other officers as may be provided by law are subject to impeachment, and upon conviction shall be removed from public office for cause may be provided by law . . . .

Art. VII, Sec. 10, Mont. Const. Forfeiture of judicial position. Any holder of a judicial position forfeits that position by either filing for an elective public office other than a judicial position or absenting himself from the state for more than 60 consecutive days.

Art. VII, Sec. 11, Mont. Const. Removal and discipline. (1) The legislature shall create a judicial standards commission consisting of five persons and provide for the appointment thereto of two district judges, one attorney, and two citizens who are neither judges or attorneys.
(2) The commission shall investigate complaints, and make rules implementing this section. It may subpoena witnesses and documents.

(3) Upon recommendation of the commission, the supreme court may:

(a) Retire any justice or judge for disability that seriously interferes with the performance of his duties and is or may become permanent; or

(b) Censure, suspend, or remove any justice or judge for willful misconduct in office, willful and persistent failure to perform his duties, violation of canons of judicial ethics adopted by the supreme court of the state of Montana, or habitual intemperance.

(4) The proceedings of the commission are confidential except as provided by statute.

2-16-502 MCA. Resignation. (1) Resignations must be in writing and made as follows: . . . .

(d) by all county and township officers not commissioned by the governor, to the clerk of the board of county commissioners of their respective counties;

(e) by all other appointed officers, to the body or officer that appointed them.

SECTION 300 — COURT PROCEEDINGS

300.100 INTRODUCTION

The Seventh Edition of Black's Law Dictionary defines "proceeding" in various ways:

1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.

2. Any procedural means for seeking redress from a tribunal or agency.

3. An act or step that is part of a larger action.

4. The business conducted by a court or other official body; a hearing. . . .

300.200 CRIMINAL PROCEDURE

300.201 Jurisdiction.

The Montana Constitution grants justice courts jurisdiction over certain criminal actions. The statutes further define or limit the justice court's jurisdiction and set the jurisdiction of the municipal and city courts. In every case the judge must always be satisfied that:

(1) jurisdiction exists over the subject matter, and

(2) jurisdiction exists over the person involved.

Jurisdiction over the subject matter. Municipal, city, and justice courts are courts of limited jurisdiction and therefore have only those powers specifically granted by the constitution or by statute.
It is very important to remember that these powers cannot be enlarged by any agreement of the parties involved. For example: A county attorney and a defendant are not permitted to agree to have a justice of the peace try a felony case and determine the guilt or innocence of the accused. Another way of expressing this rule is to say that the lack of jurisdiction of a court cannot be waived.

Jurisdiction over the person. As a general rule, a judge cannot make any order affecting a person's liberty or property unless the court has jurisdiction over that person.

Jurisdiction over a person can be acquired in any of the following ways:

(1) by the defendant's arrest upon a warrant;

(2) by summons served on the defendant; or

(3) by the defendant voluntarily appearing in court and thereby consenting to the court taking jurisdiction.

➔Comment. If a defendant appears before the court to answer a charge, consent has been given and the court acquires jurisdiction. This is somewhat different from acquiring jurisdiction in a civil case.

Jurisdiction and Statute of Limitations.

45-1-201 MCA. Classification of offenses. (1) For the determination of the court's jurisdiction at the commencement of the action and for the determination of the commencement of the period of limitations, the offense shall be designated a felony or misdemeanor based upon the maximum potential sentence which could be imposed by statute.

(2) An offense defined by any statute of this state other than this code shall be classified as provided in this section and the sentence that may be imposed upon conviction thereof shall be governed by this title and Title 46.

45-1-205 MCA. General time limitations. (1)(a) A prosecution for deliberate, mitigated, or negligent homicide may be commenced at any time.

(b) Except as provided in subsection (9), a prosecution for a felony offense under 45-5-502, 45-5-503, or 45-5-507(4) or (5) may be commenced within 10 years after it is committed, except that it may be commenced within 10 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred. A prosecution for a misdemeanor offense under those provisions may be commenced within 1 year after the offense is committed, except that it may be commenced within 5 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred.

(c) Except as provided in subsection (9), a prosecution under 45-5-504, 45-5-505, 45-5-507(1), (2), (3), or (6), 45-5-625, or 45-5-627 may be commenced within 5 years after the victim reaches 18 years of age if the victim was less than 18 years of age at the time that the offense occurred.

(2) Except as provided in subsection (7)(b) or as otherwise provided by law, prosecutions for other offenses are subject to the following periods of limitation:

(a) A prosecution for a felony must be commenced within 5 years after it is committed.

(b) A prosecution for a misdemeanor must be commenced within 1 year after it is committed.

(3) The periods prescribed in subsection (2) are extended in a prosecution for theft involving a breach of fiduciary obligation to an aggrieved person as follows:

(a) if the aggrieved person is a minor or incompetent, during the minority or incompetency or within 1 year after the termination of the minority or incompetency;

(b) in any other instance, within 1 year after the discovery of the offense by the aggrieved person or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense and is not personally a party to the offense or, in the absence of discovery, within 1 year after the prosecuting officer becomes aware of the offense.

(4) The period prescribed in subsection (2) must be extended in a prosecution for unlawful use of a computer, and prosecution must be brought within 1 year after the discovery of the offense by the aggrieved person or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense and is not personally a party to the offense or, in the absence of discovery, within 1 year after the prosecuting officer becomes aware of the offense.

(5) The period prescribed in subsection (2) is extended in a prosecution for misdemeanor fish and wildlife violations under Title 87, and prosecution must be brought within 3 years after an offense is committed.

(6) The period prescribed in subsection (2)(b) is extended in a prosecution for misdemeanor violations of the laws regulating the activities of outfitters and guides under Title 37, chapter 47, and prosecution must be brought within 3 years after an offense is committed.

(7)(a) An offense is committed either when every element occurs or, when the offense is based upon a continuing course of conduct, at the time when the course of conduct is terminated. Time starts to run on the day after the offense is committed.

(b) A prosecution for theft under 45-6-301 may be commenced at any time during the 5 years following the date of the theft, whether or not the offender is in possession of or otherwise exerting unauthorized control over the property at the time the prosecution is commenced. After the 5-year period ends, a prosecution may be commenced at any time if the offender is still in possession of or otherwise exerting unauthorized control over the property, except that the prosecution must be commenced within 1 year after the investigating officer discovers that the offender still possesses or is otherwise exerting unauthorized control over the property.

(8) A prosecution is commenced either when an indictment is found or an information or complaint is filed.

(9) If a suspect is conclusively identified by DNA testing after a time period prescribed in subsection (1)(b) or (1)(c) has expired, a prosecution may be commenced within 1 year after the suspect is conclusively identified by DNA testing.

45-1-206 MCA. Periods excluded from limitation. The period of limitation does not run during:

(1) any period in which the offender is not usually and publicly resident within this state or is beyond the jurisdiction of this state;

(2) any period in which the offender is a public officer and the offense charged is theft of public funds while in public office; or

(3) a prosecution pending against the offender for the same conduct, even if the indictment, complaint, or information which commences the prosecution is dismissed.

➔Comment. The above section answers one problem that may be presented to a judge, as the judge may be asked to "take jurisdiction of a case." If the possible punishment is greater than the jurisdiction of the court, i.e., a felony, the judge can only accept that case for the purpose of preliminary examination, but cannot hear the case to a final conclusion.

45-1-205 and 45-1-206 MCA refer to time limitations on the filing of actions. These limitations are referred to a "Statutes of Limitation." The first section provides that "a prosecution for a misdemeanor must be commenced within one year after it is committed. If an objection is made by the defendant that the statute of limitations "has run", the matter must be set for hearing there are many periods of time excluded from the statute. These are found in 45-1-206 and cited above.

Criminal Jurisdiction.

46-2-202 MCA. Jurisdiction of justice's courts. The justices' courts have criminal jurisdiction as authorized by 3-10-303.

3-10-303 MCA. Criminal jurisdiction. (1) The justices' courts have jurisdiction of public offenses committed within the respective counties in which the courts are established as follows:

(a) except as provided in subsection (2), jurisdiction of all misdemeanors punishable by a fine not exceeding $500 or imprisonment not exceeding 6 months or both;

(b) jurisdiction of all misdemeanor violations of fish and game statutes punishable by a fine of not more than $1,000 or imprisonment for not more than 6 months or both;

(c) concurrent jurisdiction with district courts of all misdemeanors punishable by a fine exceeding $500 or imprisonment exceeding 6 months, or both;

(d) concurrent jurisdiction with district courts of all misdemeanor violations of fish and game statutes punishable by a fine exceeding $1,000 or imprisonment exceeding 6 months, or both;

(e) jurisdiction to act as examining and committing courts and for that purpose to conduct preliminary hearings;

(f) jurisdiction of all violations of Title 61, chapter 10; and

(g) all misdemeanor violations of Title 81, chapter 8, part 2.

(2) In any county that has established a drug treatment court or a mental health treatment court, the district court, with the consent of all judges of the courts of limited jurisdiction in the county, has concurrent jurisdiction of all misdemeanors punishable by a fine not exceeding $500 or imprisonment not exceeding 6 months, or both.

Art. VII, Sec. 5, Mont. Const. Justices of the Peace. . . . (2) Justice courts shall have such original jurisdiction as may be provided by law. They shall not have trial jurisdiction in any criminal case designated a felony except as examining courts. . . .

➔Comment. Municipal Courts have coordinate and coextensive jurisdiction with justice courts. City courts have concurrent jurisdiction with the justice courts. (See JURISDICTION, 200.200; 200.300; 200.400.)

Various sections of the codes refer to the jurisdiction of the judge or the jurisdiction of the court. Actually, the judge is the court and except in very limited cases, the words are used interchangeably.

The Legislature often changes the jurisdiction of the courts. For example, the 2007 Legislature increased jurisdiction for drug treatment and mental health treatment courts to allow concurrent jurisdiction of all misdemeanors punishable by fines not exceeding $500 or imprisonment not exceeding 6 months, or both. Previously, the 1985 Legislature added jurisdiction for municipal and justice courts by permitting the issuing of temporary restraining orders in domestic abuse cases; and the 1989 Legislature added this jurisdiction to city courts by giving them the authority to issue temporary restraining orders in domestic abuse cases, now called partner or family member assault cases.

Jurisdiction over Juveniles.

41-5-203 MCA, which sets forth youth court jurisdiction, grants courts of limited jurisdiction authority to handle juvenile offense in five areas:

1. Traffic;
2. Fish and Game;
3. Alcoholic Beverage Violations;
4. Gambling, and
5. Tobacco Products.

Section 41-5-332 MCA gives courts of limited jurisdiction the authorization to hear probable cause hearings on the detention of a youth. Specifically, subsection (1) says, “When a youth is taken into custody for questioning, a hearing to determine whether there is probable cause to believe the youth is a delinquent youth or a youth in need of intervention must be held within 24 hours, excluding weekends and legal holidays. A hearing is not required if the youth is released prior to the time of the required hearing.”

Section 41-5-334 MCA indicates that if probable cause is established at the hearing, the court shall determine if the youth shall be retained in custody.

If a hearing is held by the youth court, a justice of the peace, a municipal or city judge, or a magistrate having jurisdiction, a record of the hearing must be made by a court reporter or by a tape recording of the hearing.

One other Montana statute also defines the jurisdiction of courts of limited jurisdiction:

> 61-8-723 MCA. Offenses committed by persons under the age of eighteen. A person under 18 years of age who is convicted of an offense under this title shall not be punished by incarceration, but shall be punished by:
> (1) a fine not to exceed the fine that could be imposed on him if he were an adult, provided that such person may not be imprisoned for failure to pay such fine;
> (2) revocation of his driver's license by the court or suspension of the license for a period set by the court;
> (3) impoundment by a law enforcement officer designated by the court of the motor vehicle operated by the person for a period of time not exceeding 60 days if the court finds that he either owns the vehicle or is the only person who used the vehicle; or
> (4) any combination of subsections (1) through (3).

When a juvenile appears before a court of limited jurisdiction on a matter not covered by the statutes quoted above, the case must be referred to the youth court. This is cone by contacting the juvenile probation officer in your area. The youth court is a subdivision of the district court and has jurisdiction beyond the jurisdiction of courts of limited jurisdiction.

The judge should exercise great care when dealing with youthful offenders. Do not exceed the punishment set forth in the specific statutes involved. The court should require the presence of a parent or adult with the juvenile prior to taking a plea on a charge.

➔Comment. There is no statutory requirement for a parent or responsible adult to accompany a juvenile to court, but many communication problems between the court, the defendant, and the parents will be avoided if the court makes a rule that a juvenile may not enter a plea unless accompanied by a responsible adult. This assures that the parents know of the citation and are aware that the youthful offender has been advised of their constitutional rights. You may accept a telephone call or handwritten note in lieu of a parent's appearance in court, if a personal appearance by the parent is unduly burdensome. However, it is best to require all parents to appear with their child in court. Advise your issuing officers of this rule, and they will advise the youth to bring a parent or guardian with them to court when a citation is issued.

300.202 Venue/Change of Venue.

46-3-111 MCA. Place of Trial. (1) The place of trial must be in the county where the charge is filed unless otherwise provided by law.

(2) All objections that a charge is filed in the improper county are waived by a defendant unless made before the first witness is sworn at the time of trial. If an objection is made, a hearing must be held and the proper county in which to file the charge must be established before further proceedings may take place.

➔Comment. If improper venue exists, the case will need to be "transferred" to the proper jurisdiction or "dismissed for lack of jurisdiction and venue." Sections 46-3-110 through 46-3-115 MCA, generally discuss venue.

300.203 Complaint/Initiation of Prosecution.

Art II, Sec. 20, Mont. Const. Initiation of proceedings.

(1) Criminal offenses within the jurisdiction of any court inferior to the district court shall be prosecuted by complaint. . . .

46-11-101 MCA. Methods of commencing prosecution. A prosecution may be commenced by:

(1) a complaint;

(2) an information following a preliminary examination or waiver of a preliminary examination;

(3) an information after leave of court has been granted; or

(4) an indictment upon a finding by a grand jury.

46-11-110 MCA. Filing complaint. When a complaint is presented to a court charging a person with the commission of an offense, the court shall examine the sworn complaint or any affidavits, if filed, to determine whether probable cause exists to allow the filing of a charge.

46-11-111 MCA. Amending complaint. A court may allow a complaint to be amended under the same circumstances and in the same manner as an information as provided in 46-11-205 MCA.

➔Comment. The complaint may be amended both in substance and in form. When the complaint is amended, grant the defendant additional time to prepare any defenses. Both the uniform Notice To Appear (NTA) and a complaint filed by a city or county prosecutor must conform with statutory requirements. (See 46-11-401 MCA below). The face of each citation must contain a definite statement describing the offense charged.

Citing only the section number and the title of section is NOT sufficient, i.e., 61-8-301, Reckless Driving is not enough. The body of the citation or complaint must state sufficient information to put the defendant on notice of the wrong doing, such as reckless driving by passing several vehicles in a no-passing zone in willful disregard for safety.

46-6-201 MCA. Issuance of arrest warrant upon complaint. If it appears from the contents of the complaint and the examination of the complainant and from the examination of other witnesses or affidavits, if any, that there is probable cause to believe that the person against whom the complaint was made has committed an offense, a warrant shall be issued by the court for the arrest of the person complained against. The court, in its discretion, may issue a summons instead of a warrant. Upon the request of the prosecutor, the court shall issue a summons instead of a warrant. More than one warrant or summons may issue on the same complaint.

46-11-401 MCA. Form of charge. (1) The charge must be in writing and in the name of the state or the appropriate county or municipality and must specify the court in which the charge is filed. The charge must be a plain, concise, and definite statement of the offense charged, including the name of the offense as definitely as can be determined. The charge must state for each count the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.

(2) If the charge is by information or indictment, it must include endorsed on the information or indictment the names of the witnesses for the prosecution, if known.

(3) If the charge is by complaint, it must be signed by a sworn peace officer, under oath by a person having knowledge of the facts, or by the prosecutor.

(4) If the charge is by information, it must be signed by the prosecutor. If the charge is by indictment, it must be signed by the foreman of the grand jury.

(5) The court, upon motion of the defendant, may strike surplusage from an indictment or information.

(6) A charges may not be dismissed because of a formal defect that does not tend to prejudice a substantial right of the defendant.

➔Comment. Notice that subsection (3) requires the county or city attorney to sign a complaint. You may receive a motion by the defense that the complaint is improperly drawn because the deputy county or city attorney has signed it and it must therefore be dismissed. Deny the motion and look at:

➔7-4-2403 MCA. Official mention of principal officer includes deputies. Whenever the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes the officer's deputies.

➔Comment. The codes allow for a complaint to be filed by a person having knowledge of the facts. However, only the prosecuting attorney can pursue the "prosecution" of a case. Before a judge allows a complaint to be filed by anyone other than an officer or city or county attorney, you should confer with the prosecuting attorney to verify that prosecution will go forward. The judge should not assist in the drafting of a criminal complaint that is to be filed in their court. 46-11-101, 46-11-102, 46-11-110, and 46-11-111 MCA set out the requirements for filing a complaint.

> 46-6-201 MCA. Issuance of arrest warrant upon complaint. If it appears from the contents of the complaint and the examination of the complainant and from the examination of other witnesses or affidavits, if any, that there is probable cause to believe that the person against whom the complaint was made has committed an offense, a warrant shall be issued by the court for the arrest of the person complained against. The court, in its discretion, may issue a summons instead of a warrant. Upon the request of the prosecutor, the court shall issue a summons instead of a warrant. More than one warrant or summons may issue on the same complaint.

➔Comment. *State ex. Rel. Wicks vs. District Court, 159 Mont. 434, 1972* is a case where the Supreme Court set aside a conviction in justice court because the justice of the peace did not enter in his docket the fact that the complainant was placed under oath and that probable cause was properly established.

Joinder of Offenses and of Defendants.

> 46-11-404 MCA. Joinder of offenses and defendants. (1) Two or more offenses or different statements of the same offense may be charged in the same charging document in a separate count, or alternatively, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same transactions connected together or constituting parts of a common scheme or plan. Allegations made in one count may be incorporated by reference in another count.
>
> (2) If two or more charging documents are filed in the case, the court may order them to be consolidated.
>
> (3) The prosecution is not required to elect between the different offenses set forth in the charging document, and the defendant may be convicted of any number of the offenses charged except as provided in 46-11-410. Each offense of which the defendant is convicted must be stated in the verdict or the finding of the court.
>
> (4) Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same transaction constituting an offense or offenses. The defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

300.204 Arrest, Summons, Notice to Appear.

46-6-105 MCA. Time of making arrest. An arrest may be made at any time of the day or night, except that a person may not be arrested in the person's home or private dwelling place at night for a misdemeanor committed at some other time and place unless upon the direction of a judge endorsed upon an arrest warrant. However, a person may be arrested in the person's home or private dwelling at night if the person is being arrested pursuant to 46-3-311 for the offense of partner or family member assault.

➔Comment. If you want a misdemeanor arrest warrant to be served at night, you must authorize a day or night arrest of a defendant at their home or private dwelling place by the language in 46-6-105 MCA, on the face of the warrant. This language is now required by statute after the Montana Supreme Court decision given in *Plumlee vs. Travis, 254 Mont. 96.*

46-6-201 MCA. Issuance of arrest warrant upon complaint. If it appears from the contents of the complaint and the examination of the complainant and from the examination of other witnesses or affidavits, if any, that there is probable cause to believe that the person against whom the complaint was made has committed an offense, a warrant shall be issued by the court for the arrest of the person complained against. The court, in its discretion, may issue a summons instead of a warrant. Upon the request of the prosecutor, the court shall issue a summons instead of a warrant. More than one warrant or summons may issue on the same complaint.

➔Comment. Examine complainant, under oath, or obtain a written a affidavit before issuing warrant.

46-6-214 MCA. Form and content of arrest warrant. (1) An arrest warrant must:

(a) be in writing in the name of the state of Montana or in the name of a municipality if a violation of a municipal ordinance is charged;

(b) set forth the nature of the offense;

(c) command that the person against whom the complaint was made be arrested and brought before the nearest or most accessible court for an initial appearance;

(d) specify the name of the person to be arrested or, if that person's name is unknown, designate the person by any name or description by which the person can be identified with reasonable certainty;

(e) state the date when issued and the municipality or county where issued; and

(f) be signed by the judge of the court with the title of office noted.

(2) The arrest warrant may specify the amount of bail.

46-6-215 MCA. Execution of warrant. An arrest warrant may be directed to all peace officers in the state. It must be executed by a peace officer and may be executed in any county of the state. Arrest warrants issued for the violation of city ordinances may not be executed outside the city limits, except as otherwise provided by law.

46-6-204 MCA. Minor irregularities in warrant. No warrant of arrest shall be dismissed nor shall any person in custody for an offense be discharged from such custody because of technical irregularities not affecting the substantial rights of the accused.

➔Comment. A peace officer does not need the actual warrant in his possession to make an arrest. Therefore, once a warrant has been signed by a judge, it is permissible for peace officers to be advised by phone or other communication of the existence of the warrant and pursuant to 46-6-216(2), arrest may follow.

Arrest without Warrant.

46-6-210 MCA. Arrest by peace officer. A peace officer may arrest a person when the officer has a warrant commanding that the person be arrested or when the officer believes on reasonable grounds:

(1) that a warrant for the person's arrest has been issued in this state, except that unless otherwise provided by law, a warrant for violation of a city ordinance may not be acted upon unless the person is located within the limits of the city in which the violation is alleged to have occurred; or

(2) that a felony warrant for the person's arrest has been issued in another jurisdiction.

61-8-703 MCA. Arrest without a warrant in radar cases. (1) The driver of any such motor vehicle may be arrested without a warrant under this section provided the arresting officer is in uniform or displays his badge of authority and has either:

(a) observed the recording of the speed of the vehicle by radio microwaves or other electrical device; or

(b) received, from the officer who has observed the speed of the vehicle recorded by the radio microwaves or other electrical device, a radio message giving the license number or other sufficient identification of the vehicle and the recorded speed, dispatched immediately after the speed of the vehicle was recorded.

(2) The arrest without a warrant of any such driver must be made immediately after such observation or radio message and as the result of uninterrupted pursuit.

46-6-502 MCA. Arrest by private person. (1) A private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest.

(2) A private person making an arrest shall immediately notify the nearest available law enforcement or peace officer and give custody of the person arrested to the officer or agency.

➔Comment. Following any arrest, see 46-7-101 MCA for procedure regarding the initial appearance of the arrested person. Not only is this the Montana statute to follow, it is also a constitutionally protected right of due process for the person arrested.

46-7-101 MCA. Appearance of arrested person~~—~~ use of two -way electronic audio-video communication. (1) A person arrested, whether with or without a warrant, must be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance.

(2) A defendant's initial appearance before a judge may, in the discretion of the court, be satisfied either by the defendant's physical appearance before the court or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other and so that the defendant and his counsel, if any, can communicate privately. A judge may order a defendant's physical appearance in court for an initial appearance hearing.

Summons.

46-6-213 MCA. Form and content of summons. (1) When authorized to issue an arrest warrant, a court may instead issue a summons.

(2) A summons may be served personally or by first-class mail .

(3) The summons must:

(a) be in writing in the name of the state of Montana or in the name of the municipality if the violation of a municipal ordinance is charged;

(b) state the name of the person summoned and that person's address, if known;

(c) set forth the nature of the offense;

(d) state the date when issued and the municipality or county where issued;

(e) be signed by the judge of the court with the title of office noted; and

(f) command the person to appear before a court at a certain time and place.

(4) The summons must plainly state that, upon failure to appear following the service of summons, an arrest warrant must be issued immediately or , if the service is made to a corporation, that a plea of not guilty will be entered.

When summons can be issued.

46-6-201 MCA. Issuance of arrest warrant upon complaint. If it appears from the contents of the complaint and the examination of the complainant and from the examination of other witnesses or affidavits, if any, that there is probable cause to believe that the person against whom the complaint was made has committed an offense, a warrant shall be issued by the court for the arrest of the person complained against. The court, in its discretion, may issue a summons instead of a warrant.
Upon request of the prosecutor, the court shall issue a summons instead of a warrant. More than one warrant or summons may issue on the same complaint.

46-6-212 MCA. Failure to appear following summons or notice to appear. (1) If, after the issuance of a summons or notice to appear, the judge becomes satisfied that the person has not appeared or will not appear as commanded, the judge may at once issue an arrest warrant.
(2) If after being summoned the corporation does not appear, a plea of not guilty must be entered in accordance with 46-12-204 and the matter must proceed to trial and judgment without further process.

Notice to Appear.

46-6-310. Notice to appear. (1) Whenever a peace officer is authorized to arrest a person without a warrant, the officer may instead issue the person a notice to appear.
(2) The notice must:
(a) be in writing;
(b) state the person's name and address, if known;
(c) set forth the nature of the offense;
(d) be signed by the issuing officer; and
(e) direct the person to appear before a court at a certain time and place.
(3) Upon failure of the person to appear, a summons or arrest warrant may be issued.

➔Comment. The NTA form serves the purpose of many of the other statutory requirements for complaint and docket entries and the use of this form has been approved by the Supreme Court. The face of each citation must contain a definite statement describing the offense charged. Citing only the section number and the title of each section is NOT sufficient, i.e., 61-8-301, Reckless Driving is not enough. The body of the citation or complaint must state sufficient information to put the defendant on notice of the wrong doing, such as reckless driving by passing several vehicles in a no-passing zone in willful disregard for safety. (Refer to 46-11-401 MCA, for the requirements for a complaint.

➔Comment. You may receive a Motion to Dismiss from an out-of-state defendant that says, "You have to dismiss the ticket, Judge. The officer failed to have me sign it!" DENY the motion. Montana's notice to appear law does not require the signature of the defendant on the face of the citation.

300.205 The Defendant appears in Court.

The filing of a complaint and the appearance of the defendant in court gives the court complete jurisdiction to proceed. The defendant makes his appearance either in person or by an attorney.

When an arrested person is brought into court, the defendant must be informed of the crime or violation that is being charged. The judge will then conduct an initial appearance hearing.

300.206 Initial Appearance.

46-7-102 MCA. Duty of court. (1) The judge shall inform the defendant:

(a) of the charge or charges against the defendant;

(b) of the defendant's right to counsel;

(c) of the defendant's right to have counsel assigned by a court of record in accordance with the provisions of 46-8-101;

(d) of the general circumstances under which the defendant may obtain pretrial release;

(e) of the defendant's right to refuse to make a statement and the fact that any statement made by the defendant may be offered in evidence at the defendant's trial;

(f) that conviction may result in the loss of various rights regarding firearms under state and federal law, and

(g) of the defendant's right to a judicial determination of whether probable cause exists if the charge is made by a complaint alleging the commission of a felony.

(2) The judge shall admit the defendant to bail as provided by law.

➔Comment. One problem that can confront a judge is the question of whether or not the arrested person is able to understand the proceedings. The mental condition of the defendant, the level of intoxication, or an inability to understand the English language are examples of problems that may be presented. Complete the initial appearance, if possible, and consider the defendant's incapacity as soon as possible. If the defendant speaks a different language or has a hearing impairment, translators are usually available, and should be used.

It is imperative that the defendant understands the charge and all proceedings.

300.207 Right to Counsel.

> 46-8-101 MCA. Right to counsel. (1) During the initial appearance before the court, every defendant must be informed of the right to have counsel, and must be asked if the aid of counsel is desired.
> (2) If the defendant desires assigned counsel because of financial inability to retain private counsel and the offense charged is a felony or the offense is a misdemeanor and incarceration is a sentencing option if the defendant is convicted, the court shall order the office of state public defender, provided for in 47-1-201, to assign counsel to represent the defendant without unnecessary delay pending a determination of eligibility under the provisions of 47-1-111.

➔Comment. On a misdemeanor, the request for appointed counsel may be denied if the judge makes the determination that, upon conviction, no jail time would be imposed, or the defendant is not indigent. This determination must be documented and explained to the defendant. *Argersinger vs. Hamlin S. Ct. 2006* is the United States Supreme Court case that holds a defendant cannot be sentenced to jail unless that defendant has knowingly waived the right to counsel. If the defendant waives the right to an attorney, have the defendant sign a waiver form and file the waiver in the docket and case file.

> 46-8-102 MCA. Waiver of counsel. A defendant may waive the right to counsel when the court ascertains that the waiver is made knowingly, voluntarily, and intelligently.

> 46-8-104 MCA. Assignment of counsel after trial— definition. (1) Any court of record may order the office of state public defender, provided for in 47-1-201, to assign counsel, subject to the provisions of the Montana Public Defender Act, Title 47, chapter 1, to represent any petitioner or appellant in any post conviction action or proceeding brought under Title 45, chapter 21, if the petitioner or appellant is eligible for the appointment of counsel and;
> (a) the district court determines that a hearing on the petition is required pursuant to 46-21-201;
> (b) the state public defender's office requests appointment of a public defender and demonstrates good cause for the appointment;
> (c) a statute specifically mandates the appointment of counsel;
> (d) the petitioner or appellant is clearly entitled to counsel under either the United States or Montana constitution; or
> (e) extraordinary circumstances exist that require the appointment of counsel to prevent a miscarriage of justice.
> (2) An appointment of counsel made in the interests of justice, as provided in 46-21-201(2), may be made only when extraordinary circumstances exist.

(3) As used in this section, "extraordinary circumstances" includes those in which the petitioner or appellant does not have access to legal materials or has a physical or mental condition or limitation that prevents the petitioner or appellant from reading or writing in English.

46-8-113 MCA. Payment by defendant for assigned counsel~~.~~ costs to be filed with court. (1) As part of or as a condition under a sentence imposed under the provisions of this title, the court shall require a convicted defendant to pay the costs of counsel assigned to represent the defendant as follows, except as provided in subsections (2) and (3):

(a) in every misdemeanor case, $150; and

(b) in every felony case, $500.

(2) Costs must be limited to costs incurred by the office of state public defender, provided for in 47-1-201, for providing the defendant with counsel in the criminal proceeding. If the criminal proceeding includes a jury trial, counsel assigned by the office of state public defender shall file with the court a statement of the hours spent on the case and the costs and expenses incurred and, except as provided in subsection (3), the court shall require the defendant to pay the costs of counsel and other costs and expenses as reflected in the statement.

(3) The court may not sentence a defendant to pay the costs for assigned counsel unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

46-8-114 MCA. Time and method of payment. When a defendant is sentenced to pay the costs of assigned counsel pursuant to 46-8-113, the court may order payment to be made within a specified period of time or in specified installments. Payments must be made to the office of state public defender, provided for in 47-1-201, and deposited in the account established in 47-1-110.

46-8-115 MCA. Effect of nonpayment. (1) When a defendant who is sentenced to pay the costs of assigned counsel defaults in payment of the costs or of any installment, the court on motion of the prosecutor or on its own motion may require the defendant to show cause why the default should not be treated as contempt of court and may issue a show cause citation or an arrest warrant requiring the defendant's appearance.

(2) Unless the defendant shows that the default was not attributable to an intentional refusal to obey the order of the court or to a failure on the defendant's

part to make a good faith effort to make the payment, the court may find that the default constitutes civil contempt.

(3) The term of imprisonment for contempt for nonpayment of the costs of assigned counsel must be set forth in the judgment and may not exceed 1 day for each $25 of the payment, 30 days if the order for payment of costs was imposed upon conviction of a misdemeanor, or 1 year in any other case; whichever is the shorter period.

A person committed for nonpayment of costs must be given credit toward payment for each day of imprisonment at the rate specified in the judgment.
(4) If it appears to the satisfaction of the court that the default in the payment of costs is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount of the payment or of each installment, or revoking the order for payment of the unpaid portion of the costs in whole or in part.
(5) A default in the payment of costs or any installment may be collected by any means authorized by law for the enforcement of a judgment. The writ of execution for the collection of costs may not discharge a defendant committed to imprisonment for contempt until the amount of the payment for costs has actually been collected.

300.208 Bail/Right to Bail/Amount/Conditions.

Art. II, Sec. 21, Mont. Const. Bail. All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

46-9-102 MCA. Bailable offenses. (1) All persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense charged.
(2). . . .

46-9-201 MCA. Who may admit to bail. A judge may admit to bail any defendant properly appearing before the judge in a bail proceeding. When bound over to any court or judge having jurisdiction of the offense charged, bail must be continued provided that the court or judge having jurisdiction may increase, reduce, or substitute bail. On appeal, a judge before whom the trial was had or a judge having the power to issue a writ of habeas corpus may admit the defendant to bail. For purposes of this section, a defendant's appearance before a judge may be either by physical appearance before the court or by two-way electronic audio-video communication as provided by 46-9-206.

46-9-111 MCA. Release on own recognizance. Any person in custody, if otherwise eligible for bail, may be released on his personal recognizance subject to such conditions as the court may reasonably prescribe to assure his appearance when required. Any person released as herein provided shall be full appraised by the court of the penalty provided for failure to comply with the terms of his recognizance.

➔Comment. The above section requires the court to "fully advise" the defendant of the consequences of failure to comply with the terms of release. Section 45-7-308 sets the criteria for the crime of bail jumping, both misdemeanor and felony. The judge may issue a warrant for a defendant's failure to comply with any conditions of release. (See 46-9-505).

46-9-301 MCA. Determining the amount of bail. In all cases that bail is determined to be necessary, bail must be reasonable in amount and the amount shall be:

(1) sufficient to ensure the presence of the defendant in a pending criminal proceeding;
(2) sufficient to assure compliance with the conditions set forth in the bail;
(3) sufficient to protect any person from bodily injury;
(4) not oppressive;
(5) commensurate with the nature of the offense charged;
(6) considerate of the financial ability of the accused;
(7) considerate of the defendant's prior record;
(8) considerate of the length of time the defendant has resided in the community and of his ties to the community;
(9) considerate of the defendant's family relationships and ties;
(10) considerate of the defendant's employment status; and
(11) sufficient to include the charge imposed in 46-18-236.

46-9-302 MCA. Bail schedule — acceptance by peace officer. (1) A judge may establish and post a schedule of bail for offenses over which the judge has original jurisdiction. A person may not be released on bail without first appearing before the judge when the offense is:

(a) any assault on a partner or family member, as partner or family member is defined in 45-5-206;
(b) stalking, as defined in 45-5-220; or
(c) violation of an order of protection, as defined in 45-5-626.

(2) A peace officer may:

(a) accept bail on behalf of a judge:
(i) in accordance with the bail schedule established under subsection (1); or
(ii) whenever the warrant of arrest specifies the amount of bail; or
(b) with the offender's permission, accept an unexpired driver's license in lieu of bail for a violation of any offense in Title 61, chapters 3 through 10, except chapter 8, part 4 as provided in subsection (4).

(3) Whenever a peace officer accepts bail, the officer shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the judge before whom the offender is to appear, and the judge shall give a receipt to the peace officer for the bail delivered.

(4) Whenever a peace officer accepts an unexpired driver's license in lieu of bail, the peace officer shall give the offender a signed driving permit, in a form prescribed by the department. The permit must acknowledge the officer's acceptance of the offender's driver's license and serves as a valid temporary driving permit authorizing the operation of a motor vehicle by the offender. The permit is effective as of the date the permit is signed and remains in effect through the date of the appearance listed on the permit. The peace officer shall deliver the driver's license to the judge before whom the offender is to appear, and the judge shall give the peace officer a receipt acknowledging delivery of the offender's driver's license to the court. After the filing of the complaint and the appearance of the defendant, the judge shall assume jurisdiction and may extend the date of the driving permit for a period of up to 6 months from the defendant's initial appearance date.

(5) The judge shall return a driver's license that has been accepted in lieu of bail to a defendant:

(a) after the required bail has been posted or there has been a final determination of the charge; and

(b) if the defendant pleaded guilty or was convicted, after a $25 administrative fee has been paid to the court.

46-9-311 MCA. Reduction, increase, revocation or substitution of bail. (1) Upon application by the state or the defendant, the court before which the proceeding is pending may increase or reduce the amount of bail, substitute one bail for another, alter the conditions of the bail, or revoke bail.

(2) Reasonable notice of such application must be given to the opposing parties or their attorneys by the applicant.

46-9-108 MCA. Conditions upon defendant's release notice to victim of stalker's release. (1) The court may imposed any condition that will reasonably ensure the appearance of the defendant as required or that will ensure the safety of any person or the community, including but not limited to the following conditions:

(a) the defendant may not commit an offense during the period of release;

(b) the defendant shall remain in the custody of a designated person who agrees to supervise the defendant and report any violation of a release condition to the court, if the designated person is reasonably able to assure the court that the defendant will appear as required and will not pose a danger to the safety of any person or the community.

(c) the defendant shall maintain employment or, if unemployed, actively seek employment;

(d) the defendant shall abide by specified restrictions on the defendant's personal associations, place of abode, and travel;

(e) the defendant shall avoid all contact with:

(i) an alleged victim of the crime, including in a case of partner or family member assault the restrictions contained in a no contact order issued under 45-5-209; and

(ii) any potential witness who may testify concerning the offense;

(f) the defendant shall report on a regular basis to a designated agency or individual, pretrial services agency, or other appropriate individual;

(g) the defendant shall comply with a specified curfew;

(h) the defendant may not possess a firearm, destructive device, or other dangerous weapon;

(i) the defendant may not use or possess alcohol or use or possess any dangerous drug or other controlled substance without a legal prescription;

(j) the defendant shall furnish bail in accordance with 46-9-401; or

(k) the defendant shall return to custody for specified hours following release from employment, schooling, or other approved purposes.

(2) The court may not impose an unreasonable condition that results in pretrial detention of the defendant and shall subject the defendant to the least restrictive condition or combinations of conditions that will ensure the defendant's appearance and provide for protection of any person or the community. At any time, the court may, upon a reasonable basis, amend the order to impose additional or different conditions of release upon its own motion or upon the motion of either party.

(3) Whenever a person accused of a violation of 45-5-206, 45-5-220, or 45-5-626 is admitted to bail, the detention center shall, as soon as possible under the circumstances, make one and if necessary more reasonable attempts, by means that include but are not limited to certified mail, to notify the alleged victim or, if the alleged victim is a minor, the alleged victim's parent or guardian of the accused's release.

➔Comment. If a defendant violates any of the conditions of release on bail, the court may issue a warrant or request the prosecuting attorney to file a petition to revoke bail. A warrant, order to show cause, or summons may be issued from the petition to revoke bail.

45-5-209 MCA. Partner or family member assault— no contact order — notice — violation of order— penalty. (1) A court may issue a standing no contact order and direct law enforcement to serve the order on all defendants charged with a violation of 45-5-206. The court order may include prohibiting the defendant from contacting the protected person in person, by a third party by telephone, by electronic communication, as defined in 45-8-213, and in writing. The court may impose up to a 1,500-foot restriction on the defendant to stay away from the protected person's location.

(2) Notice of the no contact order must be given orally and in writing by a peace officer at the time that the offender is charged with a violation of 45-5-206. One copy of the order must be given to the defendant, and one copy must be filed with the court.

(3) The charge of a violation of 45-5-206 must be supported by a peace officer's affidavit of probable cause.

(4) The no contact order issued at the time that the defendant is charged with a violation of 45-5-206 is effective for 72 hours or until the defendant makes the first appearance in court.
(5) The court order must state:
"You have been charged with an assault on a partner or family member. You are not allowed to have contact with _____
(list names). You may not _____.

Violation of this no contact order is a criminal offense under 45-5-209, MCA, and may result in your arrest. You may be arrested even if the person protected by the no contact invites or allows you to violate the prohibitions. This order lasts 72 hours or until the court continues or changes the order."
(6) The court shall review and amend, if appropriate, the no contact order at the defendant's first appearance.
(7) A no contact order may be issued by a court with jurisdiction over violations of 45-5-206 at the time of the defendant's arraignment or at any other appearance of the defendant, including sentencing. The no contact order must be in writing. A copy of the no contact order must be given to the defendant when it is issued by the court. The court order shall specify protected persons and prohibited contact, including but not limited to the restriction mentioned in subsection (1).
(8)(a) A person commits the offense of violation of a no contact order if the person, with knowledge of the order, purposely or knowingly violates any provision of any order issued under this section.

(b) Each contact or attempt to make contact with each protected person, directly or indirectly, is a separate offense. Consent of the protected person to prohibited contact is not a defense. A protected person may not be charged with a violation of a no contact order.

(c) An offender convicted of violation of a no contact order shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(9) As used in this section, the following definitions apply:

(a) "No contact order" means a court order that prohibits a defendant charged with or convicted of an assault on a partner or family member from contacting a protected person.

(b) "Partner" or "family member" has the meaning provided in 45-5-206.

(c) "Protected person" means a victim of a partner or family member assault listed in a no contact order.

46-9-505 MCA. Issuance of arrest warrant — redetermining bail — definition. (1) Upon failure to comply with any condition of a bail or recognizance, the court having jurisdiction at the time of the failure may, in addition to any other action provided by law, issue a warrant for the arrest of the person.
(2) On verified application by the prosecutor setting forth facts or circumstances constituting a breach or threatened breach of any of the conditions of the bail or a threat or an attempt to influence the pending proceeding, the court may issue a warrant for the arrest of the defendant.

(3) If the defendant has been released under the supervision of a pretrial services agency, referred to in 46-9-108(1)(f), an officer of that agency may arrest the defendant without a warrant or may deputize any other officer with power of arrest to arrest the defendant by giving the officer oral authorization and within 12 hours delivering to the place of detention a verified written statement of the defendant's release. An oral authorization delivered with the defendant by the arresting officer to the official in charge of a county detention center or other place of detention is a sufficient warrant for detention of the defendant if the pretrial officer delivers a verified statement within 12 hours of the defendant's arrest.

(4) Upon the arrest, the defendant must be brought before the court without unnecessary delay and the court shall conduct a hearing and determine bail in accordance with 46-9-311.

(5) As used in this section, "pretrial services agency" means a government agency or a private entity under contract with a local government whose employees have the minimum training required in 46-23-2003 and that is designated by a district court, justice's court, municipal court, or city court to provide services pending a trial.

46-9-115 MCA. Release ordered by court where charge not pending. If release is ordered or bail is accepted by a court other than the court in which the charge is pending, any bonds, instrument of ownership, or money posted and a written statement of other conditions of release must be delivered without delay to the court in which the charge is pending.

46-23-1003 MCA. Qualifications of probation and parole officers. (1) Probation and parole officers must have at least a college degree and some formal training in behavioral sciences. Exceptions to this rule must be approved by the department. Related work experience in the areas listed in 2-15-2302(2) may be substituted for educational requirements at the rate of 1 year of experience for 9 months formal education if approved by the department. All present employees are exempt from this requirement but are encouraged to further their education at the earliest opportunity.

(2) Each probation and parole officer shall, through a source approved by the officer's employer, obtain 16 hours a year of training in subjects relating to the powers and duties of probation officers. In addition, each probation and parole officer must receive training in accordance with standards adopted by the Montana public safety officer standards and training council established in 2-15-2029. The training must be at the Montana law enforcement academy unless the council finds that training at some other place is more appropriate.

➔Comment. When a defendant appears before you, on a warrant from another jurisdiction, you may set a different bail than the amount of bail endorsed upon the warrant. If you feel the bail should be changed, it is recommended that you contact the judge who issued the warrant and discuss the bail amount. You should also set an appearance date for the defendant within a

reasonable time when the defendant can appear before the issuing court, if bail is posted before you. This contact is not required but is a courtesy to the judge issuing the warrant.

46-9-401 MCA. Forms of bail. (1) Bail may be furnished in the following ways:

(a) by a deposit with the court of an amount equal to the required bail of cash, stocks, bonds, certificates of deposit, or other personal property approved by the court.

(b) by pledging real estate situated within the state with an unencumbered equity, not exempt, owned by the defendant or sureties at a value double the amount of the required bail;

(c) by posting a written undertaking executed by the defendant and by two sufficient sureties; or

(d) by posting a commercial surety bond executed by the defendant and by a qualified agent for and on behalf of the surety company or,

(e) by posting an offender's driver's license in lieu of bail if the summons describes the violation of any offense in Title 61, chapters 3-10, except chapter 8, part 4, and if the offender is the holder of an unexpired driver's license.

(2) The amount of the bond must ensure the appearance of the defendant at all times required through all stages of the proceeding including trial de novo, if any, and unless the bond is denied by the court pursuant to 46-9-107, must remain in effect until final sentence is pronounced in open court.

(3) This chapter does not prohibit a surety from surrendering the defendant pursuant to 46-9-510 in a case in which the surety feels insecure in accepting liability for the defendant.

(4) Whenever a driver's license is accepted in lieu of bail, the judge shall return the driver's license to the defendant after:

(a) the required bail has been posted and there has been a final determination of the charge, and

(b) if the defendant pleaded guilty or was convicted, a $25 administrative fee has been paid to the court.

➔Comment. Most bail will be furnished by cash or commercial surety bonds. A property bond should be first approved by the prosecutor. Upon acceptance of a property bond, **the court must file**, with the clerk and recorder of the county in which the property is located a certified copy of the schedule of the real estate. This filing allows the state to establish a lien on the real estate, used as bail, from the time of filing. Reference: 46-9-403 MCA.

46-9-414 MCA. Certificates accepted in lieu of cash. (1) A guaranteed arrest bond certificate must, when posted by the person whose signature appears on the certificate, be accepted in lieu of cash bail in an amount not exceeding $1,000 as a bail bond to guarantee the appearance of the person in any court, including a municipal court, in this state at the time required by the court when the person was arrested for violation of a motor vehicle law of this state or an ordinance of a municipality in this state (except for the offense of driving while intoxicated or for any felony) committed prior to the date of expiration shown on the guaranteed arrest bond certificate.

44-1-1103 MCA. Check in lieu of cash. (1) In the case of traffic violations, bond may be made by personal check in lieu of cash. Highway patrol officers or other authorized agents receiving bonds on behalf of the court may accept a personal check in lieu of cash provided that:

(a) the check is drawn on a bank domiciled in the state of Montana; and

(b) the person who writes the check in lieu of cash bond has two documents identifying him.

(2) If a check is offered in lieu of cash, the highway patrol officer or other authorized agent who accepts the check is not liable in the case of nonpayment.

(3) A person who writes a check in lieu of cash bond which is returned for insufficient funds is subject to prosecution under 45-6-316, and obtaining bond constitutes securing services for the purposes of that section.

➔Comment. By court rule, a policy should be established to allow other law enforcement personnel to accept personal checks in lieu of cash.

46-9-502 MCA. Conditions performed — bail discharged. When the conditions of bail have been performed and the accused has been discharged from his obligations in the cause, the court shall return to him or his sureties the deposit of any cash, stocks, or bonds. If the bail is real estate, the court shall notify in writing the county clerk and recorder and the lien of the bail bond on the real estate shall be discharged and the sureties exonerated.

46-9-511 MCA. Forfeiture procedure. (1) When an order of forfeiture is not discharged, the court having jurisdiction shall proceed with the forfeiture of bail as follows:

(a) if money has been posted as bail in a misdemeanor case, as defined in 45-2-101, the court shall pay the money to the treasury of the city or county where the money was posted;

(b) if money has been posted as bail in a felony case, as defined in 45-2-101, the court shall pay the money to the department of revenue for deposit in the state general fund; or

(c) if other property is posted as a condition of release, the property must be sold in the same manner as property sold in civil actions. The proceeds of the sale must be used to satisfy all court costs and prior encumbrances, if any, and from the balance, a sufficient sum to satisfy the judgment or forfeiture must be paid as provided under subsection (1)(a) in a misdemeanor case or under subsection (1)(b) in a felony case.

(2) If a surety bond has been posted as bail, execution may be issued against the sureties or the surety company in the same manner as executions in civil actions.

46-9-512 MCA. Use of forfeited bail as restitution. (1) If the court enters a judgment declaring bail to be forfeited or if the order of forfeiture is not discharged, the court having jurisdiction may order the bail forfeited to be paid as restitution to any victim of the offense for which the court has received bail. Whenever the court believes that restitution may be proper, the court shall order a hearing for the purpose of considering the nature and extent of the victim's pecuniary loss as defined by law.

(2) If the court finds that restitution is appropriate, the court shall order restitution in an amount not exceeding the amount of the victim's complaint or the amount of the victim's pecuniary loss.

(3) An order to require restitution is a judgment against the defendant and the defendant's sureties, and the court may order the restitution to be made by payment of money deposited as bail. Any balance of the bail money must be disposed of in the same manner as provided in 46-9-511.

(4) A determination or decision under this section is not admissible as evidence in any other civil action and is not res judicata in any civil action.

Comment. In order for the court to use bail as restitution, a hearing must be held to establish the extent of the victim's loss. Follow the procedure in 46-9-512. Subsection (4) does not allow a decision under the section to be used in any other civil proceeding.

300.209 Preliminary Hearing.

46-10-105 MCA. Preliminary examination— when held . After the initial appearance, in all cases in which the charge is triable in district court, the justice's court shall, within a reasonable time, hold a preliminary examination unless:

(1) the defendant waives a preliminary examination;
(2) the district court has granted leave to file an information;
(3) an indictment has been returned; or
(4) the case is triable in justice's court.

46-10-106 MCA. Waiver. If the defendant waives the preliminary examination, the judge shall hold the defendant to answer to the court having jurisdiction of the offense.

➔Comment. The rules of evidence do not apply during a preliminary hearing. The prosecuting attorney need only

establish probable cause at the preliminary examination and probable cause can be established by the use of hearsay and other types of evidence that would not be admissible during the trial of an action. (See Montana Rules of Evidence)

> 46-10-202 MCA. Presentation of evidence. (1) The defendant may not enter a plea. The judge shall hear the evidence without unnecessary delay. All witnesses must be examined in the presence of the defendant. The defendant may cross-examine witnesses against the defendant and may introduce evidence in the defendant's own behalf. For purposes of this section, a preliminary examination conducted by the use of two-way electronic audio-video communication that allows all of the participants to be observed and heard by all other participants and that allows the defendant to cross-examine witnesses is considered to be an examination of a witness in the presence of the defendant. Two-way electronic audio-video communication may not be used unless the defendant's counsel is physically present with the defendant, unless this requirement is waived by the defendant, unless this requirement is waived by the defendant.
> (2) During the examination of a witness or when the defendant is making a statement or testifying, the judge may, and on the request of the defendant or state shall, exclude all other witnesses. The judge may also cause the witnesses to be kept separate and to be prevented from communicating with each other until all are examined.
> (3) An objection to evidence on the ground that it has been acquired by unlawful means is not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in 46-13-302.
> (4) For purposes of a hearing under this chapter, a defendant may, in the discretion of the court, appear before the court either by physical appearance or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other, so that the defendant and the defendant's counsel, if any, can communicate privately, and so that the defendant and the defendant's counsel are both physically present in the same place during the two-way electronic audio-video communication. The defendant may waive the requirement that counsel be in the defendant's physical presence during the two-way electronic audio-video communication. A judge may order a defendant's physical appearance in court for a preliminary examination.

300.210 Arraignment.

> 46-12-102 MCA. Place of arraignment. The defendant must be arraigned in the court that has trial jurisdiction of the charge.

➔Comment. One important difference between the initial appearance and the arraignment is the "taking of the plea." A defendant is not asked to plead in an initial appearance, however, a plea is expected in an arraignment.

Many times the initial appearance and arraignment are held in the same proceeding or appearance by the defendant. This procedure is acceptable as a time savings to the court. Remember that you can only accept a plea if you have jurisdiction or authority to conduct a trial upon the charge or complaint. If someone appears on a charge issued from another court or appears on a felony, the municipal, justice, and city courts do not have jurisdiction to take a plea.

> 46-12-201 MCA. Manner of conducting arraignment — use of two-way electronic audio-video communication — exception. (1) Arraignment must be conducted in open court and must consist of reading the charge to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead to the charge. The defendant must be given a copy of the charging document before being called upon to plead. For purposes of this chapter, an arraignment that is conducted by the use of two-way electronic audio-video communication, allowing all of the participants to be heard in the courtroom by all present and allowing the party to be seen, is considered to be an arraignment in open court.
> (2) The court shall inquire of the defendant or the defendant's counsel the defendant's true name, and if the defendant's true name is given as any other than that used in the charge, the court shall order the defendant's name to be substituted for the name under which the defendant is charged.
> (3) The court shall determine whether the defendant is under any disability that would prevent the court, in its discretion, from proceeding with the arraignment. The arraignment may be continued until the court determines the defendant is able to proceed.
> (4) Whenever the law requires that a defendant in a misdemeanor or felony case be taken before a court for an arraignment, this requirement may be satisfied by two-way electronic audio-video communication if neither party objects and the court agrees to its use and has informed the defendant that the defendant has the right to object to its use.
> The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each, so that the defendant and the defendant's counsel are both physically present in the same place during the two-way electronic audio-video communication. The defendant may waive the requirement that the defendant's counsel be in the defendant's physical presence during the two-way electronic audio-video communication.
> (5) A judge may order a defendant's physical appearance in court for arraignment. In a felony case, a judge may not accept a plea of guilty or nolo contendere from a defendant unless the defendant is physically present in the courtroom or is appearing before the court by means of two-way electronic audio-video communication.

> 46-12-210 MCA. Advice to defendant. (1) Before accepting a plea of guilty or nolo contendere, the court shall determine that the defendant understands the following:
> (a) (i) the nature of the charge for which the plea is offered;

(ii) the mandatory minimum penalty provided by law, if any;

(iii) the maximum penalty provided by law, including the effect of any penalty enhancement provision or special parole restriction; and

(iv) when applicable, the requirement that the court may also order the defendant to make restitution of the costs and assessments provided by law;

(b) if the defendant is not represented by an attorney, the fact that the defendant has the right to be represented by an attorney at every stage of the proceeding and that, if necessary, an attorney will be assigned pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the defendant;

(c) that the defendant has the right:

(i) to plead not guilty or to persist in that plea if it has already been made;

(ii) to be tried by a jury and at the trial has the right to the assistance of counsel;

(iii) to confront and cross-examine witnesses against the defendant; and

(iv) not to be compelled to reveal personally incriminating information;

(d) that if the defendant pleads guilty or nolo contendere in fulfillment of a plea agreement, the court is not required to accept the terms of the agreement and that the defendant may not be entitled to withdraw the plea if the agreement is not accepted pursuant to 46-12-211;

(e) that if the defendant's plea of guilty or nolo contendere is accepted by the courts, there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(f) that if the defendant is not a United States citizen, a guilty or nolo contendere plea might result in deportation from or exclusion from admission to the United States or denial of naturalization under federal law.

(2) The requirements of subsection (1) may be accomplished by the defendant filing a written acknowledgment of the information contained in subsection (1).

46-12-212 MCA. Determining accuracy of plea. (1) The court may not accept a guilty plea without determining that there is a factual basis for the plea in charges of felonies or misdemeanors resulting in incarceration.

(2) A defendant who is unwilling to admit to any element of the offense that would provide a factual basis for a plea of guilty may, with the consent of the court, enter a plea of guilty or may, with the consent of the court and the prosecutor, enter a plea of nolo contendere to the offense if the defendant considers the plea to be in the defendant's best interest and the court determines that there is a factual basis for the plea.

46-12-203 MCA. Time allowed to answer. If on the arraignment the defendant required it, he must be allowed a reasonable time, not less than 1 day, to answer or otherwise plead to the indictment, information, or complaint. The answer may include appropriate pretrial motions.

46-12-213 MCA. Harmless error. Any variance from the procedure required by 46-12-211 that does not affect the substantial rights of the defendant must be disregarded.

300.211 The Plea/Plea Bargains.

46-12-204 MCA. Plea Alternatives. (1) A defendant may plead guilty, not guilty, or with the consent of the court and the prosecutor, nolo contendere. If a defendant refused to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) The court may not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement.

The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecutor and the defendant or the defendant's attorney.

(3) With the approval of the court and the consent of the prosecutor, a defendant may enter a plea of guilty or nolo contendere, reserving the right, on appeal from the judgment, to review the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant must be allowed to withdraw the plea.

(4) The court may not accept a plea of nolo contendere in a case involving a sexual offense, as defined in 46-23-502, except an offense under 45-5-301 through 45-5-303.

46-17-203 MCA. Plea of guilty~~-~~ use of two -way electronic audio-video communication. (1)Before or during trial, a plea of guilty or nolo contendere may be accepted when:

(a) subject to the provisions of subsection (3), the defendant enters a plea of guilty or nolo contendere in open court; and

(b) the court has informed the defendant of the consequences of the plea and of the maximum penalty provided by law that may be imposed upon acceptance of the plea.

(2) (a) Subject to subsection (2)(b), a plea of guilty or nolo contendere in a justice's court, city court, or other court of limited jurisdiction waives the right of trial de novo in district court. A defendant must be informed of the waiver before the plea is accepted, and the justice or judge shall question the defendant to ensure that the plea and waiver are entered voluntarily.

(b) A defendant who claims that a plea of guilty or nolo contendere was not entered voluntarily may move to withdraw the plea. If the motion to withdraw is denied, the defendant may, within 90 days of the denial of the motion, appeal the denial of a motion to withdraw the plea to district court. The district court may order the office of state public defender, provided for in 47-1-201, to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, hold a hearing, and enter appropriate findings of fact, conclusions of law, and a decision affirming or reversing the denial of the defendant's motion to withdraw the plea by the court of limited jurisdiction. The district court may remand the case, or the defendant may appeal the decision of the district court.

(3) For purposes of this section, in cases in which the defendant is charged with a misdemeanor offense, an entry of a plea of guilty or nolo contendere through the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present, is considered to be an entry of a plea of guilty or nolo contendere in open court. Audio-video communication may be used if neither party objects and the court agrees to its use. The audio-video communication must operate as provided in 46-12-201.

➔Comment. CONDITIONAL PLEA: You may accept a plea of guilty even if the defendant states that he does not believe he is guilty of the offense or he does not remember what happened. If the defendant has reviewed the evidence the state may have against him and believes that he would be convicted upon that evidence should he go to trial, the plea of guilty may be accepted by the court as an "Alford" plea. A plea of "nolo contendere" is a plea, according to *Black's Law Dictionary, Seventh Edition* which states that it is, "A criminal defendant's plea that, while not admitting guilt, the defendant will not dispute the charge." This plea has the same effect as a guilty plea, ***but must be entered with the permission of the court and the prosecutor***.

46-12-211 MCA. Plea agreement procedure— use of two -way electronic audio-video communication. (1) The prosecutor and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the prosecutor will do any of the following:

(a) move for dismissal of other charges;

(b) agree that a specific sentence is the appropriate disposition of the case; or

(c) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that the recommendation or request may not be binding upon the court.

(2) Subject to the provisions of subsection (5), if a plea agreement has been reached by the parties, the court shall, on the record, require a disclosure of the agreement in open court or, on a showing of good cause in camera, at the time that the plea is offered. If the agreement is of the type specified in subsection (1)(a) or (1)(b), the court may accept or reject the agreement or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subsection (1)(c), the court shall advise the defendant that, if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

(3) If the court accepts a plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) If the court rejects a plea agreement of the type specified in subsection (1)(a) or (1)(b), the court shall, on the record, inform the parties of this fact and advise the defendant that the court is not bound by the plea agreement, afford the defendant an opportunity to withdraw the plea, and advise the defendant that if the defendant persists in the guilty or nolo contendere plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.
(5) For purposes of this section, a disclosure of the agreement through the use of two-way electronic audio-video communication, allowing all of the participants to be heard in the courtroom by all present and allowing the party speaking to be seen, is considered to be a disclosure in open court. Audio-video communication may be used if neither party objects and the court agrees to its use and has informed the defendant that the defendant has the right to object to its use. The audio-video communication must operate as provided in 46-12-201.

46-16-606 MCA. Reasonable doubt as to which offense convicts only of least offense. When it appears beyond a reasonable doubt that the defendant has committed an offense but there is reasonable doubt as to whether he is guilty of a given offense or one or more lesser included offenses, he may only be convicted of the greatest included offense about which there is no reasonable doubt.

46-16-203 MCA. Form of verdict. (1) The jury shall return a verdict as instructed by the court. The verdict must be unanimous in all criminal actions. The verdict must be signed by the foreman and returned by the jury to the judge in open court.
(2) If there are two or more defendants, the jury, at any time during its deliberations, may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

➔Comment. **Withdrawal of guilty pleas.** The statutory rule in Montana is, "At any time before or after judgment, the court may, for good cause shown, permit the plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted."(46-16-105(2). The statute does not specify a standard for the judge to follow to determine if good cause is shown to grant the motion. The matter is solely within the discretion of the judge, and that decision will not be reversed unless there was abuse of that discretion. It is always necessary to document the reasons for allowing or disallowing the withdrawal of a plea of guilty (46-17-203(2)(b)) enacted in 2005 for the procedure that follows if the court denies a motion to withdraw a guilty plea.

300.212 Sentences.

See 400.900, et seq, Judgment and sentences for adults and 300.505 for juveniles.

300.213 Dismissal of Complaint.

46-13-401 MCA. Dismissal at instance of court or prosecution. (1) The court may, either upon its own motion or upon the application of the prosecuting attorney and in furtherance of justice, order a complaint, information, or indictment to be dismissed. However, the court may not order a dismissal of a complaint, information, or indictment, charging a felony, unless good cause for dismissal is shown and the reasons for the dismissal are set forth in an order entered upon the minutes.

(2) After the entry of a plea upon a misdemeanor charge, the court, unless good cause to the contrary is shown, shall order the prosecution to be dismissed, with prejudice, if a defendant whose trial has not been postponed upon the defendant's motion is not brought to trial within 6 months.

300.214 Presence of Defendant at Trial.

46-16-122 MCA. Absence of defendant from trial. (1) In a misdemeanor case, if the defendant fails to appear in person, either at the time set for the trial or at any time during the course of the trial and if the defendant's counsel is authorized to act on the defendant's behalf, the court shall proceed with the trial unless good cause for continuance exists.

(2) If the defendant's counsel is not authorized to act on the defendant's behalf as provided in subsection (1) or if the defendant is not represented by counsel, the court, in its discretion, may do one or more of the following:

(a) order a continuance;

(b) order bail forfeited;

(c) issue an arrest warrant; or

(d) proceed with the trial after finding that the defendant had knowledge of the trial date and is voluntarily absent.

(3) After the trial of a felony offense has commenced in the defendant's presence, the absence of the defendant during the trial may not prevent the trial from continuing up to and including the return of a verdict if the defendant:

(a) has been removed from the courtroom for disruptive behavior after receiving a warning that removal will result if the defendant persists in conduct that is so disruptive that the trial cannot be carried on with the defendant in the courtroom; or

(b) is voluntarily absent and the offense is not one that is punishable by death.

(4) Nothing in this section limits the right of the court to order the defendant to be personally present at the trial for purposes of identification unless defense counsel stipulates to the issue of identity.

46-16-123 MCA. Absence of defendant on receiving verdict or at sentencing. (1) In all misdemeanor cases, the verdict may be returned and the sentence imposed without the defendant being present.

(2) (a) In all felony cases, the defendant shall appear in person when the verdict is returned or the sentence is imposed unless, after the exercise of due diligence to procure the defendant's presence, the court finds that it is in the interest of justice

that the verdict be returned and the sentence be pronounced in the defendant's absence.

(b) For purposes of subsection (2)(a), the defendant's appearance may be through the use of two-way electronic audio-video communication, allowing all of the participants to be heard in the courtroom by all present and allowing the party speaking to be seen. Audio-video communication may be used if neither party objects and the court agrees to its use and has informed the defendant that the defendant has the right to object to its use. The audio-video communication must operate as provided in 46-12-201.

➔Comment. If you intend to hold a trial "in absentia," be sure that you docket a "finding" as listed in 46-16-122(2)(d)MCA. Here is another example of the necessity for keeping complete and up to date docket entries for each case filed.

300.300 **CIVIL PROCEDURE**

300.301 **Introduction.**

Actions are of two kinds: (a) civil; and (b) criminal. A civil action is pursued by one party against another for the enforcement or protection of a right or the redress or prevention of a wrong. When the violation of a right admits of both civil and criminal remedy, the right to prosecute the one is not merged in the other. (See 27-1-103 MCA). A civil action arises out of: (1) an obligation; (2) an injury.

27-1-105 MCA. Obligation defined. An obligation is a legal duty by which one person is bound to do or not to do a certain thing and arises from:

(1) contract; or

(2) operation of law.

27-1-106 MCA. Injury defined. (1) An injury is of two kinds:

(a) to the person; and

(b) to property.

(2) An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it. Every other injury is an injury to the person.

➔Comment. The statutes quoted in this civil procedure chapter will be justice court procedure sections. City courts follow this same procedure. However, only a portion of the justice court's procedure is followed by the municipal court. The listing of applicable statutes for municipal courts is found at 25-30-101 MCA.

25-5-121 MCA. Names of parties. In a civil action, the party complaining is known as the plaintiff and the adverse party as the defendant. The party prosecuting a special proceeding may be known as the plaintiff and the adverse party as the defendant.

300.302 Jurisdiction.

A judge is not liable for the consequences of any judicial act, if the judge has jurisdiction to perform the act. The orders of the court are not binding if the court does not have jurisdiction. For these reasons the first thing a judge must do when asked to perform a judicial function is to make certain there is statutory and constitutional authority to do what is being requested by the pleadings or the motion presented. Jurisdiction cannot be waived. Jurisdiction statutes are found at:

200.200 — Municipal Court;
200.300 — Justice Court; and
200.400 — City Court.

Case Law. The Montana Supreme Court has made many interpretations of statutes that relate to justice courts' jurisdiction. Two such interpretations are:

(1) *Cashman v. Vickers, 69 M 516, 223 P897 (1924).* The provisions of section 21, Article VIII of the 1889 Constitution, conferring upon justice of the peace courts concurrent jurisdiction with district courts in cases of forcible entry and unlawful detainer actions, is not limited by the provision of section 20 of that article declaring that justice courts shall not have jurisdiction in any case where the debt, claim, etc., exceeds the sum of $300 but that as to forcible entry and unlawful detainer actions, their jurisdiction is unlimited insofar as money demands are concerned.

➔Comment. In the above quote, the constitution numbers and the amount of money involved referred to the 1889 Montana Constitution. The important point is that the dollar amount demanded does not in any way affect jurisdiction in these types of cases.

(2) *State ex rel. Hamshaw v. Justice Court, 108 M 12, 88 P2d 1 (1939),* (1889 Constitution case note). While actions to determine title to real estate are not triable in justice of the peace courts where title becomes important in determining the right of possession in forcible entry, forcible detainer or unlawful detainer actions, evidence thereof as an incident.

Territorial Extent.

> 3-10-304 MCA. Territorial extent of civil jurisdiction. (1) The civil jurisdiction of a justice's court extends to the limits of the county in which it is held, and except as provided in subsection (2), intermediate and final process of a justice's court in a county may be issued to and served in any part of the county.
>
> (2) A summons or a writ of execution of a justice's court may be served in any county of the state.

➔Comment. Although there is no specific statement in the municipal court chapter defining the territorial extent of civil jurisdiction, 3-6-103 MCA lists the jurisdiction for municipal courts. Sections 3-11-102 through 3-11-104 MCA, specify jurisdiction for city courts.

Checklist:

(1) The court must have jurisdiction over the subject matter.

(2) Jurisdiction over the plaintiff is obtained when the action is filed in your court.

(3) Jurisdiction over the defendant is obtained only after the defendant has been properly served with summons or the defendant has voluntarily appeared in your court. (Make certain jurisdiction exists and that the requirements of due process have been met before issuing any orders affecting the rights of the defendant.)

(4) Jurisdiction can be lost by a change of venue, by a dismissal of the action, by notice of appeal, and in other ways.

(5) Make certain jurisdiction still exists before signing an order or performing any judicial acts in regard to the action.

300.303 Venue.

Venue refers to the proper place for the bringing of an action. There may be more than one proper venue. The question of proper venue becomes important when an objection is made that the place where the action is filed is not the proper venue. Rule 3, MJCC Rules of Civil Procedure describes venue.

> 25-31-205 MCA Actions for forcible entry or unlawful detainer. All actions for the recovery of the possession of real property must be commenced in the county in which the real property, or any part thereof, affected by such action or actions is situated.

➔Comment. Always read the applicable statutes or civil rules before deciding on venue motions.

300.304 Change of Venue or Place of Trial.

Rule 3, MJCC Rules of Civil Proc. Place of trial or venue. A. Proper place of trial. The proper place for the trial of an action is called "venue". There may be one or more proper place(s) for the trial of a particular action, and justice and city courts may have concurrent venue under these rules. The proper place for trial is determined by the type of case or the residence of the defendant. If application of this rule to a particular case produces more than one proper venue, the plaintiff may file the case in any one of the proper venues. If the plaintiff does not file in any proper venue, the defendant may move to dismiss the action under subsection B of this rule. If plaintiff does file in a proper venue, either party may move to change venue under subsection C of this rule.

(1) Residence of Defendant.

(a) Venue is always proper in the county (for justice court actions) or city (city court actions) where the Montana defendant, or any one of the Montana defendants, reside(s) at the time the complaint is filed.

(b) If no defendant resides in Montana at the time the complaint is filed, venue is proper in any county (justice court actions) or city (city court actions) in Montana.

(c) (i) A defendant which is a corporation is a Montana resident if it is incorporated in the state of Montana at the time the complaint is filed. The Montana Secretary of State maintains records of incorporation. If the defendant corporation is incorporated in Montana, it shall be deemed to be a resident of each county (justice court actions) or city (city court actions) in which it has a place of business at the time the complaint is filed.

(ii) For a corporate defendant which is not incorporated in Montana, venue is proper in any county or city in Montana.

(d) If there is more than one defendant, a venue that is proper for any defendant is proper for all defendants, even if that venue would not be proper for one of the defendants if sued alone. If an action with two or more defendants is brought in a venue which is not proper for any of the defendants, any of the defendants may move to dismiss the action, without prejudice, for improper venue under Rule 3B.

(2) Additional Proper Venues.

In addition to the county or city of a defendant's residence as set forth in subsection (1), venue is proper as follows:

(a) Actions based on contract or other obligation. When the defendant or all of the defendants reside in a county other than that in which the right of action accrues and the action is for damages for violation of an express or implied contract or for money due on an express or implied contract, debt, note, or account, the action also may be commenced and, subject to the provisions of Rule 3C, may be tried in the county or city in which the contract or obligation must be performed. Unless the contract specifically provides otherwise, the place of performance of the contract or obligation is the county or city in which the payment was to be due or the act constituting the obligation was to be performed.

(b) Actions for damages for injury to person or property. When the action is for damages for injury to person or property, the action also may be commenced and, subject to the provisions of Rule 3C, may be tried, in the county or city where the injury was incurred.

(c) Actions for taking or recovery of personal property. When the action is for the recovery of personal property or its value or for damages for taking or detaining the personal property, the action also may be commenced and, subject to the provisions of Rule 3C, may be tried, in the county or city in which all or any part of the property is found, or in the county or city in which all or any part of the property was taken.

(d) Actions for forcible entry or unlawful detainer. An action for the recovery of the possession of real property may be commenced in the county or city in which all or any part of the property was taken.

B. Improper place of trial.

(1) Dismissal. When the county or city in which the complaint is filed is not the proper venue, and any party moves for dismissal because of the improper venue, the court must dismiss the complaint without prejudice. Any motion for dismissal for improper venue under this subsection must be made at least ten days before trial, or it is waived. A complaint dismissed because of improper venue may be refiled in another county or city upon the payment of the filing fee. If a complaint is filed in an improper venue and is subsequently dismissed under this subsection, the applicable statute of limitations stops running on the date the complaint is filed, and restarts thirty (30) days after the service on the opposing party of the order of dismissal.

(2) Consideration of Venue on Appeal. If a party moves to dismiss a complaint because of improper venue, and the motion is denied, the case shall continue through judgment.

C. Change of Venue

(1) When change of venue permitted. At any time more than ten days before trial, any party may move for and the court may order a change in the place of trial when it appears to the satisfaction of the judge before whom the action is then pending:

(a) by affidavit of either party, that the judge is a material witness for either party;

(b) that, based on affidavit, a jury has been demanded and one or more of the part(y)ies cannot have a fair and impartial trial because of the bias or prejudice of the prospective jurors;

(c) that the judge is disqualified from acting pursuant to Supreme Court rule published at Title 3, chapter 1, part 8, M.C.A.; or

(d) that the judge is sick or unable to act.

(2) Where action to be transferred. When the court orders the place of trial to be changed, the action shall be transferred for trial to a court mutually agreeable to the parties or, if they do not agree, to the nearest appropriate court in which the judge agrees to accept the case.

(3) Papers to be transmitted. After an order has been made transferring the action or proceeding to another court for trial and on payment by the applying party of all accrued costs, the judge ordering the transfer shall immediately transmit to the judge of the court to which the trial is transferred the pleadings and all papers in the action, together with a certified transcript from the docket of the proceedings. The court to which the case is transferred must not charge any additional filing fee.

(4) Jurisdiction of transferee court. From the time the order changing the place of trial is made, the court to which the action or proceeding is transferred has the same jurisdiction over it as though it had been originally commenced in that court.

(5) Notice of time and place of trial pleading. On receipt of the pape rs, pleadings, and transcripts, the judge of the court to which the action or proceeding is transferred shall issue a notice stating the time and place of the trial and mail the notice to the parties at least 10 days before the time fixed for trial. If the defendant has not filed an answer, the court shall order an answer to be filed within 10 days.

300.305 Pleadings.

Rule 7, MJCC Rules of Civil Proc. Pleadings allowed. In justice or city court there may be a complaint, answer counterclaim, and reply to counterclaim. No other pleadings are allowed, except that the court may order a reply to an answer. A "motion" is not a "pleading".

➔Comment. Unlike the rules of procedure for district court, a motion is not a pleading. If a motion to dismiss is filed, the moving party should request an extension of time to file an answer or file the answer timely. NOTE: If only a motion to dismiss is filed without answer or request for extension of time, the plaintiff may request, and a default judgment may be entered against the defendant.

Rule 7A, MJCC Rules of Civil Proc. Complaint defined. The complaint is a concise written statement of the facts constituting the plaintiff's cause of action and the type and amount of relief requested.

Rule 7B, MJCC Rules of Civil Proc. Answer defined. The answer must contain a denial of any or all of the material facts stated in the complaint that the defendant believes to be untrue and also a statement, in plain or direct manner, of any other facts constituting a defense. Any matter not denied shall be deemed admitted.

If an answer is not filed within 20 days after service of the complaint and summons, the plaintiff may request entry of default as provided in Rule 21 of these rules.

Rule 7C, MJCC Rules of Civil Proc. Counterclaim defined. (1) A defendant may file with the answer a counterclaim against the plaintiff. The defendant must file as a counterclaim any claim arising out of the same transaction or occurrence as the complaint, which is within the jurisdiction of the justice or city court, or it is deemed to be waived. The counterclaim must be a concise written statement of the facts constituting the defendant's cause of action and the type or amount of relief requested. Any counterclaim that exceeds the jurisdiction of the justice or city court must be dismissed without prejudice.
(2) If the counterclaim, after being dismissed without prejudice as outside the subject matter jurisdiction of the justice or city court, is filed in the district court, then upon order of the district judge the pending justice or city court action must be transferred to the district court.

Rule 7D, MJCC Rules of Civil Proc. Reply to counterclaim defined. The reply must contain a denial of any or all of the material facts stated in the counterclaim that the plaintiff believes to be untrue and also a statement, in plain or direct manner, of any other facts constituting a defense to the counterclaim. Any matter not denied shall be deemed admitted. If a reply to a counterclaim is not filed within 20 days after service of the counterclaim, the defendant may request entry of default as provided in Rule 21 of these rules.

Rule 7E, MJCC Rules of Civil Proc. Cross claims defined. Cross claims are not allowed in a justice or city court, unless, in accordance with Rule 12 of these rules, justice cannot be otherwise obtained.

300.306 Form of Pleading.

Rule 7F(1), MJCC Rules of Civil Proc. General rules of pleading. Form—pleadings in justice or city court. All pleadings must be in writing and filed with the court. They must be in a form that enables a person of common understanding to know what is intended.

Rule 7F(4), MJCC Rules of Civil Proc. Signing of pleadings. Every pleading of a party represented by an attorney must be signed by that attorney and must state the address and telephone number of the attorney. A party who is not represented by an attorney shall sign the pleading and state the party's address and telephone number.

Rule 8, MJCC Rules of Civil Proc. Amendment of pleadings. A. When allowed. Each party may amend it's pleading one time, without leave of court, if the amended pleading is filed within the following times:

(1) The plaintiff's amended complaint, if any, must be filed no later than 10 days after defendant's answer to the original complaint if served upon plaintiff.

(2) The defendant's amended answer, if any, must be filed no later than 10 days after the filing of the original answer. The amended answer may add a counterclaim consistent with Rule 7C. Further amendments may be granted only upon written consent of the opposing party or upon leave of the court for good cause shown.

B. Answer to amended complaint. A defendant shall file and serve an answer within 10 days of the service of an amended complaint.

C. Reply to amended counterclaim. A plaintiff must file and serve a reply within 20 days after service of an amended counterclaim.

D. Limit. No other pleading to an amended pleading may be allowed, except that the court may order a reply to the amended answer.

300.307 Parties.

Rule 10, MJCC Rules of Civil Proc. Naming of parties to action. A. Parties.

(1) Actions must be prosecuted or defended in the name of the person who benefits from or is responsible for the satisfaction of any judgment rendered in justice or city court. That person is considered the real party in interest.

(2) A personal representative, administrator, guardian, conservator, fiduciary, bailee, trustee of an express trust, party with whom or in whose name a contract has been made for the benefit of another, or party authorized by statute may be named as a party to an action. In such a case, the pleadings must contain information concerning the circumstances or statute that enables the person to appear in the party's name and not in the name of the person for whose benefit the action is prosecuted or defended.

B. Amendment — Dismissal. Upon motion of the opposing party or upon the court's own motion, the court must require an amendment of the pleadings to name the real party in interest. If the real party in interest is not named within 5 days, the action will be dismissed without prejudice.

Rule 11 of the Montana Justice and City Court Rules of Civil Procedure explains Substitution of parties and that dismissal for Failure to make substitution must be without prejudice.

Rule 12 covers Joinder of claims and parties necessary for just adjudication. It is in this rule that justice or city courts are prohibited from handling class actions.

25-31-601 MCA. Who may act as attorney. Parties in justice's court may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney.

Guardian ad litem.

When suit is brought by or against a minor or an incompetent person, it must be brought or defended in the name of a guardian or Guardian ad litem. If there is no court appointed guardian, a Guardian ad litem is appointed by the judge for the purpose of this action only. 25-31-602 MCA explains how the judge can appoint this guardian.

➔Comment. A parent may not be a guardian for this purpose unless appointed by the court pursuant to 25-31-602 MCA.

300.308 Summons.

When a complaint is filed, the court must issue a summons which, when properly served on the defendant, gives the court jurisdiction over the defendant.

> Rule 4B, MJCC Rules of Civil Proc. Jurisdiction of Persons. (1) Subjection to jurisdiction. All persons are subject to the jurisdiction of a justice or city court who reside or are found within the State of Montana.
> (2) Acquisition of jurisdiction. A justice or city court may acquire jurisdiction over a person through service of process as provided in these rules, through the voluntary appearance in an action by a person, either personally or through an attorney or any other authorized officer, agent, or employee. Each defendant must be served separately.
>
> Rule 4C, MJCC Rules of Civil Proc. PROCESS. (1) Summons — issuance. Upon the filing of the complaint, the judge or the clerk shall issue a summons upon request of a plaintiff. Separate or additional summons must be issued, upon request, against any parties designated in the original action or against any additional parties who may be brought into the action.
> (2) Summons — form. The summons must be directed to the defendant and signed by the judge or clerk and must contain:
>
> (a) the title of the court, the name of the county and city in which the action is commenced, and the names of the parties to the action;
> (b) a direction that the defendant appear and file a written answer in the justice or city court within 20 days after service of summons and complaint, exclusive of the day of service, or such other period as may be specified by law, and serve a copy upon the plaintiff or the plaintiff's attorney.
> (c) a statement that upon failure to appear and answer or assert a counterclaim, the plaintiff may take judgment against the defendant by default for the relief demanded in the complaint; and
> (d) the name, address, and telephone number of the plaintiff or the plaintiff's attorney.
>
> (See Benchbook for example of form as specified by this rule)

300.309 Service of Process.

Rule 4D, MJCC Rules of Civil Procedure is an extensive rule explaining service of persons. This rule requires that the plaintiff furnish the person making service with such copies as are necessary. This service shall be made by a sheriff of the county where the party to be served is found, by a deputy, by a constable authorized by law, or by any other person 18 years of age or older who is not a party to the action. (See Rule 4D(1)(a))

➔Comment. Rule 4D(4) also allows the service of summons by publication. This subsection explains when publication is allowed and the proper procedure for implementing service by publication.

300.310 Proof of Service.

Rule 4D(8), MJCC Rules of Civil Proc. Proof of service. (a) Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:

(i) if served by a constable or other officer, a certificate of service; or

(ii) if served by any other person, an affidavit of service; and

(iii) the written admission of the defendant showing the date and place of service.

(b) The certificate or affidavit of service mentioned in subsection (8)(a) must state the time, date, and manner of service.

➔Comment. Rules 4D(8), 4D(9), and 4D10 set forth the requirements for proof of service, contents of affidavit of service, and the procedure if only some of the defendants are served. Proper service and the proof of service should be established before the case goes forward to judgment.

300.311 Time for Answer.

25-31-406 MCA. Time for answer or appearance. The time specified in the summons for the appearance of the defendant must be as follows:

(1) if an order of arrest is endorsed upon the summons, immediately;

(2) in all other cases, the summons must provide that the defendant shall answer in writing, file the answer, and serve a copy upon the plaintiff or the plaintiff's attorney within 20 days after service of the summons, exclusive of the day of service, and in case of the defendant's failure to appear or answer,

judgment will be taken against the defendant by default for the relief demanded in the complaint.

300.312 Setting Pretrial and Trial.

Once the necessary pleadings have been filed and motions ruled upon, a pretrial or trial may be set. Rule 14, MJCC Rules of Civil Proc., outlines in detail the objectives and procedure for pretrial conferences. The outlines for bench and jury trial, and a discussion of each, are found in:

Section 400 — Trial: Bench and Jury.

➔Comment. The 2001 legislature enacted 25-30-109, 25-31-710, and 25-35-609 MCA regarding pretrial conferences and appearance by telephone conference. These sections should be referred to as well as Rule 14, MJCC Rules of Civil Procedure.

300.313 Judgment.

A "judgment" is an order of a court determining the ultimate rights of the parties to an action, or disposing of an action in some other manner.

> Rule 21, MJCC Rules of Civil Proc. Relief from judgment. A. GROUNDS. A judge shall enter judgment in the docket of the court in the following circumstances:
>
> (1) Offer to compromise before trial. If the defendant, at any time before the trial, offers in writing to allow judgment to be taken against the defendant for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued. However, if the plaintiff does not accept the offer before the trial and fails to recover in the action a sum in excess of the offer, the plaintiff cannot recover costs. In such a case, costs must be adjudged against the plaintiff and, if the plaintiff recovers, be deducted from the plaintiff's recovery. The offer and failure
>
> (2) Judgment of dismissal without prejudice. Judgment that the action be dismissed without prejudice to a new action may be entered with costs against the plaintiff in the following cases:
>
> (a) when the plaintiff voluntarily dismissed the action, at or before the close of the plaintiff's evidence, when there is no counterclaim;
>
> (b) when the plaintiff fails to amend the complaint within the time allowed by the court;
>
> (c) for proper venue under Rule 3B of these rules.
>
> (3) Judgment by confession. Judgment by confession must be as provided for in Title 27, chapter 9.

(4) Judgment on pleadings. After the pleadings are closed but within a time as not to delay the trial, any party may move for judgment on the pleadings. Matters outside the pleadings may not be presented to the court. A court may grant judgment on the pleadings for either party. The court may only grant judgment on the pleadings if the pleadings themselves construed in the light most favorable to the party opposing the judgment, show that it would be impossible for the party against whom the judgment is entered to prevail at trial.

(5) Summary judgment. Either party may move for, and the judge may grant, summary judgment on one or more of the issues raised by the pleadings. In so moving, responding to the motion, and ruling on the motion, the parties and the court shall follow the procedures specified in Rule 56 M.R. Civ. P.

(6) Upon verdict. After a trial by jury, the judge shall enter judgment at once in conformity with the verdict.

(7) After trial by judge. When the trial is by the judge, the judge shall enter judgment within 30 days.

(8) By default. (a)(1) When a party against whom a judgment for affirmative relief is sought has failed to answer or reply as provided by these rules upon written motion by the plaintiff or counterclaiming defendant, the judge or clerk must enter the default against such party.

(2) When a default has been entered against a defendant for failure to answer and if the plaintiff's claim against the defendant is for a sum certain or for a sum that can by computation be made certain, upon the plaintiff's written request stating the amount due, the judge or clerk must enter judgment for that amount and costs against the defaulted defendant.

(b) If in order to enable the court to enter judgment or to carry it into effect it is necessary to determine the amount of damages or to establish the truth of any allegation by evidence, the court may conduct hearings it considers necessary and proper.

B. MULTIPLE DEFENDANTS: The court shall enter judgment only against those over whom it has obtained jurisdiction.

➔Comment: If you have a question regarding procedure, the Montana Justice and City Court Rules of Civil Procedure govern proceedings for civil actions. These rules are listed in Title 25, chapter 23, Part: (Rule #).

300.314 Relief from Judgment.

Rule 22, MJCC Rules of Civil Proc. Relief from judgment. A. Relief. A judge may, on such terms as may be just and on the payment of costs, relieve a party from any judgment taken against the party by mistake, inadvertence, surprise, or excusable neglect, but the application for relief must be made within 30 days after entry of the judgment and upon an affidavit showing good cause for it. The party applying for relief shall serve the application and give notice of hearing to all other parties. The court shall set a hearing within 10 days after receipt of the application.

B. Clerical mistakes. Clerical mistakes or errors arising from oversight or omission in pleadings, judgments, orders, and other parts of the record may be corrected by the court at any time on its own initiative or on the motion of any party and after any notice the court may order.

300.315 Amendment of Judgment.

3-1-111 MCA. Powers respecting conduct of business. Every court has power to:
(1) preserve and enforce order in its immediate presence;
(2) enforce order in the proceedings before it or before a person or persons empowered to conduct a judicial investigation under its authority;
(3) provide for the orderly conduct of proceedings before it or its officers;
(4) compel obedience to its judgments, orders, and process and to the orders of a judge out of court in an action or proceeding pending therein;
(5) control, in furtherance of justice, the conduct of its ministerial officers and of all other persons in any manner connected with a judicial proceeding before it in every other matter appertaining thereto;
(6) compel the attendance of persons to testify in an action or proceeding pending therein in the cases and manner provided in this code;
(7) administer oaths in an action or proceeding pending therein and in all other cases where it may be necessary in the exercise of its powers and duties;
(8) amend and control its process and orders so as to make them conformable to law and justice.

300.316 Execution, Supplemental Proceedings, and Exemptions.

Rule 23, MJCC. Rules of Civil Proc. Execution. A. HOW ENFORCED.

(1) By justice or city court. A judgment may be enforced within the boundaries of the state by a writ of execution issued by the justice or city court or the clerk thereof.

(2) Issuance of execution by judge or clerk of justice or city court. From the time of docketing in the clerk's office, execution may be issued thereon by the judge or clerk to the sheriff, constable, or levying officer of any county in the state.

B. TIME. The party in whose favor judgment is entered may request a writ of execution for its enforcement against the personal property of the judgment debtor. At any time within 10 years from the entry of judgment, the justice of the peace or city judge who entered the judgment or the successor in office or the clerk shall issue the writ upon request.

C. FORM AND CONTENT OF EXECUTION. Determination of the amount of the judgment outstanding and the type, kind, description, and location of the personal property of the judgment debtor is the exclusive duty of the judgment creditor. The execution must be directed to the sheriff, a constable, or a levying officer of the county and must be subscribed by the judge or clerk and bear the date of its issuance. The execution must contain the following information and may be in the following form:

(See Benchbook for example of form as specified by this rule)

D. RETURN OF EXECUTION. The writ of execution shall remain in effect for 120 days from the date of receipt by the sheriff or levying officer and may be served multiple times during that period at the direction of the judgment creditor. The execution must be returned to the court:

(1) not less than 10 days nor more than sixty (60) days after receipt of the recovery by the sheriff or levying officer;

(2) if the judgment creditor has requested the return of the writ;

(3) at the written direction of the officer, agent, or attorney who sent the writ, the sheriff or levying officer may return the writ to the requesting party.

E. RENEWAL. If a writ of execution is returned unsatisfied or partially satisfied, a new writ may be issued for the unsatisfied portion of the judgment, together with costs and interest. No new or additional writ may be issued until any outstanding issued writ, together with the return thereon, is returned to the issuing justice or city court.

F. SUPPLEMENTAL PROCEEDINGS. Proceedings supplementary to execution set out in 25-13-502, 25-14-101 through 25-14-105, 25-14-107, and 25-14-108 are applicable to justice or city courts, the word "constable" being substituted for the word "sheriff" and the words "justice or city judge" being substituted for the word "judge".

300.317 Costs.

A judge may be asked to award the winning or prevailing party "court costs" and therefore it is necessary to understand what court costs are and when they can be awarded. This term does not refer to the costs of the taxpayers of operating the court but rather to "costs" that one or both of the litigants have paid out for the costs of a specific case.

Court costs can be such things as filing fees, witness fees, juror fees, and the fees paid for service of papers.

25-10-201 MCA. Costs generally allowable. A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows:

(1) the legal fees of witnesses, including mileage, or referees and other officers;

(2) the expenses of taking depositions;

(3) the legal fees for publication when publication is directed;

(4) the legal fees paid for filing and recording paper and certified copies thereof necessarily used in the action or on the trial;

(5) the legal fees paid stenographers for per diem or for copies;

(6) the reasonable expenses of printing papers for a hearing when required by a rule of court;
(7) the reasonable expenses of making a transcript for the supreme court;
(8) the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and
(9) such other reasonable and necessary expenses are taxable according to the course and practice of the court or by express provision of law.

➔Comment: *Hammer v. Justice Court, 222 M 35, 720 P2d 281, 43 St. Rep. 1040 (1986),* stated that in regard to prepayment of jurors' fees, both Rule 14F, Rules of Civil Procedure (Superseded) and 3-15-203(2) were unconstitutional. "... in civil actions, the jurors' fees must be paid by the party demanding the jury and taxed as costs against the losing party, ..."

3-15-203 MCA. Fees in courts not of record and coroner inquests. (1) a jury panel member in civil actions, criminal actions, and coroner inquests is entitled to a fee of $12 per day for attendance before a court not of record and a mileage allowance, as provided in 2-18-503, for traveling each way between the member's residence and the court. A jury panel member selected for a case is entitled to an additional $13 per day while serving.
(2) In civil actions, the jurors' fees must be paid by the party demanding the jury and taxed as costs against the losing party.
(3) A juror who is excused from attendance upon the juror's own motion on the first day of appearance in obedience to a notice or who has been summoned as a special juror and not sworn in the trial of the case shall forfeit per diem and mileage.

Municipal Court Judgments and Costs.

25-30-106 MCA. Judgments. In civil causes, judgments in municipal court shall be made and entered as in district court and shall be of like tenor and effect.

25-30-107 MCA. Costs. The same costs shall be allowed as are allowed in justice's courts and shall be taxed and retaxed as in district court, 24 hours being allowed for filing memorandum of costs.

➔Comment: The prevailing party in justice's court is entitled to cost of the action and also of all proceedings taken by the party in aid of execution issued upon any judgment recovered therein. The judge must tax and include in the judgment the costs allowed by law to the prevailing party.

In a justice's or city court, no cost bill need be filed, but the judge must tax the same and make an itemized statement of all the costs incurred by each party in his docket.

Rule 17, MJCC Rules of Civil Proc. Costs. Jury fees and other costs as defined in 3-15-203 MCA, and Title 25, chapter 10, MCA, must be taxed as costs against the losing party as determined by the court, following the procedures set forth in Title 25, chapter 10.

➔Comment: Attorney fees are not allowable costs unless the statute specifically provides for attorney fees in certain cases.

Exception to costs being awarded.

Rule 21A(1), MJCC, Rules of Civil Proc. Offer to compromise before trial. If the defendant, at any time before the trial, offers in writing to allow judgment to be taken against the defendant for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued. However, if the plaintiff does not accept the offer before the trial and fails to recover in the action a sum in excess of the offer, the plaintiff cannot recover costs. In such a case, costs must be adjudged against the plaintiff and, if the plaintiff recovers, be deducted from the plaintiff's recovery. The offer and failure to accept may not be given in evidence or affect the recovery except as to costs.

300.318 Interpleader Actions.

25-31-119 MCA. Interpleader actions. (1) As used in this chapter, interpleader actions determine the rights of rival claimants to a fund held by a disinterested party and may be maintained in the justice's court when any person appears before a justice of the peace and executes an affidavit setting forth the nature and basis of the claim.
(2) The person filing the interpleader affidavit shall deposit the funds with the justice of the peace at the same time the interpleader affidavit is filed.
(3) The interpleader must be substantially in the following form: . . .

(See Benchbook for example of form as specified by this statute)

300.400 SMALL CLAIMS ACTIONS.

300.401 Small Claims Division.

There are two types of small claims courts provided in the statutes. One is provided for in the district courts. The second is a division of the justice court. The legislature has required the creation of a small claims division in every justice's court. Any reference to the small claims court should be to Title 25, chapter 35 MCA.

➔Comment: The creation of the small claims division within each justice court is statutory. There is no discretion! Each justice court in Montana must accept and file cases presented to it. There are no small claims courts in city or municipal courts.

3-10-1001 MCA. Purpose. It is the purpose of this part and Title 25, chapter 35, to provide a speedy remedy for small claims and to promote a forum in which such claim may be heard and disposed of without the necessity of a formal trial.

3-10-1002 MCA. Creation. There is established within the jurisdiction of each justice's court in this state a small claims division to be known as the "small claims court."

3-10-1003 MCA. Location — hours. The small claims division of justice's court shall be located at the same place as the justice's court and shall be open during the same hours as the justice's court.

3-10-1004 MCA. Jurisdiction — removal from district court. (1) The small claims court has jurisdiction over all actions for the recovery of money or specific personal property when the amount claimed does not exceed $3,000, exclusive of costs, and the defendant can be served within the county where the action is commenced.
(2) A district court judge may require any action filed in district court to be removed to the small claims court if the amount in controversy does not exceed $3,000. The small claims court shall hear any action so removed from the district court.

25-35-504 MCA. Venue. Proper venue for actions commenced in the small claims court is the same as that provided by law for civil actions commenced in justice's court.

300.402 Parties — Representation.

25-35-505 MCA. Parties — representation. (1) Parties in the small claims court may be individuals, partnerships, corporations, unions, associations, or any other kind of organization or entity, except the state or any agency of the state.
(2) A party may not be represented by an attorney unless all parties are represented by an attorney in a small claims court.
(3) Individuals may represent themselves in a small claims court. A partnership may be represented by a partner or one of its employees. A union may be represented by a union member or union employee. A corporation may be represented by one of its directors, officers, or employees. An association may be represented by one of its members or by an employee of the association. Any other kind of organization or entity may be represented by one of its members or employees.

(4) Except as provided in subsection (5), only a party, natural or otherwise, who has been a party to the transaction with the defendant for which the claim is brought may file and prosecute a claim in the small claims court.
(5) A party may not file an assigned claim in the small claims court unless it has been assigned pursuant to 27-1-718.
(6) Except for claims under 27-1-718, a party may not file more than 10 claims in any calendar year.
(7) Notwithstanding any other provision of this section, a personal representative of a decedent's estate, a guardian, or a conservator may be a party in the small claims court.

300.403 Procedure.

The procedure in small claims court is set forth in Title 25, chapter 35 of the Montana Code Annotated.

A action is started when a party appears before the justice of the peace and executes a sworn small claims complaint in substantially the same form as set forth in 25-35-602.

(See Benchbook for example of form as specified by this statute)

25-35-608 MCA. Fees. (1) The clerk of the justice's court shall collect a fee of:
(a) $10 from the plaintiff upon the filing of the sworn complaint; and
(b) $5 from the defendant upon the defendant's appearance and contesting of the complaint or execution of a counterclaim.
(2) The laws relating to paupers' affidavits apply to actions before the small claims court.

25-35-603 MCA. Hearing Date. The date for the appearance of the defendant to be set forth in the order must be determined by the justice of the peace or by the justice's clerk and may not be more than 40 or less than 10 days from the date of the order. Service of the order and a copy of the sworn complaint must be made upon the defendant not less than 5 days prior to the date set for the defendant's appearance by the order. If the order is not timely served, the plaintiff may have a new appearance date set by the justice of the peace or the justice's clerk and a new order issued and delivered to the sheriff, constable, or other process server. If necessary, repeated orders may be issued at any time within 1 year after the commencement of the action.

The summons may be served in the same manner as any civil summons and the original returned to the small claims court.

At any time within 10 days after the service of the complaint/order on the defendant, the defendant may remove the action to the justice court. Notice of the removal must be given to all parties. No new pleadings need to be filed. If the plaintiff had paid a filing fee in small claims court, no new fee is required from the plaintiff in justice court. The defendant's failure to remove the action to justice court is considered a waiver of right to a trial by jury and representation by an attorney.

25-35-606 MCA sets forth the rules regarding a counterclaim by the defendant. A form is provided at the court. A counterclaim must be filed and served on the plaintiff, in the same manner as the notice to the defendant, at least 72 hours before the time set for the hearing. A counterclaim must arise out of the same transaction or occurrence that is the subject matter of the complaint. The counterclaim must not exceed $2,500, and if it does, the small claim court's jurisdiction over the plaintiff's claim is not defeated, but the court shall limit its determination of the counterclaim to the question of whether the plaintiff's claim is discharged thereby, leaving the defendant to prosecute the balance of that claim in an appropriate justice or district court action.

(See Benchbook for example of form as specified by this statute)

No form or pleading other than the complaint, the order of the court/notice to the defendant, and the counterclaim of the defendant, if one is filed, is allowed.

➔Comment: No answer is provided for, however, the defendant may file a counterclaim (See 25-35-607 MCA).

The court proceedings shall be informal. The plaintiff and the defendant may offer evidence in their behalf by witnesses appearing at such hearing in the same manner as in other cases arising in a justice's court or by written evidence, and the judge may direct the production of evidence as the judge considers appropriate.

All civil actions tried in a small claims court shall be recorded either electronically or stenographically.

Upon the conclusion of the case tried to the court, the justice shall make the findings and enter judgment.

Appeals from small claims actions are as follows:

25-35-803 MCA. Appeals to district court — commencement and scope. (1) If either party is dissatisfied with the judgment of the small claims court, the party may appeal to the district court of the county where the judgment was rendered. An appeal must be commenced by giving written notice to the small claims court and serving a copy of the notice of appeal on the adverse party within 10 days after entry of judgment.
(2) There may not be a trial de novo in the district court. The appeal must be limited to questions of law.

(Appeals procedure is also found at 300.501)

➔Comment. The law says to make findings. This means, for the record, that the judge will enumerate those items found to be a "fact". For example: (1) A contract existed and has been proven. (2) Defendant breached that contract by .... (whatever action or lack of action there was). (3) Plaintiff was damaged by this breach of contract. (4)The amount of plaintiff's damages is set at $..... THEREFORE, IT IS ORDERED THAT JUDGMENT BE ENTERED FOR THE PLAINTIFF in the amount of $..... plus costs. It is not necessary to draft formal findings of facts.

➔Comment. Only cases for the recovery of money or specific personal property can be filed as a small claims action. Landlord/Tenant actions that include possession of the rental property may not be filed. Jurisdiction for small claims actions is much more limited than the jurisdiction for a civil action filed in a justice court.

300.404 Interpleader Actions.

25-35-508 MCA. Interpleader actions. (1) As used in this chapter, interpleader actions determine the rights of rival claimants to a fund held by a disinterested party and may be maintained in the small claims division of the justice's court when any person appears before a justice of the peace and executes an affidavit setting forth the nature and basis of the claim.
(2) The person filing the interpleader affidavit shall deposit the funds with the justice of the peace at the same time the interpleader affidavit is filed.
(3) The interpleader must be substantially in the following form: . . . .

(See Benchbook for example of form specified by this statute)

25-1-401 MCA. Deposit of money in lieu of undertaking. In all cases in which an undertaking or bond with sureties is required by the provisions of this code, the plaintiff or defendant may deposit with the clerk of the court, justice of the peace, or city judge, as appropriate, a sum of money equal to the amount required by the

undertaking or bond, which must be taken as security in the place of the undertaking or bond. At any time, the deposit may be withdrawn by the party making it upon giving the undertaking with sufficient sureties as required by law, approved by the clerk, justice, or judge, upon notice to the adverse party or the adverse party's attorney, who may object to the sufficiency of the sureties in the same manner as though the undertaking were filed in the first instance.

25-31-115 MCA. In civil cases arising in justices' courts wherein an undertaking is required by this chapter, the plaintiff or defendant may deposit with said justice a sum of money equal to the amount required by said undertaking, which said sum of money shall be taken as security in place of said undertaking.

300.500 OTHER PROCEEDINGS.

300.501 Appeals/Appeal Procedure — Criminal Procedure — Civil — Small Claims.

Criminal Actions:

46-17-311 MCA. Appeal from justices', municipal, and city courts. (1) Except as provided in 46-17-203(2)(b) or subsection (4) of this section and except for cases in which legal issues are preserved for appeal pursuant to 46-12-204, all cases on appeal from a justice's or city court must be tried anew in the district court and may be tried before a jury of six selected in the same manner as for other criminal cases. An appeal from a municipal court to the district court is governed by 3-6-110, and an appeal from a justice's court of record is governed by 3-10-115.

(2) The defendant may appeal to the district court by filing written notice of intention to appeal within 10 days after a judgment is rendered following trial or the denial of the motion to withdraw a plea as provided in 46-17-203(2)(b). In the case of an appeal by the prosecution, the notice must be filed within 10 days of the date that the order complained of is given. The prosecution may appeal only in the cases provided for in 46-20-103.

(3) Within 30 days of timely filing the notice of appeal, the court shall transfer the entire record of the court of limited jurisdiction to the district court. The court of limited jurisdiction has no duty to transmit the record if the notice of appeal is not timely filed. The defendant may petition the district court to order the record transmitted upon a showing of good cause for failure to timely file the notice of appeal.

(4) A defendant may appeal a justice's court, other than a justice's court of record, or city court revocation of a suspended sentence to the district court. The district court judge shall determine whether the suspended sentence will be revoked. A jury trial is not available in a sentence revocation procedure.

(5) If, on appeal to the district court, the defendant fails to appear for a scheduled court date or meet a court deadline, the court may, except for good cause shown, dismiss the appeal on the court's own initiative or on motion by the prosecution and the right to a jury trial is considered waived by the defendant. Upon dismissal, the appealed judgment is reinstated and becomes the operative judgment.

3-10-115. Appeal to district court from justice' court of record~~d~~ record on appeal. (1) A party may appeal to district court a judgment or order from a justice's court of record. The appeal is confined to review of the record and questions of law, subject to the supreme court's rulemaking and supervisory authority.

(2) The record on appeal to district court consists of an electronic recording or stenographic transcription of a case tried, together with all papers filed in the action.

(3) The district court may affirm, reverse, or amend any appealed order or judgment and may direct the proper order or judgment to be entered or direct that a new trial or further proceeding be had in the court from which the appeal was taken.

(4) Unless the supreme court establishes rules for appeal from a justice's court of record to the district court, the Montana Uniform Municipal Court Rules of Appeal to District Court, codified in Title 25, chapter 30, apply to appeals to district court from the justice's court of record.

➔Comment: As far as the defendant is concerned, the appeal is "perfected" as soon as the notice of appeal is filed. The statute does not require any notice to the county or city attorney, but the court should make certain that the prosecutor is notified. **Please note** that the defendant is allowed a jury trial in both the justice or city court in the district court. The defendant is no longer limited on only one trial by jury.

46-17-404 MCA. Appeals. (1) A party may appeal to district court from a judgment of municipal court.

(2) Appeal from a municipal court may be limited by requiring by ordinance that a minimum amount in controversy, not to exceed $200, be met before the district court has jurisdiction to hear the appeal, except:

(a) if the judgment of the municipal court includes incarceration, no minimum amount in controversy may be required for appeal; and

(b) upon petition by an aggrieved party, the district court may, in the interests of justice, accept appeal jurisdiction not withstanding the amount in controversy.

46-20-103 MCA. Scope of appeal by state. (1) Except as otherwise specifically authorized, the state may not appeal in a criminal case.
(2) The state may appeal from any court order or judgment the substantive effect of which results in:
(a) dismissing a case;
(b) modifying or changing the verdict as provided in 46-16-702(3)(c);
(c) granting a new trial;
(d) quashing an arrest or search warrant;
(e) suppressing evidence;
(f) suppressing a confession or admission;
(g) granting or denying change of venue; or
(h) imposing a sentence that is contrary to law.

➔Comment: This statute applies to city courts as well.

46-20-104 MCA. Scope of appeal by defendant. (1) An appeal may be taken by the defendant only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant.
(2) Upon appeal from a judgment, the court may review the verdict or decision and any alleged error objected to which involves the merits or necessarily affects the judgment. Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-701(2).

Contents of Record. In a justice's court established as a court of record, the appeal procedure is set out in 3-10-115. Otherwise, because the justice or city court is not a court of record, the appeal to the district court will mean that the case will be tried de novo (a new trial). The testimony from the justice or city is not transmitted to the district court as part of the record on appeal. The Montana code does not define the contents of the record on appeal but the Montana Supreme Court in the case of *In re Graye, 36M. 394* defined the record with these words:

"The original files, together with a copy of the docket minutes, constitute the record on appeal."

The record on appeal does include all exhibits introduced into evidence. The statutes do not set forth who has the burden to prepare the record on appeal, but because it consists only of matters in the hands of the judge, there is no doubt the judge must prepare the record. The party appealing has the burden to make the proper motion for the appeal and to post bail if any is required by the court.

Once the notice of appeal is filed, the judge must transmit the appeal to the district court within 30 days. If the defendant has been incarcerated for failure to post bail, transmit the record as quickly as possible. When transmitting the record on appeal, the judge shall add a certificate stating that the record is true and complete. Any appeal bail must be transmitted with the record.

> 46-9-107 MCA. Release or detention pending appeal— revocation — sentencin g hearing. A person intending to appeal from a judgment imposing a fine only or from any judgment rendered by a justice's court or city court must be admitted to bail. The court shall order the detention of a defendant found guilty of an offense who is awaiting imposition or execution of sentence or a revocation hearing or who has filed an appeal unless the court finds that, if released, the defendant is not likely to flee or pose a danger to the safety of any person or the community.

A sample form, found in the Benchbook, contains a space where the judge can set forth the amount of bail required. This obviously includes the option of a release on one's own recognizance.

The Montana Supreme Court in *State ex. Rel. Abbitt v. Justice Court Lake Co.*, held that there is no requirement in the law for an appeal bond to be posted by the defendant to perfect the appeal. A defendant has a right to be admitted to bail either in the justice or city court before the appeal is perfected, or in the district court after the appeal is perfected. The defendant must qualify for bail in accordance with the provisions of section 46-9-107 MCA, and is not to be confused with an appeal bond, for which there is no statutory provision.

➔Comment: An appeal by either party must be made within 10 days of judgment. Remember that the time starts to run at the oral pronouncement of the judgment in open court.

➔Comment: Notice that the times allowed for action are reversed. In a criminal appeal, an appeal must be filed within 10 days and the judge has 30 days to transmit the record. In a civil action, the appellant has 30 days to file the appeal and the judge has 10 days to take the case to district court.

Civil Actions.

> 25-33-102 MCA. Time for appeal. Any party dissatisfied with the judgment rendered in a civil action in a city or justice's court may appeal therefrom to the district court of the county at any time within 30 days after the rendition of the judgment.

25-33-103 MCA. How appeal taken. The appeal is taken by serving a copy of the notice of appeal on the adverse party's attorney and by filing the original notice of appeal with the justice or judge. The order of serving and filing is immaterial.

25-33-104 MCA. Papers to be transmitted. Upon the filing of the notice of appeal and the undertaking when required by 25-33-201, 25-33-203, and 25-33-205, the justice or judge shall, within 10 days, upon the payment of the fees for filing, transmit to the clerk of the district court a certified copy of the docket, the pleadings, all notices, motions, and other papers filed in the cause, the notice of appeal, and the undertaking. The justice or judge may be compelled by the district court, by an order entered upon motion, to transmit the papers and may be fined for neglect or refusal to transmit the papers. A certified copy of the order may be served on the justice or judge by the party or the party's attorney.

25-33-201 MCA. Undertaking an appeal. (1) Except as provided in subsection (4), an appeal from a justice's or city court is not effectual for any purpose unless an undertaking is filed, with two or more sureties, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money. The undertaking must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from and all costs if the appeal is withdrawn or dismissed or the amount of any judgment and all costs that may be recovered against the appellant in the action in the district court.

(2) Except as provided in subsection (4), an appeal from a justice's or city court is not effectual for any purpose unless an undertaking is filed, with two or more sureties, in a sum equal to twice the value of the property, including costs, when the judgment is for the recovery of specific personal property. When the action is for the recovery of specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from and obey the order of the court made in the action if the appeal is withdrawn or dismissed or pay any judgment and costs that may be recovered against the appellant in the action in the district court and obey any order made by the court in the action.

(3) Except as provided in subsection (4), when the judgment appealed from directs the delivery of possession of real property, the execution of the judgment cannot be stayed unless a written undertaking is executed on the part of the appellant, with two or more sureties, to the effect that:

(a) during the possession of the property by the appellant, the appellant will not commit or suffer to be committed any waste on the property; and

(b) if the appeal is dismissed or withdrawn or the judgment is affirmed or judgment is recovered against the appellant in the action in the district court, the appellant will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession of the property or the appellant will pay any judgment and costs that may be recovered against the

appellant in the action in the district court, not exceeding a sum to be fixed by the justice or judge of the court from which the appeal is to be taken, which sum must be specified in the undertaking.
(4) When the appealing party is determined by the court to be indigent, the district court shall waive the undertaking requirements of this section.

25-33-202 MCA. Undertaking when prevailing party appeals. If the party in whose favor the judgment is rendered appeals, the undertaking must be in the sum of $100 and conditioned that the party will pay all costs that may be awarded against the party and obey any order of court made in the action.

25-33-207 MCA. Defective undertaking. No appeal shall be dismissed for insufficiency of the undertaking thereon or for any defect or irregularity therein if a good and sufficient undertaking be filed in the district court at or before the hearing of the motion to dismiss the appeal, which undertaking must be approved by the district court judge.

Rule 24, MJCC Rules of Civil Proc. Appeal to district court. Appeals from a justice or city court to a district court are governed by Title 25, chapter 33, except that the undertaking on appeal, when the judgment is for the payment of money, may be in the form of an appeal bond or a deposit of money in a sum equal to the amount of the judgment, including costs.

Small Claims Action.

25-35-803 MCA. Appeal to district court— commencement and scope . (1) If either party is dissatisfied with the judgment of the small claims court, the party may appeal to the district court of the county where the judgment was rendered. An appeal must be commenced by giving written notice to the small claims court and serving a copy of the notice of appeal on the adverse party within 10 days after entry of judgment.
(2) There may not be a trial de novo in the district court. The appeal must be limited to questions of law.

25-35-804 MCA. Record on appeal. (1) Within 30 days of the notice, the entire record of the small claims court proceedings must be transmitted to the district court or the appeal must be dismissed. It is the duty of the appealing party to perfect the appeal.
(2) When notice of appeal is filed, the justice shall forward the electronic recording or transcript of the stenographic record of the proceedings to the district court, together with the original papers filed, certified by the justice to be accurate and complete. When the record is transferred to the clerk of the district court, the justice shall notify the parties in writing.

➔Comment: It is the duty of the appealing party to perfect the appeal. See MCA 25-1-401 and 25-31-115 regarding provisions for undertaking on appeals. Advise the appellant that a filing fee must be paid to the clerk of the district court.

25-1-401 MCA. Deposit of money in lieu of undertaking. In all cases in which an undertaking or bond with sureties is required by the provisions of this code, the plaintiff or defendant may deposit with the clerk of the court, justice of the peace, or city judge, as appropriate, a sum of money equal to the amount required by the undertaking or bond, which must be taken as security in the place of the undertaking or bond. At any time, the deposit may be withdrawn by the party making it upon giving the undertaking with sufficient sureties as required by law, approved by the clerk, justice, or judge, upon notice to the adverse party or the adverse party's attorney, who may object to the sufficiency of the sureties in the same manner as though the undertaking were filed in the first instance.

25-31-115 MCA. In civil cases arising in justices' courts wherein an undertaking is required by this chapter, the plaintiff or defendant may deposit with said justice a sum of money equal to the amount required by said undertaking, which said sum of money shall be taken as security in place of said undertaking.

300.502 Contempt of Court/Handling Contempt Matters.

3-1-111 MCA. Powers respecting conduct of business. Every court has the power to:
(1) preserve and enforce order in its immediate presence;
(2) enforce order in the proceedings before it or before a person or persons empowered to conduct a judicial investigation under its authority;
(3) provide for the orderly conduct of proceedings before it or its officers;
(4) compel obedience to its judgments, orders, and process and to the orders of a judge out of court in an action or proceeding pending therein;
(5) control, in furtherance of justice, the conduct of its ministerial officers and of all other persons in any manner connected with a judicial proceeding before it in every other matter appertaining thereto;
(6) compel the attendance of persons to testify in an action or proceeding pending therein in the cases and manner provided in this code;
(7) administer oaths in an action or proceeding pending therein and in all other cases where it may be necessary in the exercise of its powers and duties;
(8) amend and control its process and orders so as to make them conformable to law and justice.

3-1-402 MCA. Powers of judicial officers as to conduct of proceedings.
A judicial officer has the power to:
(1) preserve and enforce order in the officer's immediate presence and in proceedings before the officer when the officer is engaged in the performance of official duties;
(2) compel obedience to the officer's official orders, as provided in this code;
(3) compel the attendance of persons to testify in a proceeding before the officer in the cases and manner provided in this code;
(4) administer oaths to persons in a proceeding pending before the officer and in all other cases in which it may be necessary in the exercise of the officer's powers and duties.

3-1-403 MCA. Power to punish for contempt. For the effectual exercise of the powers conferred by 3-1-402, a judicial officer may punish for contempt in the cases provided in this code.

3-10-401 MCA. Contempts for which justice of the peace may punish. A justice of the peace may punish for contempt persons guilty of only the following acts:
(1) disorderly, contemptuous, or insolent behavior toward the justice while holding the court tending to interrupt the due course of a trial or other judicial proceeding;
(2) a breach of the peace, boisterous conduct, or violent disturbance in the presence or the justice tending to interrupt the due course of a trial or other judicial proceeding;
(3) disobedience or resistance to the execution of a lawful order or process made or issued by the justice;
(4) disobedience to a subpoena duly served or refusal to be sworn or to answer as a witness;
(5) rescuing any person or property in the custody of an officer by virtue of an order or process of the court.

3-11-303 MCA. Contempts city judge may punish for— procedure . (1) A city judge may punish for contempt persons guilty of only the following acts:

(a) disorderly, contemptuous, or insolent behavior toward the judge while holding the court tending to interrupt the due course of a trial or other judicial proceeding;

(b) a breach of the peace, boisterous conduct, or violent disturbance in the presence of the judge or in the immediate vicinity of the court held by the judge tending to interrupt the due course of a trial or other judicial proceeding;

(c) disobedience or resistance to the execution of a lawful order or process made or issued by the judge;

(d) disobedience to a subpoena served or refusal to be sworn or to answer as a witness;

(e) rescuing any person or property in the custody of an officer by virtue of an order or process of the court.

(2) The procedures contained in 5-1-501(3) and (4), 3-1-511 through 3-1-518, and 3-1-520 through 3-1-523 apply.

3-10-402 MCA. Proceedings. When a contempt is committed, whether or not it is in the immediate view and presence of the judge, the procedures contained in 3-1-511 through 3-1-518, and 3-1-520 through 3-1-523 apply.

➔Comment: At the first indication of contemptuous behavior, call the contemnor before the bench and give a warning. Stop the regular proceeding and docket the contempt warning immediately. **It is imperative that a record of the acts of contempt should be recorded** before making a finding that the person is guilty of contempt. Should the contemptuous behavior continue, call the contemnor again before the bench, recite the acts which the court finds to be contemptuous. Then make a finding that the person is guilty of contempt. Immediately, docket the acts constituting the contempt, the finding of the person guilty of contempt and the sentence or penalty imposed. Should the contemnor be sentenced to jail, an order of commitment should be transmitted to the sheriff. If the behavior is sufficiently disruptive, you may have the contemnor taken immediately to jail or removed from the courtroom. Then you should continue with the regular proceeding before the court.

3-1-501 MCA. What acts or omissions are contempts — civil and criminal contempt. (1) The following acts or omissions in respect to a court of justice or proceedings in a court of justice are contempts of the authority of the court:

(a) disorderly, contemptuous, or insolent behavior toward the judge while holding the court tending to interrupt the due course of a trial or other judicial proceeding;

(b) a breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceeding;

(c) misbehavior in office or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person appointed or elected to perform a judicial or ministerial service;

(d) deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding;

(e) disobedience of any lawful judgment, order, or process of the court;

(f) assuming to be an officer, attorney, or counsel of a court and acting as that individual without authority.

(g) rescuing any person or property in the custody of an officer by virtue of an order or process of the court;

(h) unlawfully detaining a witness or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial;

(i) any other unlawful interference with the process or proceedings of a court;

(j) disobedience of a subpoena duly served or refusing to be sworn or answer as a witness;

(k) when summoned as a juror in a court, neglecting to attend or serve as a juror or improperly conversing with a party to an action to be tried at the court or with any other person in relation to the merits of the action or receiving a communication from a party or other person in respect to it without immediately disclosing the communication to the court;

(l) disobedience by a lower tribunal, magistrate, or officer of the lawful judgment, order, or process of a superior court or proceeding in an action or special proceeding contrary to law after the action or special proceeding is removed from the jurisdiction of the lower tribunal, magistrate, or officer.

(2) Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of the officer.

(3) A contempt may be either civil or criminal. A contempt is civil if the sanction imposed seeks to force the contemnor's compliance with a court order. A contempt is criminal if the court's purpose in imposing the penalty is to punish the contemnor for a specific act and to vindicate the authority of the court. If the penalty imposed is incarceration, a fine, or both, the contempt is civil if the contemnor can end the incarceration to avoid the fine by complying with a court order and is criminal if the contemnor cannot end the incarceration or avoid the fine by complying a court order. If the court's purpose in imposing the sanction is to attempt to compel the contemnor's performance of an act, the court shall impose the sanction under 3-1-520 and may not impose a sanction under 45-7-309.

(4) A person may be found guilty of and penalized for criminal contempt by proof beyond a reasonable doubt. The procedures provided in Title 46 apply to criminal contempt prosecutions, except those under 3-1-511.

3-1-511 MCA. Procedure — contempt committed in presence of court. When a contempt is committed in the immediate view and presence of the court or judge at chambers and the contemptuous conduct requires immediate action in order to restore order, maintain the dignity or authority of the court, or prevent delay, it may be punished summarily. An order must be made reciting the facts that occurred in the judge's immediate view and presence and adjudging that the person proceeded against is guilty of a contempt and that the person must be punished as prescribed in the order. An order may not be issued unless the person proceeded against has been informed of the contempt and given an opportunity to defend or explain the person's conduct. A person may be adjudged guilty of and penalized for criminal contempt under this section by a fine in an amount not to exceed $500 or by imprisonment for a term not to exceed 30 days, or both, and by any other reasonable conditions or restrictions that the court may consider appropriate under the circumstances.

3-1-512 MCA. Procedure — contempt not in presence of court. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit of the facts constituting the contempt or a

statement of the facts by the referees or arbitrators or other judicial officer shall be presented to the court or judge.

3-1-513 MCA. Warrant — statement of charge. When the contempt is not committed in the immediate view and presence of the court or judge, a warrant may be issued to bring the person charged to the court to answer the charge. The warrant must be accompanied by an adequate and specific statement of the charge. The answer to the charge must be followed by a hearing under 3-1-518.

3-1-514 MCA. Endorsement allowing bail on warrant. Whenever a warrant of attachment is issued pursuant to this part, the court or judge shall direct, by an endorsement on the warrant that the person charged may be left to bail for the person's appearance in an amount to be specified in the endorsement.

3-1-515 MCA. Arrest and detention by sheriff. Upon executing the warrant of attachment, the sheriff shall keep the person in custody, bring the person before the court or judge, and detain the person until an order is made in the proceeding unless the person arrested is entitled to be discharged as provided in 3-1-516.

3-1-516 MCA. Bail bond — form and conditions of. When a direction to release the person arrested on bail is contained in the warrant of attachment or endorsed on the warrant, the arrested person must be discharged from the arrest upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge or the sureties will pay, as may be directed, the sum specified in the warrant or ordered by the court or the judge.

3-1-517 MCA. Return of warrant and undertaking. The officer shall return the warrant of arrest and undertaking, if any, received by the officer from the person arrested by the return day specified in the warrant.

3-1-518 MCA. Hearing on contempt not committed in immediate view and presence of court or judge at chambers. (1) When a person arrested for a contempt not committed in the immediate view and presence of the court or judge at chambers has been brought up or appeared, the court or judge shall proceed to investigate the charge, shall schedule and hold a hearing on any answer that the person may make to the charge, and may examine witnesses for or against the person, for which an adjournment may be had from time to time, if necessary. The judge investigating the charge and scheduling and presiding over the hearing may not be the judge against whom the contempt was allegedly committed, except that if the contempt arose from the violation of an order of the court issued after a hearing on the merits of the subject of the order, the judge who issued the order may punish the contempt or compel compliance with the order unless it is shown that the judge would not be impartial in addressing the contempt.
(2) The charged person must be given a reasonable opportunity to obtain counsel and prepare a defense or explanation prior to the hearing. The charged person may testify and call witnesses at the hearing.

3-1-520 MCA. Penalty to compel performance. When the sanction imposed for a contempt seeks to compel the contemnor to perform an act that is in the power of the contemnor to perform, the contemnor may be incarcerated, subjected to a fine in an amount not to exceed $500, or both, until the contemnor has performed the act. The act must be specified in the warrant of commitment.

3-1-521 MCA. Proceedings when party fails to appear. When the warrant of arrest has been returned served, if the person arrested does not appear on the return day, the court or judge may issue another warrant of arrest or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued and the costs of the proceeding.

3-1-522 MCA. Illness sufficient excuse — confinement under arrest. (1) Whenever an officer is required to keep a person arrested on a warrant of attachment in custody and to bring the person before a court or judge, the inability, from illness or otherwise, of the person to attend is sufficient excuse for not bringing the person before the court or judge.
(2) The officer may not confine a person arrested upon a warrant in a prison or otherwise restrain the person of personal liberty, except to the extent necessary to secure the person's personal attendance.

3-1-523 MCA. Judgment and orders in contempt cases final~~.~~ family law exception. (1) The judgment and orders of the court or judge made in cases of contempt are final and conclusive. Except as provided in subsection (2), there is no appeal, but the action of a district court or judge can be reviewed on a writ of certiorari by the supreme court or a justice of the supreme court and the action of a justice of the peace or other court of limited jurisdiction can be reviewed by the district court or judge of the county in which the justice or judge of the court of limited jurisdiction resides.
(2) A party may appeal a contempt judgment or order in a family law proceeding only when the judgment or order appealed from includes an ancillary order that affects the substantial rights of the parties involved.

➔Comment: The power of contempt for municipal courts is the same as for district courts.

MCA 3-1-512 sets forth the procedure to be followed when the contempt is committed out of the presence of the court. MCA 3-1-513 states that a warrant of arrest may be issued, however, you can issue an order to show cause. The accused must be provided a hearing and given the opportunity to defend the conduct in the same manner as any person accused of a violation of any law. The accused is not entitled to a jury trial. The United States Supreme Court in the case of *Frank v. U.S. 89 S.Ct. 1503,* confirms the fact that a jury trial cannot be demanded by the defendant.

Following the hearing, the judge must make an order or written judgment in the same manner and form as is done following the hearing or trial in any contested matter.

Criminal contempt of court— a misdemeanor . Contemptuous conduct can be so flagrant as to constitute a crime. MCA 45-7-309 specifies the acts that are criminal contempts. A criminal contempt is an entirely separate criminal action which should be prepared and prosecuted by the prosecuting attorney. A jury trial must be held on a criminal contempt charge unless waived by the defendant.

Contempt by Juveniles. There is nothing in the Montana codes to indicate that a juvenile who commits a contempt of court should be treated in a different manner than an adult. The power of the court to control proceedings cannot be discarded merely because a person is a juvenile. With the realization that the court's goal is to be able to do something immediately with the out-of-hand contemptuous juvenile, it is recommended that the juvenile be taken into custody of the nearest law enforcement officer and transported to the county seat. If your county does not have a resident juvenile probation officer, then the youth should be kept at the local police station until the youth court officer is contacted by telephone.

The court should send paperwork with the youth indicating the acts of contempt and the finding of contempt by the judge. The youth officer will take control of the youth, physically and for disposition of the case.

We, as judges, cannot be concerned what the youth officer does with the youth, but only that we cannot allow contemptuous youths to run roughshod over the courts. Historically, contempt of court charges have been used sparingly and almost never against a juvenile, but should the extreme situation occur, here are the recommended steps to follow:

(1) Stop the regular court proceeding;

(2) Call the individual before the bench and issue a strict warning about contempt of court:

  (a) State that there will not be another warning;

  (b) Docket the warning.

(3) Continue with the regular proceeding.

(4) Upon the continuance of contemptuous conduct, call the youth before the bench, explain what actions are disorderly, contemptuous, insolent, a breach of the peace, etc., and make a finding of "guilty" of contempt of court. Docket this finding immediately.

(5) If an officer is in the courtroom, have the officer take physical control of the youth.

(6) If no officer is available, have the youth take a chair until an officer arrives. If there are parents present, put them on the spot to take control of the youth. Explain that the youth must remain until an officer is available to take the youth to the youth court.
(7) When the officer is available, have the youth transported to the county seat if there is a resident youth probation officer. If there is no youth officer in your county, have the officer detain the youth at his office (not the jail) until the youth has contacted the probation officer for the procedure the youth court officer wants to follow.

300.503 Search and Seizure.

Art II, Sec. 11., Mont. Const. Search and seizures. The people shall be secure in their persons, papers, homes, and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized; or without probable cause, supported by oath or affirmation reduced to writing.

46-5-101 MCA. Searches and seizures — when authorized. A search of a person, object, or place may be made and evidence, contraband, and persons may be seized in accordance with Title 46 when a search is made:
(1) by the authority of a search warrant; or
(2) in accordance with judicially recognized exceptions to the warrant requirement.

46-5-103 MCA. When search and seizure not illegal. (1) A search and seizure, whether with or without a warrant, may not be held to be illegal if:
(a) the defendant has disclaimed any right to or interest in the place or object searched or the evidence, contraband, or person seized;
(b) a right of the defendant has not been infringed by the search and seizure; or
(c) any irregularity in the proceedings has no effect on the substantial rights of the accused.
(2) Evidence, contraband, or persons lawfully seized are admissible as evidence in any prosecution or proceeding whether or not the prosecution or proceeding is for the offense in connection with which the search was originally made.

45-5-220 MCA. Authority to issue search warrant. (1) A peace officer, the city or county attorney, or the attorney general may apply for a search warrant.
(2) A search warrant may be issued by:
(a) a city or municipal court judge or justice of the peace within the judge's geographical jurisdiction; or
(b) a district court judge within this state.

46-5-221 MCA. Grounds for search warrant. A judge shall issue a search warrant to a person upon application, in writing or by telephone, made under oath or affirmation, that:
(1) states facts sufficient to support probable cause to believe that an offense has been committed;
(2) states facts sufficient to support probable cause to believe that evidence, contraband, or persons connected with the offense may be found;
(3) particularly describes the place, object, or persons to be searched; and
(4) particularly describes who or what is to be seized.

➔Comment: An application for a search warrant can be presented to a judge before any arrest has been made or a complaint filed. The application must establish probable cause and must show all the elements required by MCA 46-5-221. Facts, not speculation, must be stated in the application for a search warrant. If a peace officer or other person requests the court to issue a search warrant, familiarize yourself with the applicable law. Read the pertinent statutes. Place the officer or other person under oath.

46-5-223 MCA. To whom search warrant directed. A search warrant must be directed to a specific peace officer commanding the officer to search for and seize the evidence, contraband, or person designated in the warrant.

46-5-226 MCA. Service of search warrant. A search warrant must in all cases be served by the peace officer specifically named and by no other person except in aid of the officer when the officer is present and acting in its service.

➔Comment: Probable cause must be contained in, and apparent from, the written sworn application or affidavit. The court bears the responsibility for determining that probable cause exists. If you are not convinced from the written affidavit that probable cause exists, refuse to issue the warrant. All facts for probable cause must be contained on the face of the application.

As a judge, you must approach the matter of search warrants and arrest warrants with a great deal of caution. The issuance of a warrant is an exceptional measure. You are required to be neutral and detached when reviewing the warrant application. Warrants issued in violation of constitutional standards are invalid and any resulting evidence is generally suppressed and not admissible in state or federal courts.

Usually a challenge to any search or arrest, whether with or without a warrant, will be made by a motion to suppress from the defendant. Set a time for a hearing and familiarize yourself with the law. After hearing the sworn testimony, the court may require legal briefs to filed by counsel. This a good idea.

The court will "grant" or "deny" the motion to suppress. Any suppression hearing must be held prior to a trial. A defendant can object to the search only if the personal rights of the defendant are adversely affected.

The warrant itself must describe with particularity the place, things, or persons to be searched, the things to be seized or, with reasonable certainty, the person to be arrested.

> 46-5-224 MCA. What may be seized with search warrant. A warrant may be issued under this section to search for and seize any:
> (1) evidence;
> (2) contraband; or
> (3) person for whose arrest there is probable cause, for whom there has been a warrant of arrest issued, or who is unlawfully restrained.

A search warrant must be executed (served) within ten (10) days from issuance.

> 46-5-225 MCA. When warrant may be served. The warrant may be served at any time of the day or night. The warrant must be served within 10 days from the time of issuance. Any warrant not served within 10 days is void and must be returned to the court or the judge issuing the warrant and identified as "not served."

> 46-5-310 MCA. Filing of return. (1) The application on which the warrant is issued must be retained by the judge but is not required to be filed with the clerk of the court or with the court, if there is no clerk, until the warrant has been served or has been returned "not served."
> (2) The judge before whom the warrant is returned shall attach to the warrant a copy of the return, the inventory, and all other papers in connection with the warrant and shall file them with the issuing court.

➔Comment: The reason the application should not be filed, as referred to in section (1) above, is to prevent it from becoming public knowledge that a warrant has been requested. The judge must keep the application private and should have some private place where these documents can be kept until a return is made. When a return is made, all records (application, original warrant, duplicate of receipt, return, order to secure and retain custody of seized articles) will be filed in the open court docket.

After execution, the warrant must be returned to the judge with a written inventory of all property taken. The judge can physically view the property and should order the officer or sheriff to secure and retain custody of the seized articles.

46-5-301 MCA. Return. (1) A return must be made promptly and must be accompanied by a written inventory of any evidence or contraband taken, verified by the person serving the warrant. The return must be made before the judge who issued the warrant or, if the judge is absent of unavailable, before the nearest available judge.
(2) The judge shall, upon request, deliver a copy of the inventory and the order of custody or disposition to the person from whom or from whose premises the property was taken and to the applicant for the warrant.
(3) The judge shall enter an order providing for the custody or appropriate disposition of the evidence or contraband seized pending further proceedings.

➔Comment: After execution, the warrant must be returned to the judge with a written inventory of all property taken. The judge can physically view the property and should order the officer or sheriff to secure and retain custody of the seized articles.

46-5-301 MCA. Return. (1) A return must be made promptly and must be accompanied by a written inventory of any evidence or contraband taken, verified by the person serving the warrant. The return must be made before the judge who issued the warrant or, if the judge is absent or unavailable, before the nearest available judge.
(2) The judge shall, upon request, deliver a copy of the inventory and the order of custody or disposition to the person from whom or from whose premises the property was taken and to the applicant for the warrant.
(3) The judge shall enter an order providing for the custody or appropriate disposition of the evidence or contraband seized pending further proceedings.

➔Comment: Seized property must be returned or disposed of according to MCA 46-5-312.

46-5-312 MCA. Return of property seized ~~—~~ right to possess . (1) A person claiming the right to possession of property seized as evidence may apply to the judge for its return. The judge shall give written notice as the judge considers adequate to the prosecutor and all persons who have or may have an interest in the property and shall hold a hearing to determine the right to possession.
(2) If the right to possession is established, the judge shall order the property, other than contraband, returned if:
(a) the property is not needed as evidence;
(b) the property is needed and satisfactory arrangements can be made for its return for subsequent use as evidence; or
(c) all proceedings in which the property might be required have been completed.

46-5-305 MCA. Disposition of unclaimed property. If property seized as evidence is not claimed within six (6) months of completion of the case for which it was seized, it must be disposed of pursuant to the provisions of 46-5-306 through46-5-309.

46-5-103 MCA. When search and seizure not illegal. (1) A search and seizure, whether with or without a warrant, may not be held to be illegal if:

(a) the defendant has disclaimed any right to or interest in the place or object searched or the evidence, contraband, or person seized;

(b) a right of the defendant has not been infringed by the search and seizures; or

(c) any irregularity in the proceedings has no effect on the substantial rights of the accused.

(2) Evidence, contraband, or persons lawfully seized are admissible as evidence in any prosecution or proceeding whether or not the prosecution of proceeding is for the offense in connection with which the search was originally made.

➔Comment: Black's Law Dictionary, Seventh Edition, defines contraband as follows: "1. Illegal or prohibited trade; smuggling. 2. Goods that are unlawful to import, export, or possess"....

300.504 Temporary Restraining Orders, Preliminary Injunctions and Orders of Protection.

The 1985 legislature created the criminal offense of domestic abuse in Section 45-5-206 MCA and amended several other sections related to this offense. These changes gave the municipal and justice courts jurisdiction to issue temporary restraining orders and after a hearing on the matter, issue an order of protection. The 1989 legislature gave this same authority to city courts, effective 10-1-1989. Currently, all courts have concurrent jurisdiction on these actions. (See 40-4-123 MCA).

Then in 1995 another major revision took place and Sections 40-15-201 through 40-15-204 and 40-15-303 were enacted. These sections were specifically enacted for victims of abuse. All courts have concurrent authority to issue Temporary and Permanent Orders of Protection. The charge of domestic abuse was amended to partner or family member assault. Sections 40-4-121 through 40-5-125 have been amended and are primarily used for those situations that involve a dissolution of marriage or a legal separation.

In 40-4-122 MCA and 40-15-203 MCA, the legislature instructs the attorney general to prepare and distribute the forms necessary for the applicant and the court to use in requesting and issuing a Temporary Restraining Order (TRO) or a Temporary Order of Protection (TOP). These forms are to be available for public use at the clerks of district courts' offices, and municipal, justice, and city courts at no charge to the public.

The victim of partner or family member assault may be granted a TRO or a TOP enjoining the adverse party from specific actions until a hearing is held. A preliminary injunction or an order of protection may not be issued without reasonable notice to the adverse party. A hearing must be set within twenty (20) days from the issuance of the temporary order.

The 1995,1997,2001 related sections of law, and pertinent TRO and TOP forms that became available for download in 2009 must be read to understand the full implication of the modifications. For example, all requirements for alleging actual physical abuse or bodily injury under Section 40-4-121 were deleted and are now present in the new sections of Title 40, Chapter 15. It is no longer necessary for any injury to have occurred before a temporary order can be issued, rather the "reasonable apprehension" of such injury is now the requirement.

The 2003 amendment provides that any assessment or counseling must hold the offender accountable for the offender's violent or controlling behavior.

These changes can lead the judge to think a temporary order is required to be issued as an **absolute or automatic** requirement. The law actually reads, in part: **"Upon a review of the petition and a finding that the petitioner is in danger...."** The judge should be very careful to review the petitions and grant a temporary order only when the criteria of the statute are met.

The TRO and the TOP have become tools of negotiation in any possible divorce situation and potentially gives one party the upper hand in any district court proceeding. Courts of limited jurisdiction must be careful to not get involved in this strategy. The statutes for protection are necessary in some instances and judges should always grant protection where it is needed. Judges should, however, be as careful in making the finding necessary to issue this type of order as they are in making findings in other matters filed before the court.

Following is a suggested list of considerations that the judge should bear in mind:

Judge's checklist: From the application (petition) determine:

1. Has it been sworn to?
2. Does it allege physical abuse, harm, bodily injury or reasonable apprehension of any of the above?
3. Is the person to be enjoined (restricted) the one creating the injury or the apprehension?

Read the affidavit in support of the application for the specific facts. If you have questions, you may swear in the victim and take testimony regarding the need for the TRO or TOP. From the affidavit or the direct testimony the court **MUST FIND** that the petitioner is in danger of harm if no TRO or TOP is issued immediately.

Granting a Temporary Restraining Order (TRO) or Temporary Order of Protection (TOP): You may use the form prepared by the attorney general or one available from the Full Court System, both available for downloading. You can also use one of your own creation if it conforms in intent with the statute. Set the matter for hearing within the statutory 20 day limit **unless good cause for an extension is shown.** The respondent may request an emergency hearing before the 20 day period by filing an affidavit. After service of the TRO or TOP upon the adverse party has been accomplished, the judge shall, within 24 hours of receiving proof of service, mail a copy of the order or any extension, modification, or termination thereof along with a copy of the proof of service to the appropriate law enforcement agencies designated in the order.

➔Comment: With the 2001 amendment to 40-15-303 MCA, **you must remember** that when you issue, extend, modify, or terminate an order, law enforcement agencies must be notified which orders are currently in effect. Law enforcement agencies are now **required** to establish procedures to register all orders. Many problems will occur if law enforcement agencies are not kept advised of all current orders and the safety of victims and law enforcement officers may be adversely affected.

Hearing: At the hearing, the court will hear all pertinent testimony. Place the parties under oath before they testify since all testimony is sworn to as to accuracy and truthfulness.

In determining the actions the judge is to consider, the following criteria should prevail regarding the presence of the parties:

1. Ensure there is proof of service on the respondent;
2. If both parties are present, proceed with the hearing;

3. If the petitioner is the only party present, allow the petitioner to testify under oath, then be prepared to base your decision and any subsequent order on that testimony only;
4. If the respondent appears and the petitioner is not present, dissolve the TRO or TOP;
5. In the event neither party appears for the hearing, dissolve the TRO or TOP.

Assuming the petitioner to be present, proceed with the petitioner's testimony, followed by that of the respondent.

Your order setting the hearing advised the respondent to be present and show cause why a more permanent order should not be issued so you may proceed if the respondent was served. If you find that the original order so you may proceed if the respondent was served. If you find that the original order (preliminary injunction, restraining order, or order of protection) should be extended, modified, or made permanent, then issue the order to do so. You must issue an order of protection for a fixed period of time or it can be made permanent. An order of protection is not effective until it is served upon the respondent, in writing.

The temporary injunction is somewhat different than the TOP or the TRO. The injunction delves deeper into family matters such as income, temporary child support, maintenance liabilities, partial property distribution, etc.

Review or removal – district court: An order issued by the municipal, city, or justice court is immediately reviewable by the district court. This is done by filing a notice of appeal (See 40-4-124 MCA or 40-15-302 MCA).

Jurisdiction and venue. District courts, municipal courts, justice's courts, and city courts have concurrent jurisdiction to hear and issue orders under 40-4-121 MCA and 40-15-201 MCA.

> 40-4-121 MCA. Temporary order for maintenance or support, temporary injunction, or temporary restraining order. (1) In a proceeding for dissolution of marriage or for legal separation or in a proceeding for disposition of property or for maintenance or support following dissolution of the marriage by a court that lacked personal jurisdiction over the absent spouse, either party may move for temporary maintenance, temporary support of a child of the marriage entitled to support, or a temporary family support order. When a party is receiving public assistance, as defined in 40-5-201, for the minor children at issue or when a party receives public assistance during the life of a temporary family support order, the temporary family support order must designate separately the amounts of temporary child support and temporary maintenance, if any. The temporary child support order or the designated child support portion of the family support order must be determined as required in 40-4-204.

The motion must be accompanied by an affidavit setting forth the factual basis for the motion, the amounts requested, a list of marital estate liabilities, a statement of sources of income of the parties and of a child of the marriage entitled to support, and, in the case of a motion for a temporary family support order, a proposal designating the party responsible for paying each liability. If ordered by a court, a temporary family support order must, without prejudice, direct one or both parties to pay, out of certain income sources, liabilities of the marital estate during the pendency of the action, including maintenance liabilities for a party or support of a child of the marriage entitled to support. If income sources are insufficient to meet the marital estate periodic liabilities, the temporary family support order may direct that certain liabilities be paid from assets of the marital estate. At any time during the proceedings, the court may order any temporary family support payments to be designated as temporary maintenance, temporary child support, or partial property distribution, retroactive to the date of the motion for a temporary family support order. When a party obtains public assistance, as defined in 40-5-201, or applies for services under Title IV-D of the Social Security Act, after the court has issued a temporary family support order, the petitioner shall promptly move the court for designation of the parts, if any, of the temporary family support order that are maintenance and child support and the court shall promptly so designate, determining the child support obligation as required in 40-4-204.

(2) As a part of a motion for temporary maintenance, temporary support of a child, or a temporary family support order or by independent motion accompanied by affidavit, either party may request that the court issue a temporary injunction for any of the following relief:

(a) restraining a person from transferring, encumbering, concealing, or otherwise disposing of any property except in the usual course of business or for the necessities of life, and if so restrained, requiring the person to notify the moving party of any proposed extraordinary expenditures made after the order is issued;

(b) restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability coverage held for the benefit of a party or a child of a party for whom support may be ordered;

(c) enjoining a party from molesting or disturbing the peace of the other party or of any family member or from stalking, as defined in 45-5-220;

(d) excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result;

(e) enjoining a party from removing a child from the jurisdiction of the court;

(f) ordering a party to complete counseling, including alcohol or chemical dependency counseling or treatment;

(g) providing other injunctive relief proper in the circumstances; and

(h) providing additional relief available under Title 40, chapter 15.

(3) When the clerk of the district court issues a summons pursuant to this chapter, the clerk shall issue and include with the summons a temporary restraining order:

(a) restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether jointly or separately held, without either the consent of the other party or an order of the court, except in the usual course of business or for the necessities of life. The restraining order must require each party to notify the other party of any proposed extraordinary expenditures at least 5 business days before incurring the expenditures and to account to the court for all extraordinary expenditures made after service of the summons. However, the restraining order may not preclude either party from using any property to pay reasonable attorney fees in order to retain counsel in the proceeding.

(b) restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability coverage held for the benefit of a party or a child of a party for whom support may be ordered. However, nothing in this subsection (3) adversely affects the rights, title, or interest of a purchaser, encumbrancer, or lessee for value if the purchaser, encumbrancer, or lessee does not have actual knowledge of the restraining order.

(4) A person may seek the relief provided for in subsection (2) without filing a petition under this part for a dissolution of marriage or legal separation by filing a verified petition requesting relief under Title 27, chapter 19, part 3. Any temporary injunction entered under this subsection must be for a fixed period of time, not to exceed 1 year, and may be modified as provided in Title 27, chapter 19, part 4, and 40-4-208, as appropriate.

(5) The court may issue a temporary restraining order for a period not to exceed 20 days without requiring notice to the other party only if it finds on the basis of the moving affidavit or other evidence that irreparable injury will result to the moving party if an order is not issued until the time for responding has elapsed.

(6) The party against whom a temporary injunction is sought must be served with notice and a copy of the motion and is entitled to a hearing on the motion. A response may be filed within 20 days after service of notice of motion or at the time specified in the temporary restraining order.

(7) At the time of the hearing, the court shall:

(a) inform both parties that the temporary injunction may contain a provision or provisions that limit the rights of one or both parties relating to firearms under state law or a provision or provisions that may subject one or both parties to state or federal laws that limit their rights relating to firearms; and

(b) determine whether good cause exists for the injunction to continue for 1 year.

(8) On the basis of the showing made and in conformity with 40-4-203 and 40-4-204, the court may issue a temporary injunction and an order for temporary maintenance, temporary child support, or temporary family support in amounts and on terms just and proper in the circumstance.

(9) A temporary order or injunction, entered pursuant to Title 40, chapter 15, or this section:

(a) may be revoked or modified on a showing by affidavit of the facts necessary to revocation or modification of a final decree under 40-4-208;

(b) terminates upon order of the court or when the petition is voluntarily dismissed and, in the case of a temporary family support order, upon entry of the decree of dissolution; and

(c) when issued under this section, must conspicuously bear the following: "Violation of this order is a criminal offense under 45-5-220 or 45-5-626."

(10) When the petitioner has fled the parties' residence, notice of the petitioner's new residence must be withheld except by order of the court for good cause shown.

40-4-122 MCA. Forms ─ distribution ─ filing. The attorney general shall prepare uniform sample instructions and petition and order forms necessary for allowing an applicant to obtain a temporary restraining order under 40-4-121 and uniform sample affidavits and orders of inability to pay filing fees or other costs. The attorney general shall distribute samples of the restraining order and the inability-to-pay-filing-fees order forms to the clerk of the district court in each county and to justice, city, and municipal courts. The clerk of the district court, justices of the peace, city, and municipal courts shall make forms available to the public at no charge.

40-4-123 MCA. Jurisdiction and venue. (1) District courts, municipal courts, justices' courts have concurrent jurisdiction to hear and issue orders under 40-4-121.

(2) The municipal judge, justice of the peace, or city court judge shall on motion suspend all further proceedings in the action and certify the pleading and any orders to the clerk of the district court of the county where the action was begun if an action for declaration of invalidity of a marriage, legal separation, or dissolution of marriage or for parenting is pending between the parties. From the time of the certification of the pleadings and any orders to the clerk, the district court has the same jurisdiction over the action as if it had been commenced in district court.

(3) An action brought under 40-4-121 may be tried in the county in which either party resides or in which the physical abuse was committed.

(4) The right to petition for relief may not be denied because the plaintiff has vacated the residence or household to avoid abuse.

40-4-124 MCA. Review or removal─ district court. (1) An order issued by a municipal court, justice's court, or city court pursuant to 40-4-121 is immediately reviewable by the judge of the district court at chambers upon the filing of a notice of appeal. The district judge may affirm, dissolve, or modify an order of a municipal court, justice's court, or city court made pursuant to 40-4-121.

(2) Any case in which an order has been issued by a municipal court, justice's court, or city court pursuant to 40-4-121 may be removed to district court upon filing of a notice of removal.

40-4-125 MCA. Registration of orders. (1) The clerk of court, justice of the peace, municipal court judge, or city court judge shall, within 24 hours of receiving proof of service of an order under 40-4-121, mail a copy of the order or any extension, modification, or termination of the order along with a copy of the proof to the appropriate law enforcement agencies designated in the order, which shall, within 24 hours after receipt of the order, enter the order into the database of the national crime information center of the United States department of justice and may enter the order into any existing state or other federal registry of protection orders, in accordance with applicable law.
(2) Law enforcement agencies shall establish procedures, using an existing system for warrant verification and the database of the national crime information center of the United States department of justice, to ensure that peace officers at the scene of an alleged violation of a protective order are informed of the existence and terms of the order.

40-15-101 MCA. Purpose. The purpose of this chapter is to promote the safety and protection of all victims of partner and family member assault, victims of sexual assault, and victims of stalking.

40-15-102 MCA. Eligibility for order of protection. (1) A person may file a petition for an order of protection if:

(a) the petitioner is in reasonable apprehension of bodily injury by the petitioner's partner or family member as defined in 45-5-206; or

(b) the petitioner is a victim of one of the following offenses committed by a partner or family member:

(i) assault as defined in 45-5-201;
(ii) aggravated assault as defined in 45-5-502;
(iii) intimidation as defined in 45-5-203;
(iv) partner or family member assault as defined in 45-5-206;
(v) criminal endangerment as defined in 45-5-207;
(vi) negligent endangerment as defined in 45-5-208;
(vii) assault on a minor as defined in 45-5-212;
(viii) assault with a weapon as defined in 45-5-213;
(ix) unlawful restraint as defined in 45-5-301;
(x) kidnapping as defined in 45-5-302;
(xi) aggravated kidnapping as defined in 45-5-303; or
(xii) arson as defined in 45-6-103.

(2) The following individuals are eligible to file a petition for an order of protection against the offender regardless of the individual's relationship to the offender:

(a) a victim of assault as defined in 45-5-201, aggravated assault as defined in 45-5-202, assault on a minor as defined in 45-5-212, stalking as defined in 45-5-220, incest as defined in 45-5-507, sexual assault as defined in 45-5-502, or sexual intercourse without consent as defined in 45-5-503; or

(b) a partner or family member of a victim of deliberate homicide as defined in 45-5-102 or mitigated deliberate homicide as defined in 45-5-103.

(3) A parent, guardian ad litem, or other representative of the petitioner may file a petition for an order of protection on behalf of a minor petitioner against the petitioner's abuser. At its discretion, a court may appoint a guardian ad litem for a minor petitioner.

(4) A guardian must be appointed for a minor respondent when required by Rule 17(c), Montana Rules of Civil Procedure, or by 25-31-602. An order of protection is effective against a respondent regardless of the respondent's age:

(5) A petitioner is eligible for an order of protection whether or not:

(a) the petitioner reports the abuse to law enforcement;

(b) charges are filed; or

(c) the petitioner participates in a criminal prosecution.

(6) If a petitioner is otherwise entitled to an order of protection, the length of time between the abusive incident and the petitioner's application for an order of protection is irrelevant.

40-15-103 MCA. Notice of rights when partner or family member assault is suspected. (1) Whenever a patient seeks health care and the health care provider suspects that partner or family member assault has occurred, the health care provider, outside the presence of the suspected offender, may advise the suspected victim of the availability of a shelter or other services in the community and give the suspected victim immediate notice of any legal rights and remedies available. The notice must include furnishing the suspected victim with a copy of the following statement:

"The city or county attorney's office can file criminal charges against the offender if the offender committed the offense of partner or family member assault.

In addition to the criminal charges filed by the state of Montana, you are entitled to the civil remedies listed below.

You may go to court and file a petition requesting any of the following orders for relief:

(1) an order of protection that prohibits the offender from threatening to hurt you or hurting you;

(2) an order of protection that directs the offender to leave your home and prohibits the offender from having any contact with you;

(3) an order of protection that prevents the offender from transferring any property except in the usual course of business;

(4) an order of protection that prohibits the offender from being within 1,500 feet or other appropriate distance of you, any named family member, and your worksite or other specified place;
(5) an order of protection that gives you possession of necessary personal property;
(6) an order of protection that prohibits the offender from possessing or using the firearm used in the assault.

If you file a petition in district court, the district court may order all of the above and may award custody of your minor children to you or the other parent. The district court may order visitation of your children between the parents. The district court may order the offender to pay support payments to you if the offender has a legal obligation to pay you support payments.

The forms that you need to obtain an order of protection are at _____. You may call _____ at _____ for additional information about an order of protection.

You may file a petition in district court at _____.

You may be eligible for restitution payments from the offender (the offender would repay you for costs that you have had to pay as a result of the assault) or for crime victims compensation payments (a fund administered by the state of Montana for innocent victims of crime). You may call _____ at _____ for additional information about restitution or crime victims compensation.

The following agencies may be able to give you additional information or emergency help. (List telephone numbers and addresses of agencies other than shelters with secret locations and a brief summary of services that are available)."

(2) Partner or family member assault may be suspected by health care workers in circumstances in which a patient repeatedly seeks health care for trauma type injuries or a patient gives an explanation for injuries that is not consistent with the injuries that are observed.
(3) For purposes of this section, "health care provider" has the meaning provided in 50-16-504.

40-15-201 MCA. Temporary order of protection. (1) A petitioner may seek a temporary order of protection from a court listed in 40-15-301. The petitioner shall file a sworn petition that states that the petitioner is in reasonable apprehension of bodily injury or is a victim of one of the offenses listed in 40-15-102, and is in danger of harm if the court does not issue a temporary order of protection immediately.
(2) Upon a review of the petition and a finding that the petitioner is in danger of harm if the court does not act immediately, the court shall issue a temporary order of protection that grants the petitioner appropriate relief. The temporary order of protection may include any or all of the following orders:

(a) prohibiting the respondent from threatening to commit or committing acts of violence against the petitioner and any designated family member;

(b) prohibiting the respondent from harassing, annoying, disturbing the peace of, telephoning, contacting, or otherwise communicating, directly or indirectly, with the petitioner, any named family member, any other victim of this offense, or a witness to the offense;

(c) Prohibiting the respondent from removing a child from the jurisdiction of the court.

(d) directing the respondent to stay 1,500 feet or other appropriate distance away from the petitioner, the petitioner's residence, the school or place of employment of the petitioner, or any specified place frequented by the petitioner and by any other designated family or household member;

(e) removing and excluding the respondent from the residence of the petitioner, regardless of ownership of the residence;

(f) prohibiting the respondent from possessing or using the firearm used in the assault;

(g) prohibiting the respondent from transferring, encumbering, concealing, or otherwise disposing of any property except in the usual course of business or for the necessities of life and, if so restrained, requiring the respondent to notify the petitioner, through the court, of any proposed extraordinary expenditures made after the order is issued;

(h) directing the transfer of possession and use of the residence, an automobile, and other essential personal property, and directing an appropriate law enforcement officer to accompany the petitioner to the residence to ensure that the petitioner safely obtains possession of the residence, automobile, or other essential personal property or to supervise the petitioner's or respondent's removal of essential personal property;

(i) directing the respondent to complete violence counseling, which may include alcohol or chemical dependency counseling or treatment, if appropriate;

(j) directing other relief considered necessary to provide for the safety and welfare of the petitioner or other designated family member.

(3) If the petitioner has fled the parties' residence, notice of the petitioner's new residence must be withheld, except by order of the court for good cause shown.

(4) The court may, without requiring prior notice to the respondent, issue an immediate temporary order of protection for up to 20 days if the court finds, on the basis of the petitioner's sworn petition or other evidence, that harm may result to the petitioner if an order is not issued before the 20-day period for responding has not elapsed.

40-15-202 MCA Order of protection ─ hearing ─ evidence. (1) A hearing must be conducted within 20 days from the date that the court issues a temporary order of protection. The hearing date may be continued at the request of either party for good cause or by the court. If the hearing date is continued, the temporary order of protection must remain in effect until the court conducts a hearing. At the hearing, the court shall determine whether good cause exists for the temporary order of protection to be continued, amended, or made permanent.

(2) The respondent may request an emergency hearing before the end of the 20-day period by filing an affidavit that demonstrates that the respondent has an urgent need for the emergency hearing. An emergency hearing must be set within 3 working days of the filing of the affidavit.
(3) The order of protection may not be made mutually effective by the court. The respondent may obtain an order of protection from the petitioner only by filing an application for an order of protection and following the procedure described in this chapter.
(4) (a) Except as provided in subsection (4)(b), evidence concerning a victim's sexual conduct is not admissible in a hearing under this section.

(b) Evidence of a victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease may be admitted in a hearing under this section only if that sexual conduct is at issue in the hearing.

(5) If a respondent proposed to offer evidence subject to subsection (4)(b), the trial judge shall order a separate hearing to determine whether the proposed evidence is admissible under subsection (4)(b).

40-15-203 MCA. Attorney general to provide forms. The attorney general shall prepare uniform sample instructions, petition forms, and order forms for temporary orders of protection and for orders of protection. The attorney general shall distribute samples of the instructions, petitions, and forms to the clerk of the district court in each county and to justices', municipal, and city courts. The clerk of the district court, justices of the peace, and municipal and city courts shall make forms available to the public at no charge.

40-15-204 MCA. Written orders of protection. (1) The court may, on the basis of the respondent's history of violence, the severity of the offense at issue, and the evidence presented at the hearing, determine that to avoid further injury or harm, the petitioner needs permanent protection. The court may order that the order of protection remain in effect permanently.
(2) In a dissolution proceeding, the district court may, upon request , issue either an order of protection for an appropriate period of time or a permanent order of protection.
(3) An order of protection may include all of the relief listed in 40-15-201, when appropriate.
(4) An order of protection may include restraining the respondent from any other named family member who is a minor. If this restriction is included, the respondent must be restrained from having contact with the minor for an appropriate time period as directed by the court pr permanently if the court finds that the minor was a victim of abuse, a witness to abuse, endangered by the environment of abuse.
(5) An order of protection issued under this section may continue for an appropriate time period as directed by the court or be made permanent under subsection (1), (2), or (4). The order may be terminated upon the petitioner's request that the order be dismissed.

(6) An order of protection must include a section that indicates whether there are any other civil or criminal actions pending involving the parties, a brief description of the action, and the court in which the action is filed.
(7) An amendment to a temporary order of protection or to an order of protection is effective only after it has been served in writing on the opposing party.
(8) There is no cost to file a petition for an order of protection or for service of an order of protection whether served inside or outside the jurisdiction of the court issuing the order.
(9) Any temporary order of protection or order of protection must conspicuously bear the following: "Violation of this order is a criminal offense under 45-5-220 or 45-5-626 and may carry penalties of up to $10,000 in fines and up to a 5-year jail sentence.

This order is issued by the court, and the respondent is forbidden to do any act listed in the order, even if invited by the petitioner or another person. This order may be amended only by further order of this court or another court that assumes jurisdiction over this matter."

40-15-301 MCA. Jurisdiction and venue. (1) District courts, justices' courts, municipal courts, and city courts have concurrent jurisdiction to hear and issue orders under 40-15-201.
(2) When a dissolution of marriage or parenting action involving the parties is pending in district court, a person may file a petition for an order of protection in a justice's, municipal, or city court only if the district court judge assigned to that case is unavailable or if the petitioner, to escape further abuse, left the county where the abuse occurred. The petitioner shall provide a copy of relevant district court documents to the justice's, municipal, or city court, along with the petition. The justice of the peace, municipal court judge, or city court judge shall immediately certify the pleadings to the original district court after signing an order of protection under this subsection. The district court shall conduct the hearing unless both parties and both courts agree that the hearing may be conducted in the court of limited jurisdiction. If the district court is unable to conduct a hearing within 20 days of receipt of the certified pleadings, it shall conduct a hearing within 45 days of the receipt of the pleadings, unless the hearing is continued at the request of either party for good cause or by the court. If the hearing is continued, the order of protection must remain in effect until the court conducts the hearing.
(3) If one of the parties to an order of protection files for dissolution of marriage or files a parenting action after the order of protection is filed but before the hearing is conducted, the hearing must be conducted in the court in which the order of protection was filed. Either party may appeal or remove the matter to the district court prior to or after the hearing. If the district court is unable to conduct a hearing within 20 days of receipt of the certified pleadings, the district shall conduct a hearing within 45 days of receipt of the pleadings. The hearing may be continued at the request of either party for good cause of by the court. If the hearing is continued, the order of protection must remain in effect until the court conducts the hearing.

(4) An action brought under this chapter may be filed in the county where the petitioner currently or temporarily resides, the county where the respondent resides, or the county where the abuse occurred. There is no minimum length of residency required to file a petition under this chapter.
(5) The right to petition for relief may not be denied because the petitioner has vacated the residence or household to avoid abuse.
(6) An order of protection issued under this section is effective throughout the state. Courts and law enforcement officials shall give full faith and credit to all orders of protection issued within the state.
(7) A certified order of an order of protection from another state, along with proof of service, may be filed in a Montana court with jurisdiction over orders of protection in the county where the petitioner resides. If properly filed in Montana, an order of protection issued in another state must be enforced in the same manner as an order of protection issued in Montana.

40-15-302 MCA. Appeal to district court— order to remain in effect . (1) An order issued by a justice's court, municipal court, or city court pursuant to 40-15-201 is immediately reviewable by the district judge upon the filing of a notice of appeal. The district judge may affirm, dissolve, or modify an order of a justice's court, municipal court, or city court made pursuant to 40-15-201 or 40-15-204.
(2) A case in which an order has been issued by a justice's court, municipal court, or city court pursuant to 40-15-201 or 40-15-204 may be removed to district court upon filing of a notice of removal.
(3) If a temporary order of protection or an order of protection issued by a court of limited jurisdiction is appealed or removed to an appellate court, the order continues in full force and effect unless modified by the appellate court.

40-15-303 MCA. Registration of orders. (1) The clerk of court, justice of the peace, municipal court judge, or city court judge shall, within 24 hours of receiving proof of service of an order under 40-15-201, 40-15-204, or 40-15-301, mail a copy of the order or any extension, modification, or termination of the order, along with a copy of the proof of service, to the appropriate law enforcement agencies designated in the order, which shall, within 24 hours after receipt of the order, enter the order into the database of the national crime information center of the United States department of justice and may enter the order into any existing state or other federal registry of protection orders, in accordance with applicable law.
(2) Law enforcement agencies shall establish procedures, using an existing system for warrant verification and the database of the national crime information center of the United States department of justice, to ensure that peace officers at the scene of an alleged violation of an order of protection are informed of the existence and terms of the order.

300.600 The Juvenile Defendant.

300.601 Jurisdiction.

MCA 41-5-203, which sets forth youth court jurisdiction, grants courts of limited jurisdiction authority to handle juvenile offenses in five areas:

(1) Traffic;
(2) Fish, wildlife, and parks;
(3) Alcoholic beverage;
(4) Gambling; and
(5) Tobacco products.

➔Comment: Highly recommend subsections (1) and (2)of 45-5-203, be reviewed any time a court of limited jurisdiction is required to process an initial appearance involving a juvenile. Also, be sure to have a recorder available if the youth is in custody.

> 41-5-203 MCA. Jurisdiction of court. (1) Except as provided in subsection (2) and for cases filed in the district court under 41-5-206, the court has exclusive original jurisdiction of all proceedings under the Montana Youth Court Act in which a you is alleged to be a delinquent youth or a youth in need of intervention or concerning any person under 21 years of age charged with having violated any law of the state or any ordinance of a city or town other than a traffic or fish and game law prior to having become 18 years of age.
>
> (2) Justices', municipal, and city courts have concurrent jurisdiction with the youth court over all alcohol beverage, tobacco products, and gambling violations alleged to have been committed by a youth.
>
> (3) The court has jurisdiction to:
>
> (a) transfer a youth court case to the district court after notice and hearing;
>
> (b) with respect to extended jurisdiction juvenile cases:
>
> (i) designate a proceeding as an extended jurisdiction juvenile prosecution;
>
> (ii) conduct a hearing, receive admissions, and impose upon a youth who is adjudicated as an extended jurisdiction juvenile a sentence that may extend beyond the youth's age of majority;
>
> (iii) stay that portion of an extended jurisdiction sentence that is extended beyond a youth's majority, subject to the performance of the juvenile portion of the sentence;
>
> (iv) continue, modify, or revoke the stay after notice and hearing;
>
> (v) after revocation, transfer execution of the stayed sentence to the department;
>
> (vi) transfer supervision of any juvenile sentence if, after notice and hearing, the court determines by a preponderance of the evidence that the juvenile has violated or failed to perform the juvenile portion of an extended jurisdiction sentence; and

(vii) transfer a juvenile case to district court after notice and hearing; and

(c) impose criminal sanctions on a juvenile as authorized by the Extended Jurisdiction Prosecution Act, Title 41, chapter 5, part 16.

Section 41-5-332 MCA gives courts of limited jurisdiction the authority to hear probable cause hearings on the detention of a youth in custody. These hearings, if held by the limited jurisdiction courts, **must be recorded**.

41-5-332 MCA. Custody — hearing for probable cause. (1) When a youth is taken into custody for questioning, a hearing to determine whether there is probable cause to believe the youth is a delinquent youth or a youth in need of intervention must be held within 24 hours, excluding weekends and legal holidays. A hearing is not required if the youth is released prior to the time of the required hearing.

(2) When a youth is taken into custody for a violation of placement under a home arrest program, a hearing to determine whether a violation occurred must be held within 24 hours, excluding weekends and holidays.

(3) The probable cause hearing required under subsection (1) may be held in person or by videoconference by the youth court, a justice of the peace, a municipal or city judge, or a magistrate having jurisdiction in the case as provided in 41-5-203. If the probable cause hearing is held by a justice of the peace, a municipal or city judge, or a magistrate, a record of the hearing must be made by a court reporter or by a tape recording of the hearing or by an audio-video tape if the hearing is held by videoconference.

(4) A probable cause hearing may be conducted by telephone if other means of conducting the hearing are impractical. All written orders and findings of the court in a hearing conducted by telephone must bear the name of the judge or magistrate presiding in the case and the hour and date the order or findings were issued.

(5) A hearing is not required for a youth placed in detention for an alleged parole violation.

In a criminal case, the defendant's age will determine if the court has jurisdiction for the criminal offenses. Example: the county attorney files a misdemeanor bad check charge. The defendant is served with a summons and appears for initial appearance. The court determines that the defendant is 16 years old. The court does not have jurisdiction and must forward the charge to the youth court. Do not hold an initial appearance procedure or set bail. The case must be transferred to youth court.

Another example showing the importance of determining the age of the defendant follows:

The highway patrol has charged the defendant with a DUI occurring before the defendant's 18th birthday, March 6, 2010.

If this charge goes to judgment of guilty and sentencing, the court must sentence the defendant as a juvenile since the defendant was a juvenile at the time of the alleged offense. The age at time of sentencing is not a factor.

The judge should exercise great care anytime a juvenile is before the court. The court should require the presence of a parent, guardian, or other responsible adult with the juvenile during any court appearance.

➔Comment: There is no statutory requirement for a parent or responsible adult to accompany a juvenile to court, but many communication problems between the court, the defendant, and the parents will be avoided <u>if</u> the court makes a rule that a juvenile may not enter a plea unless accompanied by a responsible adult. This assures that the parents know of the citation and are aware that the youthful offender has been advised of the offenders constitutional rights. You may accept a telephone call or hand-written note in lieu of a parent's appearance in court if a personal appearance by the parent is unduly burdensome. However, it is best to require all parents to appear with their child in court. Advise your issuing officer(s) of this rule and they will advise the youth to bring a parent or guardian with them to court when a citation is issued.

300.602 <u>Issuing a warrant of arrest</u>.

Can a warrant of arrest be issued for a juvenile? Yes, <u>but</u> the warrant must be for "DAY SERVICE ONLY" and served when the court will be in session. Example: A city court holds court only on Tuesdays. The court has tried all reasonable actions to get the juvenile into court. The officer may go to the school and bring the defendant <u>directly</u> to court. After your proceedings, the officer should return the defendant to school or to the custody of a parent.

***** NEVER JAIL A JUVENILE DEFENDANT *****

(<u>Exception</u>: Contempt that takes place in the courtroom)

300.603 <u>Basic legal rights</u>.

The same basic legal rights apply to a juvenile defendant as to an adult defendant. Generally, no bail is required of a juvenile because a juvenile cannot be incarcerated if bail is not posted.

A juvenile defendant may be represented by an attorney and, if in the interest of justice, a court may appoint a public defender for the juvenile. If no attorney is requested, have the defender sign a waiver of counsel.

Set the juvenile's case for a jury trial unless there is a knowing waiver by a parent or responsible adult. Have both the juvenile and adult sign the waiver of jury form.

300.604 **Sentencing.**

Traffic:

61-8-723 MCA. Offenses committed by persons under 18 years of age. A person under 18 years of age who is convicted of an offense under this title may not be punished by incarceration, but shall be punished by:
(1) a fine not to exceed the fine that could be imposed on the person if the person were an adult, provided that the person may not be imprisoned for failure to pay the fine;
(2) revocation of the person's driver's license by the court or suspension of the license for a period set by the court;
(3) impoundment by a law enforcement officer designated by the court if the motor vehicle operated by the person for a period of time not exceeding 60 days if the court finds that the person either owns the vehicle or is the only person who uses the vehicle; or
(4) any combination of subsections (1) through (3).

Fish, Wildlife, and Parks.

There is no specific sentencing statute for juveniles. 87-1-102 MCA is the penalty section for all violations. Be guided in this sentence by what you would impose for a traffic violation on a youthful offender. **However, remember that you must not jail a youthful offender as part of the sentence.** 87-1-102 MCA is quoted in part:

"87-1-102 MCA. Penalties — violation of state law. (1)(a) A person who purposely, knowingly, or negligently violates a provision of this title or any other state law pertaining to fish and game is guilty of a misdemeanor, except if a felony is expressly provided by law, and shall be fined an amount of not less than $50 or more than $1,000, be imprisoned in the county detention center for not more than 6 months, or both unless a different punishment is expressly provided by law for the violation. In addition, the person, upon conviction or forfeiture of bond or bail, may be subject to forfeiture of that person's license and the privilege to hunt, fish, or trap in this state or to use state lands, as defined in 77-1-101, for recreational purposes for a period set by the court. . . ."

Alcoholic beverage violations.

45-5-624 MCA. Unlawful attempt to purchase or possession of intoxicating substance ─ interference with sentence or court order. (1) A person under 21 years of age commits the offense of possession an intoxicating substance. A person may not be arrested for or charged with the offense solely because the person was at a place where other persons were possessing or consuming alcoholic beverages. A person does not commit the offense if the person consumes or gains possession of an alcoholic beverage because it was lawfully supplied to the person under 16-6-305 or when in the course of employment it is necessary to possess alcoholic beverages.

(2)(a) In addition to any disposition by the youth court under 41-5-1512, a person under 18 years of age who is convicted under this section:

(i) for the first offence, shall be fined an amount not less than $100 and not to exceed $300 and;

(A) shall be ordered to perform 20 hours of community service;

(B) shall be ordered, and the person's parent or parents or guardian shall be ordered, to complete and pay all costs of participation in a community-based substance abuse information course that meets the requirements of subsection (9), if one is available; and

(C) if the person has a driver's license, must have the license confiscated by the court for 30 days, except as provided in subsection (2)(b);

(ii) for a second offense, shall be fined an amount not less than $200 and not to exceed $600 and;

(A) shall be ordered to perform 40 hours of community service;

(B) shall be ordered, and the person's parent or parents or guardian shall be ordered, to complete and pay all costs of participation in a community-based substance abuse information course that meets the requirements of subsection (9), if one is available;

(C) If the person has a driver's license, must have the license confiscated by the court for 6 months, except as provided in subsection (2)(b); and

(D) shall be required to complete a chemical dependency assessment and treatment, if recommended, as provided in subsection (8);

(iii) for a third or subsequent offense, shall be fined an amount not less than $300 or more than $900, shall be ordered to perform 60 hours of community service, shall be ordered, and the person's parent or parents or guardian shall be ordered , to complete and pay all costs of participation in a community-based substance abuse information course that meets the requirements of subsection (9), if one is available, and shall be required to complete a chemical dependency assessment and treatment, if recommended, as provided in subsection (8). If the person has a driver's license, the court shall confiscate the license for 6 months, except as provided in subsection (2)(b).

(b) If the convicted person fails to complete the community-based substance abuse course and has a driver's license, the court shall order the license suspended for 3 months for a first offense, 9 months for a second offense, and 12 months for a third or subsequent offense.

(c) The court shall retain jurisdiction for up to 1 year to order suspension of a license under subsection (2)(b).

(3) A person 18 years of age or older who is convicted of the offense of possession of an intoxicating substance:

(a) for a first offense:

(i) shall be fined an amount not less than $100 or more than $300;

(ii) shall be ordered to perform 20 hours of community service; and

(iii) shall be ordered to complete and pay all costs of participation in a community-based substance abuse information course that meets the requirements of subsection (9);

(b) for a second offense:

(i) shall be fined an amount not less than $200 or more than $600;

(ii) shall be ordered to perform 40 hours of community service; and

(iii) shall be ordered to complete and pay for an alcohol information course at an alcohol treatment program that meets the requirements of subsection (9), which may, in the court's discretion and upon recommendation of a licensed addiction counselor, include alcohol or drug treatment, or both;

(c) for a third or subsequent offense:

(i) shall be fined an amount not less than $300 or more than $900;

(ii) shall be ordered to perform 60 hours of community service;

(iii) shall be ordered to complete and pay for an alcohol information course at an alcohol treatment program that meets the requirements of subsection (9), which may, in the sentencing court's discretion and upon recommendation of a licensed addiction counselor, include alcohol or drug treatment, or both; and

(iv) in the discretion of the court, shall be imprisoned in the county jail for a term not to exceed 6 months.

(4) A person under 21 years of age commits the offense of attempt to purchase an intoxicating substance if the person knowingly attempts to purchase an alcoholic beverage. A person convicted of attempt to purchase an intoxicating substance shall be fined an amount not to exceed $150 if the person was under 21 years of age at the time that the offense was committed and may be ordered to perform community service.

(5) A defendant who fails to comply with a sentence and is under 21 years of age and was under 18 years of age when the defendant failed to comply must be transferred to the youth court. If proceedings for failure to comply with a sentence are held in the youth court, the offender must be treated as an alleged youth in need of intervention as defined in 41-5-103. The youth court may enter its judgment under 41-5-1512.

(6) A person commits the offense of interference with a sentence or court order if the person purposely or knowingly causes a child or ward to fail to comply with a sentence imposed under this section or a youth court disposition order for a youth found to have violated this section and upon conviction shall be fined $100 or imprisoned in the county jail for 10 days, or both.

(7) A conviction or youth court adjudication under this section must be reported by the court to the department of public health and human services if treatment is ordered under subsection (8).

(8)(a) A person convicted of a second or subsequent offense of possession of an intoxicating substance shall be ordered to complete a chemical dependency assessment.

(b) The assessment must be completed at a treatment program that meets the requirements of subsection (9) and must be conducted by a licensed addiction counselor. The person may attend a program of the person's choice as long as a licensed addiction counselor provides the services. If able, the person shall pay the cost of the assessment and any resulting treatment.

(c) The assessment must describe the person's level of abuse or dependency, if any, and contain a recommendation as to the appropriate level of treatment if treatment is indicated. A person who disagrees with the initial assessment may, at the person's expense, obtain a second assessment provided by a licensed addiction counselor or program that meets the requirements of subsection (9).

(d) The treatment provided must be at a level appropriate to the person's alcohol or drug problem, or both, if any, as determined by a licensed addiction counselor pursuant to diagnosis and patient placement rules adopted by the department of public health and human services. Upon the determination, the court shall order the appropriate level of treatment, if any. If more than one counselor makes a determination, the court shall order an appropriate level of treatment based upon the determination of one of the counselors.

(e) Each counselor providing treatment shall, at the commencement of the course of treatment, notify the court that the person has been enrolled in a chemical dependency treatment program. If the person fails to attend the treatment program, the counselor shall notify the court of the failure.

(f) The court shall report to the department of public health and human services the name of any person who is convicted under this section. The department of public health and human services shall maintain a list of those persons who have been convicted under this section. This list must be made available upon request to peace officers and to any court.

(9)(a) A community-based substance abuse information course required under subsection (2)(a)(i)(B), (2)(a)(ii)(B), (2)(a)(iii), or (3)(a)(iii) must be:

(i) approved by the department of public health and human services under 53-24-208 or by a court or provided under a contract with the department of corrections; or

(ii) provided by a hospital licensed under Title 50, chapter 5, part 2, that provides chemical dependency services and that is accredited by the joint commission on accreditation of healthcare organizations to provide chemical dependency services.

(b) An alcohol information course required under subsection (3)(b)(iii) or (3)(c)(iii) must be provided at an alcohol treatment program:

(i) approved by the department of public health and human services under 53-24-208 or by a court or provided under a contract with the department of corrections; or

(ii) provided by a hospital licensed under Title 50, chapter 5, part 2, that provides chemical dependency services and that is accredited by the joint commission on accreditation of healthcare organizations to provide chemical dependency services.

(c) A chemical dependency assessment required under subsection (8) must be completed as a treatment program:

(i) approved by the department of public health and human services under 53-24-208 or by a court or provided under a contract with the department of corrections; or

(ii) provided by a hospital licensed under Title 50, chapter 5, part 2, that provides chemical dependency services and that is accredited by the joint commission on accreditation of healthcare organizations to provide chemical dependency services.

(10) Information provided or statements made by a person under 21 years of age to a health care provider or law enforcement personnel regarding an alleged offense against that person under Title 45, chapter 5, part 5, may not be used in a prosecution of that person under this section. This subsection's protection also extends to a person who helps the victim obtain medical or other assistance or report the offense to law enforcement personnel.

3-10-518 MCA. Youth matters cited in justice's court — public record. Except as provided in 41-5-216, all filed matters related to a youth cited in a justice's court are a public record.

➔Comment: The 1985 Legislature created the offense of interference with a sentence in violation of 45-5-624 for the parent or guardian. When there is interference with the sentence given to the youth, advise the prosecutor, and it will be determined if a charge will be filed against the parent(s) or guardian.

➔Comment: The 2003 Legislature added language in 45-5-624 requiring the parent, parents, or guardian of a minor convicted of a possession of alcohol offense to complete and pay for a substance abuse information course. An Attorney General's opinion has been requested on the court's authority to issue such an order. Pending any opinion or court review, judges should comply with the statute as written.

Tobacco violations.

45-5-637 MCA. Tobacco possession or consumption by persons under 18 years of age prohibited— unlawful attempt to purchase — penalties . (1) A person under 18 years of age who knowingly possesses or consumes a tobacco product, as defined in 16-11-302, commits the offense of possession or consumption of a tobacco product.

(2) A person convicted of possession or consumption of a tobacco product:

(a) shall be fined $50 for a first offense, no less than $75 or more than $100 for a second offense, and no less than $100 or more than $250 for a third or subsequent offense; or

(b) may be adjudicated on a petition alleging the person to be a youth in need of intervention under the provisions of the Montana Youth Court Act provided for in Title 41, chapter 5.

(3) A person convicted of possession or consumption of a tobacco product may also be required to perform community service or to attend a tobacco cessation program.

(4) A person under 18 years of age commits the offense of attempt to purchase a tobacco product if the person knowingly attempts to purchase a tobacco product, as defined in 16-11-302. A person convicted of attempt to purchase a tobacco product:

(a) for a first offense, shall be fined $50 and may be ordered to perform community service;

(b) for a second or subsequent offense, shall be fined an amount not to exceed $100 and may be ordered to perform community service.

(5) The fines collected under subsections (2) and (4) must be deposited to the credit of the general fund of the local government that employs the arresting officer, or if the arresting officer is an officer of the highway patrol, the fines must be credited to the county general fund in the county in which the arrest was made.

Gambling prohibited for minors.

23-5-158 MCA. Minors not to participate— penalty — exception . (1) Except as provided in subsection (3), a person may not purposely or knowingly allow a person under 18 years of age to participate in a gambling activity. A person who violates this subsection is guilty of a misdemeanor and must be punished in accordance with 23-5-161.

(2) Except as provided in subsection (3), a person under 18 years of age may not purposely or knowingly participate in a gambling activity. A person who violates this subsection is subject to a civil penalty not to exceed $50 if the proceedings for violating this subsection are held in justice's, municipal, or city court. If the proceedings are held in youth court, the offender must be treated as an alleged youth in need of intervention, as defined in 41-5-103. The youth court may enter its judgment under 41-5-1512.

(3) A person under 18 years of age may sell or buy tickets for or receive prizes from a raffle conducted in compliance with 23-5-413 if proceeds from the raffle, minus administrative expenses and prizes paid, are used to support charitable activities, scholarships or educational grants, or community service projects.

23-5-161 MCA. Criminal liabilities — misdemeanor. "A person who purposely or knowingly violates a provision of parts 1 through 8 of this chapter, the punishment of which is for a misdemeanor, shall upon conviction of a first offense be fined not more than $500. Upon a second conviction within 5 years of a first conviction, a person shall be fined not more than $1,000 or imprisoned in the county jail for not more than 6 months, or both. . . ."

➔Comment: 23-5-161 MCA is quoted in part since third and subsequent convictions listed in the statute are felonies based upon jurisdictional limitations.

300.605 Contempt of court.

There is nothing in the Montana codes to indicate that a juvenile who commits a contempt of court should be treated in a different manner than an adult. The power of the court to control proceedings cannot be discarded merely because a person is a juvenile. (See Section 300.502 for the procedure).

300.700 OATHS, CERTIFICATES, AND AFFIDAVITS.

300.701 Oath.

➔Comment: An oath is any form of attestation by which a person signifies that they are bound in conscience to perform an act faithfully and truthfully. Without doubt, every judicial officer can administer oaths when testimony is being given before that officer (See 1-6-101).

300.702 Form of Oath.

1-6-102 MCA. Form of ordinary oath. An oath or affirmation in an action or proceeding may be administered by the person who swears or affirms expressing that person's assent when addressed with "You do solemnly swear (or affirm, as the case may be) that the evidence you will give in this issue (or matter), pending between ……. and ……., is the truth, and nothing but the truth, so help you God."

➔Comment: The court may vary the mode of swearing or affirming for the witness's beliefs whenever the court is satisfied that the witness has a distinct mode of swearing or affirming. Any person who desires it may, instead of taking an oath, make a solemn affirmation or declaration by assenting when addressed, "You do solemnly affirm/declare," etc., as in 1-6-102 MCA.

300.703 Certificates.

➔Comment: A certificate is a statement written and signed by a public officer, under the oath of that office, which is by law made evidence of the truth of the facts stated in that writing. It usually relates to something the public officer did or has in the officer's possession.

300.704 Form of certificate.

State of Montana)
)ss:
County of _____)

I hereby certify that the attached copy is a true and correct copy of docket No. _____, Page ____, in the case of _____ vs _____ in the justice (city) court of ___(city)___, (County), Montana.

Dated this _____ day of _____, 20___.

_____(signature)_____

_____(title)_____

➔Comment: The Montana codes authorize justices of the peace and city judges to administer oaths. In addition, most judges or their clerks become notary publics, thus eliminating the need of any additional certificate. However, there may be some instances where a clerk's certificate is necessary. Be sure and read the pertinent statutes in this area.

300.705 Affidavits.

An "affidavit" is a written declaration under oath, made without notice to the adverse party.

26-1-1002 MCA. Permissible uses for affidavits. An affidavit may be used:
(1) to verify a pleading or a paper in a special proceeding;
(2) to prove the service of a summons, notice, or other paper in an action or special proceeding;
(3) to obtain a provisional remedy, the examination of a witness, or a stay of proceedings;
(4) upon a motion; and
(5) in any other case expressly permitted by some other provision of this code.

➔Comment: You will receive most affidavits under (1) above – to verify a pleading. For example: complaints and answers in an action for forcible entry or unlawful detainer must be verified. (See MCA 70-27-116), as do small claims in Title 25, chapter 35 of the MCA.

26-1-1003 MCA. Affidavits made in this state before whom taken. An affidavit to be used before any court judge, or officer of this state may be taken before any judge or clerk of any court or any justice of the peace, county clerk, or notary public in this state.

300.800 MARRIAGE PROCEDURE AND REQUIREMENTS.

300.801 License.

A license must be obtained from the clerk of the district court. Do not attempt to give any interested parties information about the license; refer them to the clerk of the district court.

A marriage license is valid for 180 days after it has been issued. The license is good throughout the state. If both parties are nonresidents of the state, the license may be obtained from the clerk of the district court of the county where the marriage ceremony is to be performed. Each female applicant must obtain a medical certificate for a rubella immunity test.

300.802 Solemnization.

A marriage may be solemnized by a judge of a court of record, by a public official whose powers include solemnization of marriages, by a mayor, city judge, or justice of the peace, by a tribal judge, or in accordance with any mode of solemnization recognized by any religious denomination, Indian nation or tribe, or native group.

No particular form of solemnization is required by law. It may be as simple as the parties coming into the office and saying, "It is my intent to be married and I take _____ for my _____(husband or wife)." An example of a marriage ceremony is set forth later in this unit.

Montana law makes provision for a proxy marriage. The requirements are: (1) the party is unable to be present;
(2) a third person must be authorized in writing to act as the proxy; and
(3) the judge must be satisfied as to the validity of the first two provisions.

300.803 Registration of Marriage.

Every license contains a certificate which must be filled out by the person solemnizing the marriage. The license may also have space for witnesses to sign.

Immediately after the ceremony, the judge should complete the certificate and mail or take it to the clerk of the district court where the license was issued. The certificate must be delivered to the clerk within 30 days after the ceremony (See 40-1-321 MCA). The law calls for a fine of $10 to $50 for failure to deliver the completed certificate to the clerk of the district court.

300.804 Sample Ceremony.

Friends, we are gathered here for this wedding ceremony to join in matrimony _____(names)_____ (or) this man and this woman.

The vows of marriage must be freely and voluntarily given, and are a sacred bond by which both parties assume a new status, under the law and before God.

The married status bestows upon the husband and the wife, rights and obligations that are the most solemn in human relationships. How well these privileges and duties are understood and observed will determine the happiness and welfare of you as individuals, and as a family.

Your happiness for many years to come will be assured only by your considerate and unselfish devotion, each for the other. Upon that foundation of love, your marriage must be built and its continuance must depend. For these reasons, it is important that your mutual vows be fully understood and exchanged with candor and good faith.

(Who gives this woman in marriage?)

__Man__ Will you have this woman to be your lawful wedded wife, and with her to live together in Holy Matrimony pursuant to the laws of God and this State? Will you love her, comfort her, honor and keep her both in sickness and health, and forsaking all others keep you only unto her, so long as you both shall live? (Man responds).

__Woman__, Will you have this man to be your lawful wedded husband, and with him to live together in Holy Matrimony pursuant to the laws of God and this State? Will you love him, comfort him, honor and keep him both in sickness and in health, and forsaking all others, keep you only unto him, so long as you both shall live? (Woman responds).

(To Both): Will you please face each other, join hands and repeat after me.

(Man) I, _____, take you, _____, to be my wedded wife, to have and to hold, from this day forward, for better~~r~~ for worse, in poverty and wealth, through sickness and health, to love and to cherish, till death do us part.

(Woman) I, _____, take you, _____, to be my wedded husband, to have and to hold, from this day forward, for better— for worse, in poverty and wealth, through sickness and health, to love and to cherish, till death do us part.

The ring is but an outward symbol of the bonds that will unite these two lives together. May this gift, from one to the other, be a constant reminder of all the bonds uniting your hearts, and of the joy its giving brings.

(Man — Woman) Place the ring upon her/his finger and repeat after me:

With this ring I thee wed, and my love I pledge to you.

Let us pray. Lord, may this couple remember when they first met and the strong love that grew between them. Help them to see the good in each other and to find the answers to all of their problems. Help them to say the kind and loving things to each other that will continue this beautiful relationship. Help them to understand humility and to be big enough to seek forgiveness. Finally, help them to understand that their marriage is now in your hands and your blessing. Amen.

By the authority vested in me as a municipal/city/justice court judge, of the State of Montana, I now pronounce you husband and wife. You may kiss your bride. Congratulations!

(To any persons assembled): May I present Mr. and Mrs. _____.

SECTION 400 — TRIAL: BENCH AND JURY

400.100 Introduction.

Art II, Sec. 26, Mont. Const. Trial by jury. The right to trial by jury is secured to all and shall remain inviolate. But upon default of appearance or by consent of the parties expressed in such manner as the law may provide, all cases may be tried without a jury or before fewer than the number of jurors provided by law. In all civil actions, two-thirds of the jury may render a verdict, and a verdict so rendered shall have the same force and effect as if all had concurred therein. In all criminal actions, the verdict shall be unanimous.

3-15-101 MCA. Jury defined. A jury is a body of persons temporarily selected from the citizens of a particular district and invested with power to present or indict a person for a public offense or to try a question of fact.

3-15-102 MCA. Kinds of juries. Juries are of three kinds:
(1) grand juries;
(2) trial juries;
(3) juries of inquest.

3-15-104 MCA. (*Temporary)* Trial jury defined. A trial jury is a body of persons returned from the citizens of a particular district before a court or officer of competent jurisdiction and sworn to try and determine, by verdict, a question of fact.
3-15-104 MCA. *(Effective on occurrence of contingency)* Trial jury defined. Except as provided in 3-20-103, a trial jury is a body of persons returned from the citizens of a particular district before a court or officer of competent jurisdiction and sworn to try and determine, by verdict, a question of fact.

➔Comment: The contingency referenced in the second entry of 3-15-104 MCA has to do with asbestos related claims only. See 3-20-103 for details about the exception. Judges should regard the first entry of the statute as the one to use under normal circumstances.

46-17-201 MCA. Juries in misdemeanor cases. (1) The parties in a misdemeanor case are entitled to a jury of six qualified persons but may agree to a number less than six at any time before the verdict.
(2) Upon consent of the parties, a trial by jury may be waived.

➔Comment: Please note the judge is **required** to make a notation, regarding the election of jury, on the charging document or on the Minutes of Appearance or Court Minutes forms found in the Benchbook, if attached as part of the record.

3-15-107 MCA. Number in justices' court. A jury in a justice's court, in misdemeanors, consists of six persons, but the parties may agree to a less number than six.

400.101 Jury Waivers.

Jury waiver, criminal:

46-17-201 MCA. Juries in misdemeanor cases. (1) The parties in a misdemeanor case are entitled to a jury of six qualified persons but may agree to a number less than six at any time before the verdict.
(2) Upon consent of the parties, a trial by jury may be waived.

➔Comment: Remember that Title 46 is criminal procedure and that Title 25 is civil procedure. A judge must understand the difference between the right of a jury trial in a criminal or in a civil action. In a criminal action, the jury is required unless waived. In a civil action, the jury is waived unless demanded.

Jury waiver, civil:

Rule 15, MJCC Rules of Civil Proc. Right to jury trial. A. RIGHT PRESERVED. The right to a trial by jury as declared by the constitutions of the United States and the State of Montana or as given by statute must be preserved to the parties inviolate.
B. DEMAND. At any time after the commencement of the action and not later than 5 days after the service of the last pleading directed to the issue, a party may demand a trial by jury, as allowed by law, of any issue of fact by filing in the court and serving upon the other parties a written demand for a jury trial. The demand may be stated in a pleading of the party.
C. HOW WAIVED. A jury may be waived:
(1) by consent of the parties entered in the docket;
(2) by the failure of any party to demand a jury trial under this title;
(3) by the failure of either party to appear at the time fixed for the trial of an issue of fact.

400.102 Pretrial Motions and Notices.

46-13-101 MCA. Pretrial motions and notices. (1) Except for good cause shown, any defense, objection, or request that is capable of determination without trial of the general issue must be raised at or before the omnibus hearing unless otherwise provided by Title 46.

(2) Failure of a party to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court, constitutes a waiver of the defense, objection, or request.

(3) The court, for cause shown, may grant relief from any waiver provided by this section. Lack of jurisdiction or the failure of a charging document to state an offense is a nonwaivable defect and must be noticed by the court at any time during the pendency of a proceeding.

(4) Unless the court provides otherwise, all pretrial motions must be in writing and must be supported by a statement of the relevant facts upon which the motion is being made. The motion must state with particularity the grounds for the motion and the order or relief sought.

➔Comment: The pretrial conference or hearing is an effective and helpful tool to assure the court that all parties are prepared to go on to trial, especially with a pro se defendant. Using a pretrial checklist (See Benchbook for a sample form) will assist the judge in making decisions about continuances and other trial motions, i.e., a continuance would not be granted, if at the pretrial the attorney or defendant stated that they were prepared to go to trial and now they say they are not ready. Also, if the defendant appears at the pretrial and the trial date is discussed, then the judge should not be hesitant about holding a trial in the absence of the defendant. Omnibus (pretrial) hearings are required under 46-13-110 MCA for criminal cases and provided for in Rule 14, MJCC Rules of Civil Procedure for civil cases.

46-13-110 MCA. Omnibus hearing. (1) Within a reasonable time following the entry of a not guilty plea but not less than 30 days before trial, the court shall hold an omnibus hearing.

(2) The purpose of the hearing is to expedite the procedures leading up to the trial of the defendant.

(3) The presence of the defendant is not required, unless ordered by the court. The prosecutor and the defendant's counsel shall attend the hearing and must be prepared to discuss any pretrial matter appropriate to the case, including but not limited to:

(a) joinder and severance of offenses or defendants, 46-11-404, 46-13-210, and 46-13-211;

(b) double jeopardy, 46-11-410, 46-11-503, and 46-11-504;

(c) the need for exclusion of the public and for sealing records of any pretrial proceedings, 46-11-701;

(d) notification of the existence of a plea agreement, 46-12-211;
(e) disclosure and discovery motions, Title 46, chapter 15, part 3;
(f) notice of reliance on certain defenses, 46-15-323;
(g) notice of seeking persistent felony offender status, 46-13-108;
(h) notice of other crimes, wrongs, or acts, 46-13-109
(i) motion to suppress, 46-13-301 and 46-13-302;
(j) motion to dismiss, 46-13-401 and 46-13-402;
(k) motion for change of place of trial, 46-13-203 through 46-13-205;
(l) reasonableness of bail, Title 46, chapter 9; and
(m) stipulations.

(4) At the conclusion of the hearing, a court-approved memorandum of the matters settled must be signed by the court and counsel and filed with the court.

(5) Any motions made pursuant to subsections (1) through (3) may be ruled on by the court at the time of the hearing, where appropriate, or may be scheduled for briefing and further hearing as the court considers necessary.

Rule 14, MJCC Rules of Civil Proc. Pretrial conferences. A. OBJECTIVES. In any action, the court may, in its discretion, direct the parties' attorneys or the parties to appear before it for one or more conferences before trial for the following purposes:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be delayed because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial with more thorough preparation; and

(5) facilitating the settlement of the case. All pretrial scheduling shall be the duty of the judge.

B. SUBJECTS TO BE DISCUSSED AT PRE-TRIAL CONFERENCES. The participants at any conference under this rule may consider and take action with respect to:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authentication of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the possibility of settlement;

(7) the form and substance of the pretrial order;

(8) the disposition of pending motions;

(9) the time for submission of proposed findings of fact and conclusions of law in a non-jury action, or proposed instructions to the jury and form of

verdict in a jury action, and such other matters as may aid in the disposition of the action.

Each party or an attorney for each party participating in any conference before trial must have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. After any conference held pursuant to this rule, an order must be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order.

C. SANCTIONS. If a party or a party's attorney fails to participate in good faith, the judge, upon the judge's own motion, may make orders as are just and may deal with the offending party pursuant to Title 3, chapter 10, part 4, in lieu of or in addition to any other sanction, the judge may require the party or the party's attorney, or both, to pay the reasonable expenses, including attorney fees, incurred because of any noncompliance with this rule unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

➔Comment: 25-31-710 MCA listed below allows telephonic pretrial conferences. Many courts already use this procedure to save time for the parties and the court and to save costs for the parties. The same rules apply for the hearing whether it is held in person or by telephone.

25-31-710 MCA. Pretrial conferences or hearings— appearance by telephone conference. (1) A party or the party's attorney may make an appearance by telephone conference in a pretrial conference or other hearing under this chapter if:

(a) the party does not need to or intend to offer evidence at the pretrial conference or hearing;

(b) the party does not reside within the county in which the case is filed or the party's or the party's attorney's principal place of business is not located in that county; and

(c) at least 10 days before the pretrial conference or other hearing, the party or the party's attorney intending to appear by telephone conference provides written notice to the court and to all parties or the attorneys for the parties.

(2) The party requesting the telephone conference is responsible for arranging the telephone conference and paying the associated costs.

400.103 Trial and Hearing Defined.

A trial is a proceeding which will bring about a final decision or judgment in an action. It is defined in Black's Law Dictionary, Seventh Edition, as follows:

"A formal judicial examination of evidence and determination of legal claims in an adversary proceeding."

A "hearing" is a proceeding on a motion or a hearing for any of the many preliminary matters that need to be resolved before the

cause is at issue and ready for trial. A cause is "at issue" when the court is aware of the claims and contentions of the parties and the questions that must be decided. Some types of hearings include bail, suppression of evidence, motions to set aside judgment, or motions to dismiss.

400.104 Issues Defined.

25-31-801 MCA. Issue defined, types of issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:
(1) of law; and
(2) of fact.

400.105 Issues of Law.

25-31-803 MCA. By whom issues tried. (1) An issue of law must be tried by the court.
(2) An issue of fact must be tried by a jury unless a jury is waived, in which case it must be tried by the court.

400.106 Issues of Fact.

25-31-802 MCA. When issues of fact arise. An issue of fact arises:
(1) whenever a material allegation in the complaint is controverted by the answer; and
(2) whenever the answer contains new matter which raises questions of fact and not merely an issue of law.

26-1-202 MCA. Questions of fact. If a trial is by jury, all questions of fact other than those mentioned in 26-1-201 must be decided by the jury, and all evidence thereon must be addressed to them, except as otherwise provided by law. If the trial of a question of fact is not by jury, all evidence thereon must be addressed to the trial court, which shall decide such question.

400.107 Presence of Defendant.

46-16-122 MCA. Absence of defendant from trial. (1) In a misdemeanor case, if the defendant fails to appear in person, either at the time set for the trial or at any time during the course of the trial and if the defendant's counsel is authorized to act on the defendant's behalf, the court shall proceed with the trial unless good cause for continuance exists.

(2) If the defendant's counsel is not authorized to act on the defendant's behalf as provided in subsection (1) or if the defendant is not represented by counsel, the court in its discretion, may do one or more of the following:
(a) order a continuance;

(b) order bail forfeited;

(c) issue an arrest warrant; or

(d) proceed with the trial after finding that the defendant had knowledge of the trial date and is voluntarily absent.

(3) After the trial of a felony offense has commenced in the defendant's presence, the absence of the defendant during the trial may not prevent the trial from continuing up to and including the return of a verdict if the defendant;

(a) has been removed from the courtroom for disruptive behavior after receiving a warning that removal will result if the defendant persists in conduct that is so disruptive that the trial cannot be carried on with the defendant in the courtroom; or

(b) is voluntarily absent and the offense is not one that is punishable by death.

(4) Nothing in this section limits the right of the court to order the defendant to be personally present at the trial for purposes of identification unless defense counsel stipulates to the issue of identity.

400.108 Trial after Nonappearance of a Party.

Rule 16, MJCC Rules of Civil Prod. Failure to appear or proceed.

A. DEFENDANT. If a defendant, who has been properly served, fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party or parties.

B. PLAINTIFF. If a plaintiff fails to appear at the time fixed for trial, the judge shall dismiss the plaintiff's claim with prejudice and award costs to the defendant. The trial may proceed on any other pending claims of any other parties.

C. TIME. If a party fails to pursue disposition of a matter filed in a justice or city court in a timely manner, the court may, on it's own motion, dismiss the matter without prejudice. A dismissal at the court's discretion under this Rule 16C must be by written notice of the court to all parties and may not be made for at least 90 days after the last action. The notice must state that unless good cause is shown by a party or a party's attorney within 30 days of the court's notice, the matter must be dismissed without prejudice. If good cause is shown, in writing, by a party or a party's attorney, the court may set the matter for trial and no dismissal may be entered by the court.

400.200 PROCEDURES.

400.201 Setting the Trial.

Set a Criminal matter for trial immediately after receiving the defendant's plea of "not guilty." The defendant may say, "Well, I don't know yet if I'll want a jury." While the defendant is deciding or contacting an attorney, time is running. The trial on a misdemeanor charge must be held within six (6) months unless the defendant applies to have it postponed (See 46-13-401(2)). The defendant's indecision is not justification for postponement. If the defendant waives the jury, you may cancel your setting for the jury trial and reset it as a bench trial. A jury trial is required in a criminal matter unless waived. Use a waiver form for the defendant to sign and docket the defendant's waiver. You may also use your daily appearance or initial appearance/arraignment form. You must advise the defendant of the right to a jury and explain that by signing the form, the right is waived or is secured, depending on the defendant's choice in the matter.

Set a civil matter for trial upon the request of either party or upon the court's own motion. (Trial and pretrial hearings could be set in one order.) You will not call a jury for the civil case unless one is demanded by a party to the action.

Trial in a small claims case is set by the court on the form ORDER OF COURT/NOTICE TO DEFENDANT. Trial is held when the defendant appears to defend the claim, and in case the defendant does not appear, judgment by default is entered.

There will be times when you must change trial dates. Advise the parties as soon as possible of the change to avoid as much inconvenience as you can. One reason for a change could be the necessity to have a trial for an incarcerated defendant pursuant to the following statute:

> 46-16-101 MCA. Who given precedence on calendar. Prosecutions against defendants held in custody must be disposed of in advance of prosecutions against defendants on bail unless for good cause the court shall direct an action to be tried out of its order.

➔Comment: As you select a trial setting, it is wise to think of the time necessary for all parties in a criminal action, Title 46, or the litigants in a civil action, Title 25, to prepare for trial. You should also consider the number of witnesses and the complexity of the issues.

46-16-106 MCA. Time to prepare for trial. After plea, the defendant shall be entitled to a reasonable time to prepare for trial.

25-31-702 MCA. Trial to be timely. Unless postponed as provided in this part or transferred to another court, the trial of the action may commence at the time set by the court as specified in the notice mentioned in Rule 20, Montana Justice and City Court Rules of Civil Procedure, and after the trial has commenced, there may be no adjournment for more than 24 hours at any one time until all the issues are disposed of.

Rule 20, MJCC Rules of Civil Proc. Notice of trial. After all parties served with process have appeared or some have appeared and the remaining have been defaulted, the judge, upon request of any party, shall fix a day for trial of the cause and shall provide notice of the trial date to the plaintiffs and defendants who have appeared.

➔Comment: Schedule the criminal matters first and then fill the open time periods with civil matters. By reading the pleadings, you will have a good estimate of the time needed to hear the issues.

A misdemeanor charge must be heard within 6 months of entry of plea by the defendant or the defendant's attorney, unless the defendant has filed a written waiver of speedy trial.

46-14-401 MCA. Dismissal at instance of court or prosecution. (1) The court may, either on its own motion or upon the application of the prosecuting attorney and in furtherance of justice, order a complaint, information, or indictment to be dismissed. However, the court may not order a dismissal of a complaint, information, or indictment, or a count contained in a complaint, information, or indictment, charging a felony, unless good cause for dismissal is shown, and the reasons for the dismissal are set forth in an order entered upon the minutes.
(2) After the entry of a plea upon a misdemeanor charge, the court, unless good cause to the contrary is shown, shall order the prosecution to be dismissed, with prejudice, if a defendant whose trial has not been postponed upon the defendant's motion is not brought to trial within 6 months.

➔Comment: The court should advise the defendant of the obligation to keep the court notified of the current residence/mailing address/telephone number. This should be a standard condition of release in a criminal case.

➔Comment: Time does not run during any period the defendant is out of state. Do not dismiss a charge because the dates show that 6 months have expired. Time may not have been running. A motion will be filed by the prosecutor or the defendant to bring this issue before the court.

400.202 The Jury Panel.

➔Comment: In the process of selection of a jury, the first step is the preparation of a "jury list" or a list of those persons qualified to sit on a trial jury in that jurisdiction. One section in the criminal code deals directly with this subject for courts of limited jurisdiction but by reference it makes applicable other sections of the Montana code.

> 46-17-202 MCA. Formation of trial jury for justices', municipal, and city courts. (1) At the time of preparing the district court jury list under 3-15-404(6), the clerk of the district court shall prepare a jury list for each justice's, municipal, and city court within the county. Each list must consist of residents of the appropriate county, city, or town. The lists must be selected in any reasonable manner that ensures fairness, and each list must include a number of names sufficient to meet the annual jury requirements of the respective court. Additional lists may be prepared if required. The lists must be filed in the office of the clerk of the district court as provided in 3-15-403. The appropriate list must be posted in a public place in each county, city, or town, and the list must comprise the trial jury list for the ensuing year for the county, city, or town.
> (2) Trial jurors must be summoned from the jury list by notifying each one orally that the person is summoned and of the time and place at which attendance is required.

➔Comment: Effective October 1, 2005, the list of those competent to serve as jurors will be expanded from the list of registered electors to a list of all who have resided in the state and city, town, or county for 30 days and who are at least 18 years of age and citizens of the United States.

Failure of juror to attend.

> 3-15-321 MCA. Attachment and fine for failure to attend. Any juror summoned who willfully and without reasonable excuse fails to attend may be attached and compelled to attend. The court may impose a fine not exceeding $50, upon which execution may issue. If the juror was not personally served, the fine must not be imposed until, upon an order to show cause, an opportunity has been offered the juror to be heard. The court may for good cause remit, modify, or cause any fine collected to be refunded.
>
> 3-15-402 MCA. Selection of qualified persons. The secretary of state shall select from the most recent list of all registered electors and make a list of the names of

all persons qualified to serve as trial jurors, as prescribed in part 3 of this chapter. The secretary of state shall then combine the resulting list with the list submitted to the secretary of state under 61-5-127, ensuring that a person's name does not appear on the combined list more than once. Each name appearing on the combined list must be assigned a number that must be placed opposite the name on the combined list and must be considered the number of the juror opposite whose name it appears. A person's name may not appear on a combined list for more than one court during a 1-year term.

3-15-404 MCA. Duty of jury commissioner— jury box or computer database .
(1) The clerk of court is the jury commissioner and may appoint a deputy pursuant to 7-4-2401.
(2) A county jury commissioner may by order establish the use of either a jury box, as provided in subsection (3), or a computer database, as provided in subsection (4), as the means for selecting jurors in the county.
(3) If a county uses a jury box for selection of jurors, the jury commissioner shall prepare and keep a jury box and contents as prescribed in this subsection. The number of each juror must be written, typed, or stamped on a slip of paper or other suitable material, identical in all respects to the slips used for the other numbers. The slips must be placed in a box of ample size to permit them to be thoroughly mixed. The box must be plainly marked "jury box". The slips may be used as often as necessary, except that none may be used that is in any manner defaced or disfigured or so marked that it may be recognized or distinguished from the others in the jury box except by the number on the slip. The box may contain only one slip for each number corresponding to the number before the name of each juror on the jury list filed under 3-15-403.
(4) If a county uses a computer database for selection of jurors, the jury commissioner shall cause the list of jurors filed under 3-15-403 to be entered into a computerized database.
(5) A person's name may not appear on a jury list for more than one court during a 1-year term.
(6) The clerk of court shall prepare a list of persons to serve as trial jurors for the ensuing year for the district court or each division of the district court. On or before the second Monday of June, the clerk of court shall prepare the jury list pursuant to 46-17-202.
(7) If the clerk of court is satisfied that a person whose name is drawn is deceased, is mentally incompetent, has permanently moved from the county, or has been permanently excused under the provisions of 3-15-313, the person's name must be omitted from the jury list. The reason for the omission must be recorded.

3-15-411 MCA. Term of service of jurors. (1) The persons whose names are so returned are known as regular jurors and must serve for 1 year and until other persons are selected and returned unless they are excused by the court or a judge pursuant to 3-15-501.
(2) If jurors are drawn before the selection and return of the new jury list as provided in this part and thereafter a new jury list is returned, they shall continue to serve as jurors, if the business of the court requires the attendance of a jury, for a period not exceeding 90 days.
(3) Notwithstanding each limitation of service, a jury composed of such jurors duly impaneled to try any cause shall continue to serve in such cause until discharged by the court from any further consideration of such cause. The fact that a new jury list has been returned shall not affect their status as jurors.

400.203 Calling the Jurors to Report.

➔Comment: The master "jury list" furnished to your court will contain more names than can be used for one trial. Summon more than 12 initially because you will need extras for those needing to be excused from jury service because of health or similar problems. By calling 16 or 18 jurors, you should be able to replace those jurors excused for cause and still have 12 remaining for the peremptory challenge procedure. MCA 3-15-704 says that 12 or double the number agreed upon should be summoned. Trials could be delayed or continued to another time because insufficient jurors are present for the selection process. Therefore, the court should summon a sufficient number of prospective jurors to allow for those excused.

3-15-701 MCA. When and by whom. When jurors are required in any court of limited jurisdiction, they:
(1) must, upon the order of the judge, be summoned by a sheriff, constable, marshal, or police officer of the jurisdiction; or
(2) may be summoned by the judge of the court of limited jurisdiction or by the clerk of that court.

3-15-702 MCA. How to be summoned. Such jurors must be summoned from the persons competent to serve as jurors, residents of the county, city, or town in which such court has jurisdiction, by notifying them orally or by mail that they are summoned and of the time and place at which their attendance is required.

3-15-703 MCA. Officer's return. The officer summoning the jurors shall, at the time fixed in the order for their appearance, return the order to the court with a list of the persons summoned endorsed thereon.

➔Comment: From the regular jurors summoned, six (6) will finally be selected to try the case and render a verdict. It is not generally necessary to choose an alternate, however, you should ask the parties whether or not an alternate is necessary.

400.204 Forming the Jury.

> 3-15-704 MCA. Forming jury. At the time appointed for a jury trial in a justice's or city court or any other court of limited jurisdiction, the list of jurors summoned must be called. The jurors summoned shall be 12 in number or double the number agreed upon by the parties before the trial. The names of those attending and not excused must be written upon separate slips of paper, which slips must be folded so as to conceal the names, and placed in a box from which the trial jury must be drawn.

➔Comment: The list of jurors summoned will be read and jurors will indicate their presence. Then select individual slips from the box and have the drawn jurors seated in the order of selection. After 12 jurors have been selected they will be examined *voir dire*. The purpose of this examination is to determine if the juror's decision in this case would in any way be influenced by personal opinions or personal experience or special knowledge on the subject matter to be tried. First the judge will ask preliminary questions to determine "cause."

During the examination of the individual prospective jurors, either party or the judge may challenge an individual "for cause." The list of challenges for cause are found in MCA 46-16-115. There is no limit on challenges for cause. Either party should address the court saying, "I challenge this juror for cause." The judge will then address this juror and inquire into the area that has caused this concern. A simple question may suffice. For example: If the juror has stated that the juror has some old feelings that the juror has against highway patrolmen could not be put aside, and the prosecutor has challenged knowing the state's case is based upon the testimony of three highway patrolmen, you may ask the juror, "Do you feel that you could be a fair and impartial juror and, putting your prior feelings behind you, render a fair verdict based only upon the testimony presented here today?" Another way to determine jurors' state of mind is to ask if they were the defendant, would they be comfortable having themselves sit as a juror. Each defendant should start with a clean slate and only the testimony and evidence of the trial should count toward a juror's decision of guilt or innocence. If a juror is not certain if he can even begin the trial with an open mind, this juror may be excused at the court's discretion.

➔Comment: Note, however, the quotation cited in both State v. Brown v. Brown 1999 MT 309 and State v. Freshment 2002 MT 61 2002 MT 61: "It is not a district court's role to rehabilitate jurors whose spontaneous, and thus most reliable and honest, responses on *voir dire* expose a serious question about their ability to be fair and impartial." citing State v. DeVore 1998 MT 340. These cases suggest that judge rehabilitation of a potential juror should be used with extreme caution.

When both parties have "passed the jury panel for cause", they will exercise the peremptory challenges. No reason is given for these challenges. The names are simply struck from the jury panel, alternately, until each side has removed three (3) names if the case is criminal, two (2) if the case is civil, or waived their challenge.

The judge will now read the names of those jurors having been selected to serve as trial jurors and ask if the state and the defense "stipulate that these are the selected jurors." If it is so stipulated, excuse the other jurors and swear those jurors to try the case now at issue. You should invite those jurors not chosen to remain if they desire and thank them for coming in as summoned.

➔Comment: In civil actions, the procedure is the same. However, the number of peremptory challenges is reduced to two per party.

400.205 Motions.

Introduction. A "motion" is an application to, or a request of, the court for a ruling on some point. A motion, whether oral or written, should state the grounds on which it is based and should also state the relief requested or the court order desired. Every motion is for the purpose of "moving" the discretion of the judge to either grant or deny a certain request.

Because the substance of motions are the products of the author's ingenuity and imagination, it is impossible to set forth all the possible motions a judge will be asked to consider. Representative and more common motions are listed later in this chapter.

Ruling on motions. A judge must either "grant" the motion, which means that the request is proper and what is requested will be done, or to "deny" the motion. In some instances, the judge can take the motion "under advisement", which means an immediate ruling will not be made but the judge will rule on the matter in the future. This can only be done if an immediate ruling is not critical to a continuation of the hearing.

Procedural requirements. It is not required that motions be made in writing. Attorneys will often do so because they can be more certain that all points they wish to present are clearly set forth. Whether oral or written, it is necessary to have the substance of the motion and the ruling entered in the court docket.

It is very common for a party to present a request to the court without saying, "I move the court" or some such words. If the substance of the request is understood to be a motion, then the court should enter the motion in the docket, together with the ruling.

Motions should be stated in the form of a request without argument being included. This is especially true when a case is being presented before a jury. When a court feels it would be helpful to the court to have oral argument, the court should ask for argument before ruling on the motion. Argument on a motion during a jury trial should always be out of the hearing of the jurors.

Setting a motion for hearing. Some motions are made "ex parte" (by one party to the action without the other party being present). In such a case, the judge should first consider the due-process question, i.e., should the other party be present and be given a chance to be heard before the court rules on the motion? Yes— all parties should be aware of any potential rulings the court might make. There are not many statutes that help answer the due-process question and, for the most part, the judge must rely upon common sense and fair play.

During a trial, a lawyer may ask to be allowed to make a motion outside the presence of the jury. This request usually indicates that the substance of the motion is something the jury should not hear or the necessary argument on the motion is something the jury should not hear. The best policy is to excuse the jury and listen to the motion out of the hearing of the jurors.

A typical list of motions. A. Motions that will terminate the judge's responsibility:

1. Lack of Jurisdiction:
   (a) civil;
   (b) criminal;
   (c) juvenile.

2. To Change Venue:

   (a)..improper venue;
   (b) bias or prejudice in the community.

3. Relating to Witnesses:

   (a) to issue subpoena or subpoena *duces tecum*;
   (b) to exclude witnesses from the courtroom;
   (c) to examine a witness out of order;
   (d) to call as an adverse witness;
   (e) to examine as a hostile witness;
   (f) to recall the witness;
   (g) to require the witness to answer;
   (h) to admonish the witness;
   (i) to strike the testimony of a witness;
   (j) to excuse the witness;
   (k) to produce the original copy of a document;
   (l) to examine notes the witness is using;
   (m) to challenge the qualifications of an expert witness;
   (n) to challenge the right to testify for lack of Competency or privileged communication.

B. General Motions in Criminal Cases.

1. Re: Search Warrants.
   (a) to issue;
   (b) to suppress.

2. Re: Bail.
   (a) to set;
   (b) to change;
   (c) to revoke;
   (d) to exonerate.

3. Re: Counsel.
   (a) to appoint;
   (b) to permit counsel to withdraw;
   (c) to waive counsel.

4. Re: Complaint and Arrest.
   (a) to issue warrant or summons;
   (b) to dismiss the action;
   (c) to issue duplicate warrant or summons;
   (d) to quash service.

5. Re: Confession or Admission.
   (a) to suppress;
   (b) to hold a hearing on voluntary nature;
   (c) to furnish defendant with a copy.

6. Re: Preliminary Hearing.
   (a) to hold;
   (b) to waive.

7. Re: Trial.
   (a) to set;
   (b) waive jury;
   (c) continue trial;
   (d) for mistrial;
   (e) for directed verdict;
   (f) for new trial;
   (g) for instructions.

8. Re: Due Process, Motions to Dismiss.
   (a) double jeopardy;
   (b) statute of limitations.

C. General Motions in Civil Cases.

1. Re: Pleadings.
   (a) to appoint *guardian ad litem*;
   (b) to amend;
   (c) to issue alias summons;
   (d) to dismiss — failure to state cause of action;
   (e) to dismiss, with or without prejudice;
   (f) to strike;
   (g) to make more definite or certain;
   (h) for a bill of particulars;
   (i) to dismiss, failure to verify;
   (j) to dismiss, improper service.

2. Re: Trial or Judgment.
   (a) for default;
   (b) to set case for trial;
   (c) to call a jury;
   (d) to continue;
   (e) motion *in limine*;
   (f) for mistrial;
   (g) for new trial;
   (h) to poll the jury;
   (i) to tax costs.

400.206 Continuance for Trial.

➔Comment: The continuance of a trial is left to the discretion of the court. Such things as timely application and health of the parties involved, and speedy trial issues are important considerations.

46-13-202 MCA. Motions for continuance. (1) The defendant or the prosecutor may move for a continuance. If the motion is made more than 30 days after arraignment or at any time after trial has begun, the court may require that it be supported by affidavit.
(2) The court may upon the motion of either party or upon the court's own motion order a continuance if the interests of justice so require.
(3) All motions for continuance are addressed to the discretion of the trial court and must be considered in the light of the diligence shown on the part of the movant. This section must be construed to the end that criminal cases are tried with due diligence consonant with the rights of the defendant and the prosecution to a speedy trial.

25-31-703 MCA. Postponement by motion of court. The court may, of its own motion, postpone the trial for not exceeding 4 months for good cause.

25-31-704 MCA. Postponement by consent of parties. The court may, by the consent of the parties given in writing or in open court, postpone the trial to a time agreed upon by the parties.

25-31-705 MCA. Postponement upon application of party—proof required. The trial may be postponed upon the application of either party for a period not exceeding 4 months. The party making the application shall prove, by the party's own oath or otherwise, that the party cannot, for want of material testimony that the party expects to procure, safely proceed to trial and shall show in what respect the testimony expected is material and that the party has used due diligence to procure the testimony and has been unable to do so.

400.300 BENCH TRIAL.

400.301 Introduction.

A bench trial is heard before the judge, without jury. The judge has the duty to decide both the issues of law and the issues of fact. A bench trial can occur, in criminal matters, only after the defendant has made a knowledgeable waiver of the right to a jury. A civil case will be handled as a bench trial unless a jury is demanded. A small claims trial is always a bench trial.

400.302 Bench Trial Outline.

** Announce name of court and judge presiding (optional).

** Call the case for trial.

** Inquire if the plaintiff (state) is ready.

** Inquire if the defendant is ready.

** Ask for any pretrial motions.

** Allow plaintiff to make opening statements.

** Allow defendant to make statement or reserve for later.

** Call for witnesses for the plaintiff (State's case in chief).

** Defendant makes opening statement if reserved.

** Call for witnesses for defendant (Defendant's case in chief).

** Rebuttal by plaintiff (There may be none).

** Surrebuttal by defendant.

(There can be no surrebuttal if plaintiff has not put on rebuttal testimony).

** Allow initial argument by plaintiff.

** Allow closing argument by defendant.

** Allow closing argument by plaintiff.

➔Comment: After the closing arguments, the court may recess for deliberation on the issues or judgment may be pronounced immediately. After a civil trial, judgment must be entered within 30 days. In a small claims case, the justice shall make findings and enter judgment at the conclusion of the case.

Remember that the time for appeal starts to run the day following the oral pronouncement of judgment and sentence; and appeal time is calculated from that point.

400.400 JURY TRIAL

400.401 Introduction.

The purpose of the pleadings in a civil case and of the complaint and plea in criminal cases is to "frame the issues" that are to be determined by the trial. The judge must make certain that the cause is ready for trial before it is set. Make certain all proper docket entries are made.

400.402 Court Bailiff.

Every judge of any court should have a constable or a bailiff present to carry out court orders and to serve the court. The bailiff should ask all persons in the courtroom to rise as the judge enters and assumes the bench. This sets the stage and puts the judge in command of the courtroom. Do not have anyone serve as bailiff who will be a witness at any trial before that particular jury panel. It is best if you have training sessions for your bailiff before the trial. This procedure will help assure the smooth operation of the court.

400.403 Jury Trial Outline.

* * Summon members of jury panel before trial date.

* * Qualify the jury panel ─ administer oath.

  Who competent (MCA 3-15-301 & 302)

  Who not competent (MCA 3-15-303)

* * Announce name of court and judge presiding (Optional).

* * Call the case for trial.

* * Inquire if the plaintiff (state) is ready.

* * Inquire if the defendant is ready.

* * Any motions prior to the trial jury selection.
  (These should be done in chambers prior to beginning.)

* * Call role of the summoned jury panel members. Administer oath.

* * Advise the panel members generally about the case, i.e., a DUI or theft.

* * Introduce the attorneys, defendant and officers, if any.

* * Ask the panel members if, after knowing about the case and the attorneys and parties involved, they know of any reason that they should not serve as a trial juror.

* * Ask the panel members if they have any reason, health or otherwise, that would prevent them from serving as a trial juror should they be selected.

* * Pass the jurors for cause.

* * Plaintiff's attorney will examine and pass for cause. There may be challenges for cause.

* * Rule on each challenge.

* * Defendant's attorney will examine and pass for cause. Again there may be challenges for cause.

* * Peremptory challenges will be exercised or waived.
(Civil cases, 2 on each side);
(Criminal cases, 3 on each side).

* * Call the names of those not challenged in the order that they appear on the jury list. The first six would be the trial jury and the next one, an alternate, if needed for the case.

* * Ask the attorneys if they will stipulate that these are the jurors duly selected. If so stipulated, excuse the remaining jurors. They may be encouraged to stay in the courtroom and watch the proceedings, and always thank them.

* * Administer final oath to the trial jurors.

General Instructions.

* * Opening statement by plaintiff (state).

* * Opening statement by defendant (or reserved).

* * Witnesses for plaintiff testify. (State's case in chief)

* * Opening statement by defendant. (if reserved previously)

* * Witnesses for defendant testify. (Defense case in chief)

* * Rebuttal witnesses for plaintiff.

* * Surrebuttal witnesses for defendant. If there are no rebuttal witnesses, there can be no surrebuttal testimony.

* * Recess to settle instructions. Resume trial.

* * Read all selected instructions to the jury numbering them in the order given.

* * Initial closing argument by plaintiff (state).

* * Closing argument by defendant.

* * Oath to bailiff. Jury retired to jury room.

* * Gather all parties into the courtroom before having the jury returned after deliberation.

* * Have defendant and counsel stand and face jury.

* * Have foreman of jury stand and read the verdict.

* * Have bailiff hand you the verdict. Silently confirm the verdict.

* * Ask attorneys if they wish the jury polled. If yes, ask each individual juror if the verdict of _____ is that juror's verdict? All must agree with the announced verdict (criminal) or 2/3's (civil).

* * Thank the jury for their service and discharge them.

* * The verdict of the jury is the judgment of the court.

  * * If the judgment is acquittal, discharge the defendant immediately and exonerate the defendant's bail.

  * * If the judgment is guilty, the defendant is entitled to a reasonable time before sentencing. The defendant may wish to proceed to sentencing at this time. If not, SET A DATE AND TIME CERTAIN FOR SENTENCING.

➔Comment: In civil trials, judgment MUST be entered immediately in conformity with the verdict.

400.404 Oaths and Admonition.

Oath to **JURY PANEL** to qualify.

> Do you and each of you solemnly swear that you will make true answers to those questions that may be asked of you as to your qualifications to serve on the panel of trial jurors during this term of court, so help you God?

Oath to **TRIAL PANEL** members.

> Do you and each of you solemnly swear that you will make true answers to questions asked of you as to your qualifications to serve as a trial juror in the case now being heard, so help you God?

Oath to **TRIAL JURORS.**

> Do you and each of you solemnly swear (or affirm) that you will well and truly try the case now at issue and a true verdict render according to the law and the evidence, so help you God?

Oath to **WITNESS.**

> Do you solemnly swear that the testimony you will give in this cause will be the truth, the whole truth, and nothing but the truth, so help you God?

Admonition when **JURY** is permitted to separate.

> You are admonished by the court that it is your duty not to converse with one another or any other person on any matter that is the subject of this trial, and it is your duty not to form or express an opinion about this trial until the case is finally submitted to you for your verdict.

Oath to **INTERPRETER**.

> Do you solemnly swear that you will interpret truly from English into the native tongue of the witness all questions asked of this witness and then all the answers into English, so help you God?

➔Comment: Interpreters are required for deaf persons or other witnesses who cannot speak or understand English.

Oath on **VIEW OF THE PREMISES**.

(Administer to the bailiff or officer conducting jury to view.)

Do you solemnly swear that you will conduct this jury to view the property or place which is the subject of this trial and which the court has ordered viewed, and, that you will permit no one except one person representing each party, properly designated by the court, to accompany the jurors, and that while absent you will permit no one to speak with the jurors on any subject connected with the trial except that the designated persons may point out the matters designated by the court, so help you God?

Oath to **BAILIFF**.

Do you solemnly swear that you will take charge of this jury and keep them together in some private place, and, that you will not permit any person to speak to, or communicate with them, or do so yourself unless by order of the court, and, that when they have agreed on a verdict, or when ordered by the court you will return them to court, so help you God?

400.405 Submission of Case to Jury.

Exhibits to Jury Room.

25-7-404 MCA. Papers which may be taken into jury room. Upon retiring for deliberation, the jurors may take with them all papers which have been received as evidence in the cause except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them but none taken by any other person.

46-16-504 MCA. Items that may be taken into jury room. Upon retiring for deliberation, the jurors may take with them the written jury instructions read by the court, notes of the proceedings taken by themselves, and all exhibits that have been received as evidence in the cause that in the opinion of the court will be necessary.

➔Comment: Notice that this section allows exhibits to be taken into the jury room. The general rule is that all exhibits (guns, reports, etc.) go to the jury room. Jurors may return to the court for further instructions.

46-16-503 MCA. Conduct of jury after retirement ~~t~~ advice from court. (1) When the jury retires to consider its verdict, an officer of the court must be appointed to keep the jurors together and to prevent conversations between the jurors and others.

(2) After the jury has retired for deliberation, if there is any disagreement among the jurors as to the testimony or if the jurors desire to be informed on any point of law arising in the cause, they shall notify the officer appointed to keep them together, who shall then notify the court. The information requested may be given, in the discretion of the court, after consultation with the parties.

25-7-405 MCA. Jury's request for further information. After the jury has retired for deliberation, if there be a disagreement among the jurors as to any part of the testimony or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of or after notice to the parties or counsel. Such information must be given in writing or taken down by the stenographer.

➔Comment: The preceding sections indicate some areas of concern: (1) Never communicate with the jury unless both parties are present or represented. (2) Any communication should be in writing. Since courts of limited jurisdiction have no verbatim record of testimony given in the cause, with the exception of justice's courts established as a court of record, and if the jurors have a disagreement over testimony given, they must resolve this disagreement between themselves. Each juror must rely upon his or her own memory of the testimony.

Return of verdict by the jury.

46-16-603 MCA. Form of verdict. (1) The jury shall return a verdict as instructed by the court. The verdict must be unanimous in all criminal actions. The verdict must be signed by the lead juror and returned by the jury to the judge in open court.
(2) If there are two or more defendants, the jury, at any time during its deliberations, may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

46-16-604 MCA. Poll of jury. When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not the required concurrence, the jury may be directed to retire for further deliberations or may be discharged.

46-16-605 MCA. Verdict of not guilty ─ when defendant discharged. If a verdict of not guilty is returned and the defendant is not detained for any other legal cause, the defendant must be discharged as soon as the judgment is given.

46-16-606 MCA. Reasonable doubt as to which offense convicts only of least offense. When it appears beyond a reasonable doubt that the defendant has committed an offense but there is reasonable doubt as to whether the defendant is guilty of a given offense or one or more lesser included offenses, the defendant may only be convicted of the greatest included offense about which there is no reasonable doubt.

25-7-501 MCA. Return of verdict─ polling jury . (1) When the jurors or two-thirds of them have agreed upon a verdict, they must be conducted into court, their names must be called by the clerk, and the verdict must be rendered by the lead juror. The verdict must be in writing and signed by the lead juror and must be read by the clerk to the jury, and the inquiry made whether it is the jury's verdict.

(2) Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is the juror's verdict. If upon the inquiry or polling more than one-third of the jurors disagree to the verdict, the jury must be sent out again, but if disagreement is not expressed, the verdict is complete and the jury discharged from the case.

Discharge of Jury.

The jury must be kept together until they have reached a verdict. For good cause a mistrial may be declared, i.e., by reason of a hung jury, and then the jurors will be discharged. When they have reached a verdict and returned it to the court, the jury should be discharged with the thanks of the court for their service. You should also advise the jurors that they are not required to discuss their deliberations with anyone; the parties, the press, or outsiders. The decision to discuss the case is a personal one and each juror will be protected by the court from harassment on this issue.

400.406 Sample — Jury List Form.

IN THE _____ COURT OF _____, _____ COUNTY,

STATE OF MONTANA, BEFORE _____, CITY JUDGE/JUSTICE OF THE PEACE

* * * * * *

Jurors	State Challenge	Defense Challenge	Excused for Cause	Remarks
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				
16.				
17.				
18.				

Plaintiff Challenge Waived

1. 2. 3.

Defendant Challenge Waived

1. 2. 3.

400.500 JURY INSTRUCTIONS

400.501 Introduction.

General instructions should be read to the jury before the beginning of the trial and specific instructions on the law should be read after the close of testimony. (See 400.403, Jury Trial Outline.)

It is highly recommended that judges refer to and use the model instructions Montana Criminal Jury Instructions (MCJI) by the Montana Supreme Court Criminal Jury Instruction Commission, 1999. In the event the Montana Criminal Jury Instructions are not available, an instruction for use in a criminal trial follows.

400.502 Jury Instructions, Criminal.

INSTRUCTION No. 1-001 (MCJI):

Ladies and Gentlemen of the Jury:

It is important that as jurors and officers of this court you obey the following instructions at any time you leave the jury box, whether it be for recesses of the court during the day or when you leave the courtroom to go home at night.

> **First,** do not talk about this case either among yourselves or with anyone else during the course of the trial. In fairness to the defendant and to the State of Montana, you should keep an open mind throughout the trial and do not form or express an opinion about the case. You should only reach your decision after you have heard all the evidence, after you have heard my final instructions, and after the attorneys' final arguments. You may only enter into discussion about this case with the other members of the jury after it is submitted to you for your decision. All such discussion should take place in the jury room.
>
> **Second,** do not let any person talk about this case in your presence. If anyone does talk about it, tell them you are a juror on the case. If they won't stop talking, leave and report the incident to me as soon as you are able to do so. You should not tell any of your fellow jurors about what has happened. You should not talk to your fellow jurors about anything else that you feel necessary to bring to the attention of the judge.

Third, although it is a normal human tendency to talk and visit with people, both at home and in public, you may not, during the time you serve on this jury, talk with any of the parties or their attorneys or any witnesses. By this, I mean not only do not talk about the case, but do not talk at all, even to pass the time of day. In no other way can all parties be assured of the fairness they are entitled to expect from you as jurors.

Fourth, during this trial, you may not make any investigation of this case or inquiry outside of the courtroom on your own. You may not go to any place mentioned in the testimony without explicit order from me to do so. You must not consult any books, dictionaries, encyclopedias, or any other source of information unless I specifically authorize you to do so.

Fifth, do not read about the case in the newspapers. Do not listen to radio or television broadcasts about the trial. News accounts are often inaccurate and may contain matters which are not proper evidence for your consideration. You must base your verdict solely on what is presented in court and not upon newspaper, radio, television, or any other version of what may have happened. You are now sworn jurors in this case, and you will bear the evidence and thus be in a better position to know the true facts than anyone else.

INSTRUCTION NO. 1-004 (MCJI)

An Information has been filed charging the defendant _____, with the offense of _____ alleged to have been committed in _____ County, State of Montana, on or about the _____ day of _____, 20__.

The defendant has pled not guilty. The jury's task in this case is to decide whether the defendant is guilty or not guilty based upon the evidence and the law as stated in my instructions These are some of the rules of law that you must follow:

1. The filing of an Information against this defendant is simply a part of the legal process to bring this case into court for trial and to notify the defendant of the charge. Neither the Information nor the charge contained therein is to be taken by you as any indication, evidence, or proof that the defendant is guilty of any offense.

2. By a plea of not guilty, the defendant denies every allegation of the charge.

3. The State of Montana has the burden of proving the guilt of the defendant beyond a reasonable doubt. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of that person's own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt.

4. The defendant is presumed to be innocent of the charge against this person. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty. The defendant is not required to prove innocence or present any evidence.

400.503 DUI Instruction.

➔Comment: The term "intoxicating liquor" was replaced with "alcohol." This does not change the definition of "under the influence." Also, be aware of the 1985 change, "highways of this state" now reads "ways of this state open to the public." The use of "vehicle" instead of "motor vehicle" was incorporated in 1983.

➔Comment: 61-8-401 MCA, makes it unlawful for any person who is under the influence of alcohol or drugs to drive or be in actual physical control of a vehicle upon the ways of this state open to the public. This section also makes it unlawful for any person who is under the influence of a dangerous drug, or any other drug to drive or be in actual physical control of a vehicle within this state. The fact that a person charged with a violation of this section is or has been entitled to use such a drug under the laws of this state is not a defense.

Following are two examples of instructions for DUI cases found in Montana Criminal Jury Instructions:

INSTRUCTION NO. 10-101 — Ways of this State open to the Public.

The phrase "ways of this state open to the public" means any highway, road, alley, lane, parking area, or other public or private place adapted and fitted for public travel that is in common use by the public.
(Source: 61-8-101 MCA).

➔Comment: Cite as MCJI 10-101; Authority: 61-8-101 MCA.

INSTRUCTION NO. 10-401(a) — Issues in Driving While Under the Influence of Alcohol.

To convict the defendant of the offense of driving while under the influence of alcohol, the state must prove the following elements:

That the defendant:

1. was (driving) (in actual physical control of) a vehicle.
2. upon the ways of this state open to the public.
3. while under the influence of alcohol.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty. (Source: 61-8-401(1)(a)).

➔Comment: Applicable bracketed language should be included. This instruction is designed to be utilized in a case in which alcohol is the substance involved. If the defendant is charged under subsection (1)(b), (c), or (d), the language in element Number 2 relative to where the vehicle operated will have to be modified accordingly. Although conviction under this statute subjects the defendant to possible jail time, subsection (7) of 61-8-401 provides for absolute liability thus negating the need for proving particular mental state. See also, *State v. McDole, 226 M 169, 734 P2d 683, 44 St. Rep. 561 (1987).* Cite as MCJI 10-401(a); Authority: 61-8-401(1)(a) MCA.

INSTRUCTION NO. 10-401(3) — Under the Influence.

The phrase "under the influence" means that as a result of taking into the body (alcohol)(drugs) or (any combination of alcohol and drugs), a person's ability to safely operate a vehicle has been diminished. (Source: 61-8-401(3)).

➔Comment: The 2001 legislature amended the above statute and deleted the term "motor" which reconciles this statute to the definition of terms in 61-1-103 MCA. Cite as MCJI 10-401(3); Authority: 61-8-401(3) MCA.

400.504 Jury Instructions, Civil.

The judge could read the following as an instruction to the jury in all civil cases and make such additions as are necessary. Where applicable, refer to Montana Criminal Jury Instructions and make amendments pertinent to the case at issue.

Ladies and Gentlemen of the Jury:

I will now instruct you in the law that applies to this case. It your duty to decide the issues of fact presented in this action. In performing that duty, you should decide this case upon the testimony given from the witness stand and the exhibits received as part of the evidence during the trial.

In this case the pleadings have been read to you and the parties have each advised you of their positions in the matter.

(At this point, if there are any special problems, the judge should be sure the jury understands exactly what they are expected to determine, i.e., contract and breach of contract; landlord/tenant.)

The party asserting the affirmation of an issue has the burden of proving by a preponderance of the evidence that they are entitled to the relief requested.

(Again, at this point, the judge should be sure that the jury understands any complicated problems. The defendant could have the burden of proof by virtue of a counterclaim as to any relief demanded by them.)

Preponderance of the evidence does not mean the greater number of witnesses. It actually means that, as between the two sides of a question, you believe one over the other based on the evidence.

The effect of the burden of proof is explained as follows: If the evidence submitted on an issue by each of the two parties leaves you with the feeling that the proof is evenly balanced, then your finding on that issue must be against the party who has the legal burden to prove that issue by a preponderance of the evidence.

(If the case requires the reading of any code provisions or other law instructions, do so at this point in the giving of instructions.)

There are certain rules of law to aid you in considering the evidence of any action.
(1) The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact.
(2) A witness whom you believe has knowingly or carelessly given false testimony in one part of his is to be distrusted in others.

(3) Do not consider any statements of counsel or any other person, not sworn as a witness, as part of the evidence.
(4) In considering the evidence you have a right to interpret it in the light of your common general knowledge formed by your ordinary experiences and observations in daily life.

Finally, when you retire to the jury room, elect one of your number "foreman", who will return your verdict to the court. Two-thirds of your number must agree upon a verdict.

➔Comment: Criminal juries must have a unanimous verdict (See46-16-603 MCA) and civil juries require two-thirds majority (See 25-7-501 MCA).

400.600 WITNESSES.

400.601 Producing the Witness.

A subpoena is used to obtain the presence of a witness at either a criminal or civil trial. A subpoena duces tecum is used to require production of a document at trial. Courts of limited jurisdiction may not issue investigative subpoenas.

400.602 **Subpoenas.**

> 26-2-101 MCA. Subpoena defined. The process by which the attendance of a witness is required is by a subpoena. A subpoena is a writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness. The subpoena may also require the person to bring with the person any books, documents, or other things under the person's control that the person is bound by law to produce in evidence.

46-15-101 MCA. Subpoenas. (1) After the filing of charges and upon the request of the prosecuting attorney, the defendant, or the defendant's attorney, the clerk of the court shall issue subpoenas with the name of the person to whom each subpoena is directed, commanding the person to appear and to give testimony. The court shall maintain a list of the names of the persons to whom subpoenas are issued.
(2) A subpoena must state the name of the court and the title, if any, of the proceeding and must command each person to whom it is directed to attend and give testimony at the time and place specified in the subpoena. The time and place may be modified by mutual written agreement of the parties or by an amended subpoena issued by the clerk of the court.
(3) The court, upon a timely motion, may quash or modify a subpoena if compliance would be unreasonable or oppressive.
(4) A subpoena remains in effect unless quashed or until judgment, dismissal, or other final determination of the action by the court in which the action was filed or to which the action was transferred.

400.603 Service of Subpoenas.

46-15-107 MCA. Service of subpoenas. (1) A subpoena may be served by a peace officer or by any other person who is not a party and who is not less than 18 years of age. A peace officer shall serve any subpoena delivered to the peace officer's county either on the part of the prosecution or of the defendant.
(2) Service of a subpoena must be made by delivering a copy of the subpoena to the person named and, if ordered by the court, by tendering to those residing outside the county of trial the fee for 1 day's attendance and the mileage allowed by law. The person making the service shall without delay make a written return of the service subscribed by the person, stating the time and place of service.
(3) A subpoena requiring attendance of a witness at a hearing or trial may be served anywhere within the state of Montana.

3-10-304 MCA. Territorial extent of civil jurisdiction. (1) The civil jurisdiction of a justice's court extends to the limits of the county in which it is held, and except as provided in subsection (2), intermediate and final process of a justice's court in a county may be issued to and served in any part of the county.
(2) A summons or a writ of execution of a justice's court may be served in any county of the state.

400.604 Problems in Service of Subpoenas.

➔**Comment:** Problems in serving a witness with a subpoena or the witness's failure to obey the subpoena are addressed in Title 26, chapter 2, part 1. Disobedience to a subpoena can be punished as a contempt of court.

Specific sections are:

26-2-103 MCA. Service of subpoena on concealed witness. If a witness is concealed in a building or vessel so as to prevent the service of a subpoena upon the witness, any court, judge, or any officer issuing a subpoena may, upon proof by affidavit of the concealment and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena, and the sheriff shall serve it accordingly and, for that purpose, may break into the building or vessel where the witness is concealed.

26-2-104 MCA. Disobedience ─ how punished. Disobedience to a subpoena or a refusal to be sworn or to answer as a witness or to subscribe an affidavit or deposition, when required, may be punished as a contempt by the court issuing the subpoena or requiring the witness to be sworn, to answer, or to subscribe. If the witness is a party, the party's complaint or answer may be stricken out.

26-2-105 MCA. Disobedience ─ civil damages. A witness disobeying a subpoena also forfeits to the party aggrieved the sum of $100 and all damages that the person may sustain by the failure of the witness to attend. The forfeiture and damages may be recovered in a civil action.

26-2-106 MCA. Warrant to arrest and bring in disobedient witness. In case of a failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court or officer where attendance was required.

26-2-107 MCA. Contents of warrant ─ execution. Each warrant of commitment issued by a court or officer pursuant to this part must specify, particularly. the cause of the commitment. If the warrant is issued for refusing to answer a question, the question must be stated in the warrant. Each warrant to arrest or commit a witness pursuant to this part must be directed to the sheriff of the county where the witness may be and must be executed by the sheriff in the same manner as process by the district court.

400.605 Duties of Witnesses.

26-2-301 MCA. Witness required to attend when subpoenaed. A witness served with a subpoena shall attend at the time appointed, with any papers under the witness's control required by the subpoena, and answer all pertinent and legal questions and, unless sooner discharged, shall remain until the testimony is closed.

26-2-302 MCA. Witness required to answer questions. A witness shall answer questions legal and pertinent to the matter in issue though the answer may establish a claim against the witness. However, the witness is not required to give an answer that will have a tendency to subject the witness to punishment for a felony or to give an answer that will have a direct tendency to degrade the witness's character unless the answer is to the very fact in issue or to a fact from which the fact in issue would be presumed.

➔Comment: The constitutional rights of the witness must be kept in mind when reading the preceding section. A witness can refuse to testify and exercise the Fifth Amendment constitutional right against self-incrimination and claim that the answer might tend to incriminate the defendant, but the witness cannot refuse to take the stand. The witness can exercise this right only in response to each individual question.

A defendant in a criminal action cannot be asked by opposing counsel to take the stand. However, should the defendant waive the right against self-incrimination and take the witness stand, the defendant cannot refuse to testify (or be cross-examined).

26-2-303 MCA. Person present required to testify. A person present in court or before a judicial officer may be required to testify in the same manner as if the person were in attendance upon a subpoena issued by the court or officer.

➔Comment: An order from the judge, given orally, telling the witness to take the stand is all that is necessary to subject the witness to the authority of the court.

400.606 Rights of Witnesses.

26-2-401 MCA. Right of witness to protection from harassment. It is the right of a witness to be protected from irrelevant, improper, or insulting questions and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

26-2-402 MCA. Witness protected from arrest when attending, going, and returning. Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person in a case where the disobedience of the witness may be punished as a contempt is exonerated from arrests in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom.

46-15-120 MCA. Exemption from arrest and service of process. (1) If a person comes into this state in obedience to a subpoena directing the person to attend and

testify in this state, the person may not, while in this state pursuant to the subpoena or order, be subject to arrest or the service of process, civil or criminal, in connection with matters that arose before the person's entrance into this state under the subpoena.

(2) If a person passes through this state while going to another state in obedience to a subpoena or order to attend and testify in that state, the person may not, while passing through this state, be subject to arrest or the service of process, civil or criminal, in connection with matters that arose before the person's entrance into this state under the subpoena.

400.700 THE WEIGHT OF EVICENCE.

400.701 Introduction.

Title 26 of the Montana codes contain the provisions of the law of evidence. There are some special provisions relating to "weight of evidence" and burden of proof" that deserve emphasis in this Deskbook.

400.702 How to Evaluate Evidence.

26-1-301 MCA. One witness sufficient to prove a fact. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.

➔Comment: The "weight" of evidence is its convincing effect.

400.703 Burden of Proof.

➔Comment: A different standard of proof exists for civil and criminal cases.

(1) Civil.

26-1-401 MCA. Who has burden of producing evidence. The initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against that party in the absence of further evidence.

(2) **Criminal.**

26-1-403 MCA. Instructions to jury on standard of proof required to meet burden of persuasion. The jury is to be instructed by the court on all proper occasions:
(1) that in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence; and
(2) that in criminal cases guilt must be established beyond reasonable doubt.

400.704 Proof required.

26-1-402 MCA. Who has burden of persuasion. Except as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense the party is asserting.

➔Comment: The prosecution has the burden of proving the guilt of the defendant beyond a reasonable doubt in all criminal proceedings. The prosecution must prove that a confession or admission was voluntary by a preponderance of the evidence. (See 46-13-301(2) MCA.)

400.705 Rules of Evidence, Criminal.

➔Comment: The Montana Rules of Evidence are included in the Montana Code Annotated in Title 26, chapter 10. The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in the Montana code. (See 46-16-201 MCA.)

A special rule applicable only in criminal cases is:

46-16-212 MCA. Competency of spouses. (1) Neither spouse may testify to the communications or conversations between spouses that occur during their marriage unless:
(a) consent of the defendant-spouse is obtained;
(b) the defendant-spouse has been charged with an act of criminal violence against the other; or
(c) the defendant-spouse has been charged with abuse, abandonment, or neglect of the other spouse or either spouse's children.
(2) Except as provided in subsection (1), a spouse is a competent witness for or against the other spouse.

400.800 EXTRAORDINARY REMEDIES.

400.801 Motion for New Trial.

". . . A Justice's Court is not a "court" for the purposes of 46-16-701, and a Justice of the Peace may not dismiss charges against a defendant upon a motion for a new trial. *Forsythe v. Wenholz, 170 M 496, 554 P2d 1333 (1976).*"

➔Comment: The above also applies to a city court judge.

400.802 Motion for Judgment Notwithstanding the Verdict.

A motion for judgment notwithstanding the verdict is not allowed in justice or city court.

400.803 Motion for Directed Verdict.

46-16-403 MCA. Evidence insufficient to go to jury. When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant. However, prior to dismissal, the court may allow the case to be reopened for good cause shown.

400.804 Motion to Withdraw Plea.

46-16-105 MCA. Plea of guilt~~y~~ use of two -way electronic audio-video communication. (1) Before or during trial, a plea of guilty or nolo contendere must be accepted when:

(a) subject to the provisions of subsection (3), the defendant enters a plea of guilty or nolo contendere in open court; and

(b) the court has informed the defendant of the consequences of the plea and of the maximum penalty provided by law that may be imposed upon acceptance of the plea.

(2) At any time before judgment or, except when a claim of innocence is supported by evidence of a fundamental miscarriage of justice, within 1 year after judgment becomes final, the court may, for good cause shown, permit the plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted. A judgment becomes final for purposes of this subsection (2):

(a) when the time for appeal to the Montana supreme court expires;

(b) if an appeal is taken to the Montana supreme court, when the time for petitioning the United States supreme court for review expires; or

(c) if review is sought in the United States supreme court, on the date that that court issues its final order in the case.

(3) For purposes of this section, an entry of a plea of guilty or nolo contendere through the use of two-way audio-video communication, allowing all of the participants to be heard in the courtroom by all present and allowing the party speaking to be seen, is considered to be an entry of a plea of guilty or nolo contendere in open court. Audio-video communication may be used if neither party objects and the court agrees to its use and has informed the defendant that the defendant has the right to object to its use. The audio-video communication must operate as provided in 46-12-201.

400.805 Motion for Mistrial.

A motion for a mistrial is to request a new trial. Example: "hung jury". The court should declare a mistrial and not dismiss the action. This allows the case to be heard before another panel of jurors if the prosecutor decides to retry the case.

400.900 JUDGMENT AND SENTENCE.

400.901 Judgment Defined.

Black's Law Dictionary, Seventh Edition, defines "judgment" as "... A court's final determination of the rights and obligations of the parties in a case. The term *judgment* includes a decree and any order from which an appeal lies. ..."

400.902 Policy of the Law.

46-18-101 MCA. Correctional and sentencing policy. (1) It is the purpose of this section to establish the correctional and sentencing policy of the state of Montana. Laws for the punishment of crime are drawn to implement the policy established by this section.

(2) The correctional and sentencing policy of the state of Montana is to:

(a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;

(b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;

(c) provide restitution, reparation, and restoration to the victim of the offense; and

(d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

(3) To achieve the policy outlined in subsection (2), the state of Montana adopts the following principles:

(a) Sentencing and punishment must be certain, timely, consistent, and understandable.

(b) Sentences should be commensurate with the punishment imposed on other persons committing the same offenses.

(c) Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.
(d) Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances.
(e) Sentencing practices must include punishing violent and serious repeat felony offenders with incarceration.
(f) Sentencing practices must provide alternatives to imprisonment for the punishment of those nonviolent felony offenders who do not have serious criminal records.
(g) Sentencing and correctional practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions.
(h) Sentencing practices must emphasize restitution to the victim by the offender. A sentence must require an offender who is financially able to do so to pay restitution, costs as provided in 46-18-232, costs of assigned counsel, as provided in 46-8-113, and, if the offender is a sex offender, costs of any chemical treatment.
(i) Sentencing practices should promote and support practices, policies, and programs that focus on restorative justice principles.

400.903 Procedure.

46-18-102 MCA. Rendering judgment and pronouncing sentence— use of two - way electronic audio-video communication. (1) The judgment must be rendered in open court. For purposes of this section, a judgment rendered through the use of two-way electronic audio-video communication, allowing all of the participants to be heard in the courtroom by all present and allowing the party speaking to be seen, is considered to be a judgment rendered in open court. Audio-video communication may be used if neither party objects and the court agrees to its use and has informed the defendant that the defendant has the right to object to its use. The audio-video communication must operate as provided in 46-12-201.
(2) If the verdict or finding is not guilty, judgment must be rendered immediately and the defendant must be discharged from custody or from the obligation of a bail bond.
(3) (a) Except as provided in 46-18-301, if the verdict or finding is guilty, sentence must be pronounced and judgment rendered within a reasonable time.
(b) When the sentence is pronounced, the judge shall clearly state for the record the reasons for imposing the sentence.

➔Comment: If the finding is guilty and sentence is not to be pronounced immediately, the court must set a day certain for sentencing. One supreme court case held that failure to do so resulted in the justice court losing jurisdiction to pass judgment and pronounce sentence.

400.904 Sentence Defined.

Black's Law Dictionary, Seventh Edition, defines "sentence" as "The judgment that a court formally pronounces after finding a criminal defendant guilty; the judgment imposed on a criminal wrongdoer...." In civil cases, the terms "judgment", "decision", "award", "findings", etc., are used.

400.905 Sentences that may be Imposed.

46-18-201 MCA. Sentences that may be imposed. (1)(a) Whenever a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere, a sentencing judge may defer imposition of sentence, except as otherwise specifically provided by statute, for a period:

(i) not exceeding 1 year for a misdemeanor or for a period not exceeding 3 years for a felony; or

(ii) not exceeding 2 years for a misdemeanor or for a period not exceeding 6 years for a felony if a financial obligation is imposed as a condition of sentence for either the misdemeanor or the felony, regardless of whether any other conditions are imposed.

(b) Except as provided in 46-18-222, imposition of sentence in a felony case may not be deferred in the case of an offender who has been convicted of a felony on a prior occasion, whether or not the sentence was imposed, imposition of the sentence was deferred, or execution of the sentence was suspended.

(2) Whenever a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere, a sentencing judge may suspend execution sentence, except as otherwise specifically provided by statute, for a period up to the maximum sentence allowed or for a period of 6 months, whichever is greater, for each particular offense.

(3) (a) Whenever a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere, a sentencing judge may impose a sentence that may include:

(i) a fine as provided by law for the offense;

(ii) payment of costs, as provided in 46-18-232, or payment of costs of assigned counsel as provided in 46-8-113;

(iii) a term of incarceration, as provided in Title 45 for the offense, at a county detention center or at a state prison to be designated by the department of corrections.

(iv) commitment of:

(A) an offender not referred to in subsection (3)(a)(iv)(B) to the department of corrections, with a recommendation for placement in an appropriate correctional facility or program; however, all but the first 5 years of the commitment to the department of corrections must be suspended, except as provided in 45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(c), and 45-5-625(4); or

(B) a youth transferred to district court under 41-5-206 and found guilty in the district court of an offense enumerated in 41-5-206 to the

department of corrections for a period determined by the court for placement in an appropriate correctional facility or program;

(v) with the approval of the facility or program, placement of the offender in a community corrections facility or program as provided in 53-30-321;

(vi) with the approval of the prerelease center or prerelease program and confirmation by the department of corrections that space is available, placement of the offender in a prerelease center or prerelease program for a period not to exceed 1 year;

(vii) chemical treatment of sexual offenders, as provided in 45-5-512, if applicable, that is paid for by and for a period of time determined by the department of corrections, but not exceeding the period of state supervision of the person; or

(viii) any combination of subsections (2) and (3)(a)(i) through (3)(a)(vii).

(b) A court may permit a part or all of a fine to be satisfied by a donation of food to a food bank program.

(4) When deferring imposition of sentence or suspending all or a portion of execution of sentence, the sentencing judge may impose upon the offender any reasonable restrictions or conditions during the period of the deferred imposition or suspension of sentence. Reasonable restrictions or conditions imposed under subsection (1)(a) or (2) may include but are not limited to:

(a) limited release during employment hours as provided in 46-18-701;

(b) incarceration in a detention center not exceeding 180 days;

(c) conditions for probation;

(d) payment of the costs of confinement;

(e) payment of a fine as provided in 46-18-231;

(f) payment of costs as provided in 46-18-232 and 46-18-233;

(g) payment of costs of assigned counsel as provided in 46-8-113;

(h) with the approval of the facility or program, an order that the offender be placed in a community corrections facility or program as provided in 53-30-321;

(i) with the approval of the prerelease center or prerelease program and confirmation by the department of corrections that space is available, an order that the offender be placed in a prerelease center or prerelease program for a period not to exceed 1 year;

(j) community service;

(k) home arrest as provided in Title 46, chapter 18, part 10;

(l) payment of expenses for use of a judge pro tempore or special master as provided in 3-5-116;

(m) with the approval of the department of corrections and with a signed statement from an offender that the offender's participation in the boot camp incarceration program is voluntary, an order that the offender complete the boot camp incarceration program established pursuant to 53-30-403.

(n) participation in a day reporting program provided for in 53-1-203;

(o) any other reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society; or

(p) any combination of the restrictions or conditions listed in subsections (4)(a) through (4)(p).

(5) In addition to any other penalties imposed, if a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere and the sentencing judge finds that a victim, as defined in 46-18-243, has sustained a pecuniary loss, the sentencing judge shall, as part of the sentence, require payment of full restitution to the victim, as provided in 46-18-241 through 46-18-249, whether or not any part of the sentence is deferred or suspended.

(6) In addition to any of the penalties, restrictions, or conditions imposed pursuant to subsections (1) through (5), the sentencing judge may include the suspension of the license or driving privilege of the person to be imposed upon the failure to comply with any penalty, restriction, or condition of the sentence.

A suspension of the license or driving privilege of the person must be accomplished as provided in 61-5-214 through 61-5-217.

(7) In imposing a sentence on an offender convicted of a sexual or violent offense, as defined in 46-23-502, the sentencing judge may not waive the registration requirement provided in Title 46, chapter 23, part 5.

(8) If a felony sentence includes probation, the department of corrections shall supervise the offender unless the court specified otherwise.

➔Comment: The following statute may help the judge concerning crime victims, their family members, and their rights (and rules) to appear in court for trial or hearing, including sentencing of alleged offenders:

46-24-106 MCA. Crime victims ─ family members ─ right to attend proceedings ─ exceptions ─ right to receive documents ─ rights during interview. (1) Except as provided in subsection (2), a victim of a criminal offense has the right to be present during any trial or hearing conducted by a court that pertains to the offense, including a court proceeding under Title 41, chapter 5. A victim of a criminal offense may not be excluded from any trial or hearing based solely on the fact that the victim has been subpoenaed or required to testify as a witness in the trial or hearing.

(2) A judge may exclude a victim of a criminal offense from:

(a) a trial or hearing upon the finding of specific facts supporting exclusion or for disruptive behavior; or

(b) a portion of a proceeding under Title 41, chapter 5, that deals with sensitive personal matters of a youth's family and that does not directly relate to the act or alleged act committed against the victim.

(3) If a victim is excluded from a trial or hearing upon the finding of specific facts supporting exclusion, the victim must be allowed to address the court on the issue of exclusion prior to the findings.

(4) A family member of a victim may not be excluded from a trial or hearing based solely on the fact that the family member is subpoenaed or required to testify as a witness in the trial or hearing unless there is a showing that the family member can give relevant testimony as to the guilt or innocence of the defendant or that the defendant's right to a fair trial would be jeopardized if the family member is not excluded.

(5) As used in this section, "victim" means:

(a) a person who suffers loss of property, bodily injury, or reasonable apprehension of bodily injury as a result of:

(i) the commission of an offense;

(ii) the good faith effort to prevent the commission of an offense; or

(iii) the good faith effort to apprehend a person reasonably suspected of committing an offense; or

(b) a member of the immediate family of a homicide victim.

(6) (a) Except as provided in subsection (6)(c), a victim of a criminal offense has the right to receive, upon request and at no cost to the victim, one copy of all public documents filed in the court file.

(b) If the victim is under 18 years of age, copies provided under subsection (6)(a) must be provided to the victim's parents or guardian instead of to the minor victim.

(c) Subsection (6)(a) does not apply to:

(i) trial transcripts;

(ii) trial exhibits;

(iii) court proceedings conducted under Title 41, chapter 5; or

(iv) documents the prosecutor determines would adversely affect the prosecution if released.

(7) A victim of a criminal offense has the right, upon request, to have a victim advocate present when the victim is interviewed about the offense.

➔Comment: 46-18-249 MCA pertains to separate civil actions that may be taken by the victim against the offender.

Also, note that a provision in 46-18-201(6) allows suspension of the license or the driving privilege of the person being sentenced to be accomplished as provided in 61-5-214 through 61-5-217. These actions may well impact both criminal and civil jurisdiction issues.

400.906 Presentence Investigation.

46-18-111 MCA lists those offenses and statutes wherein a presentence investigation must be prepared for the court prior to sentencing. The statute concludes with "...The district court may order a presentence investigation for a defendant convicted of a misdemeanor only if...."

➔Comment: There is no statutory provision for courts of limited jurisdiction to conduct formal presentence investigations, however, this is done informally by questioning the defendant by the court. 46-18-115 MCA, states that before imposing sentence or making any other disposition, "...the court shall conduct a sentencing hearing...." This hearing is the time wherein you receive recommendations from the prosecutor and the defendant or defense attorney. It may also include statements from victims, spouses, employers, or counselors treating the defendant. This satisfies the "hearing" requirement and does allow either party to ask for presentence information that will be useful to the judge in pronouncing sentence. Also, 45-5-206(3)(v) states, "...If the offense was committed within the vision or hearing of a minor, the judge shall consider the minor's presence as a factor at the time of sentencing...."

400.907 Sentencing Indigents.

Two United States Supreme Court cases which have set forth requirements regarding indigents: (1) *Williams v. Illinois, 399 U.S. 235* ; (2) *Tate v. Short, 401 U.S. 395.*

➔Comment: If the maximum jail time allowed for an offense is 6 months and a $500 fine, the defendant cannot be required to spend 50 days extra in jail upon non-payment of the fine. An indigent cannot be required to serve out a fine at the rate set pursuant to 46-18-403 MCA, but instead must be given a chance to pay the fine in installments if necessary. The court may impose a fine and suspended jail sentence. The sentence is revocable upon non-payment of the fine if the terms of payment are such that non-payment or failure to pay could be said to be willful on the part of the defendant.

400.908 Sentence when Code Silent on Punishment.

46-18-212 MCA. When no penalty is specified. The court, in imposing sentence upon an offender convicted of an offense for which no penalty is otherwise provided or if the offense is designated a misdemeanor and no penalty is otherwise provided, may sentence the offender to a term of imprisonment not to exceed 6 months in the county jail or a fine not to exceed $500, or both.

400.909 Dismissal After Deferred Imposition.

46-18-204 MCA. Dismissal after deferred imposition. Whenever the court has deferred the imposition of sentence and after termination of the time period during which imposition of sentence has been deferred or upon termination of the time remaining on a deferred sentence under 46-18-208, upon motion of the court, the defendant, or the defendant's attorney, the court may allow the defendant to withdraw a plea of guilty or nolo contendere or may strike the verdict of guilty

A copy of the order of dismissal must be sent to the prosecutor and the department of justice, accompanied by a form prepared by the department of justice and containing identifying information about the defendant. After the charge is dismissed, all records and data relating to the charge are confidential criminal justice information, as defined in 44-5-103, and public access to the information may be obtained only by district court order upon good cause shown.

400.910 Revocation.

46-18-203 MCA. Revocation of suspended or deferred sentence. (1) Upon the filing of a petition for revocation showing probable cause that the offender has violated any condition of a sentence, any condition of a deferred imposition of sentence, or any condition of supervision after release from imprisonment imposed pursuant to 45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(c), or 45-5-625(4), the judge may issue an order for a hearing on revocation. The order must require the offender to appear at a specified time and place for the hearing and be served by delivering a copy of the petition and order to the offender personally. The judge may also issue an arrest warrant directing any peace officer or a probation and parole officer to arrest the offender and bring the offender before the court.

(2) The petition for a revocation must be filed with the sentencing court during the period of suspension or deferral. Expiration of the period of suspension or deferral after the petition is filed does not deprive the court of its jurisdiction to rule on the petition.

(3) The provisions pertaining to bail, as set forth in Title 46, chapter 9, are applicable to persons arrested pursuant to this section.

(4) Without unnecessary delay, the offender must be brought before the judge, and the offender must be advised of:

(a) the allegations of the petition;

(b) the opportunity to appear and to present evidence in the offender's own behalf;

(c) the opportunity to question adverse witnesses; and

(d) the right to be represented by counsel at the revocation hearing pursuant to Title 46, chapter 8, part 1.

(5) A hearing is required before a suspended or deferred sentence can be revoked or the terms or conditions of the sentence can be modified, unless:

(a) the offender admits the allegations and waives the right to a hearing; or

(b) the relief to be granted is favorable to the offender and the prosecutor, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation is not favorable to the offender for the purposes of this subsection (5)(b).

(6) (a) At the hearing, the prosecution shall prove, by a preponderance of the evidence, that there has been a violation of:

(i) the terms and conditions of the suspended or deferred sentence; or

(ii) a condition of supervision after release from imprisonment imposed pursuant to 45-5-403(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(c), or 45-5-625(4).

(b) However, when a failure to pay restitution is the basis for the petition, the offender may excuse the violation by showing sufficient evidence that the failure to pay restitution was not attributable to a failure on the offender's part to make a good faith effort to obtain sufficient means to make the restitution payments as ordered.

(7) (a) If the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence, the judge may:

(i) continue the suspended or deferred sentence without a change in conditions;

(ii) continue the suspended sentence with modified or additional terms and conditions;

(iii) revoke the suspension of sentence and require the offender to serve either the sentence imposed or any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence; or

(iv) if the sentence was deferred, impose any sentence that might have been originally imposed.

(b) If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time and either expressly allow all or part of the time as a credit against the sentence or reject all or part of the time as a credit. The judge shall state the reasons for the judge's determination in the order. Credit must be allowed for time served in a detention center or home arrest time already served.

(c) If a judge finds that an offender has not violated a term or condition of a suspended or deferred sentence, that judge is not prevented from setting, modifying, or adding conditions of probation as provided in 46-23-1011.

(8) If the judge finds that the prosecution has not proved, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence, the petition must be dismissed and the offender, if in custody, must be immediately released.

(9) The provisions of this section apply to any offender whose suspended or deferred sentence is subject to revocation regardless of the date of the offender's conviction and regardless of the terms and conditions of the offender's original sentence.

➔Comment: Subsection (2) of 46-18-203 MCA has been a great aid to our courts procedurally. If in the pronouncement of sentence, jail time has been suspended upon condition that the fine will be paid in installments as agreed by the offender and final payment by ...(date)... and the offender does not make these payments, the city or county attorney may file a petition for revocation. This filing continues the jurisdiction of the court. Issue a warrant and hold a hearing for revocation of suspended sentence. The offender may then be required to serve either the sentence originally imposed or any sentence that could have been imposed that does not include a longer imprisonment or commitment term than the original sentence. This latter option was created during the 2003 legislative term and allows you more latitude in deciding how to treat a revocation.

400.911 Credit for Incarceration.

46-18-403 MCA. Credit for incarceration prior to conviction. (1) A person incarcerated on a bailable offense against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction, except that the time allowed as a credit may not exceed the term of the prison sentence rendered.

(2) A person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of the offense may be allowed a credit for each day of incarceration prior to conviction, except that the amount allowed or credited may not exceed the amount of the fine. The daily rate of credit for incarceration must be established annually by the board of county commissioners by resolution. The daily rate must be equal to the actual cost incurred by the detention facility for which the rate is established.

➔Comment: Note subsection (2) above. This credit against the fine is not discretionary by the court. Anyone not posting the required bail must be allowed the credit. As stated in *State v. Fisher 2003 MT 33*, a sentencing court has no authority in applying the above statute. It must employ both subsections and give the defendant **credit** for each day of incarceration against both the sentence and any **fine** imposed.

400.912 Execution of Judgment.

46-17-302 MCA. Execution of judgment. (1) The judgment must be executed by the sheriff, constable, marshal, or police officer of the jurisdiction in which the offender was convicted.

(2) When a judgment of imprisonment is entered, a certified copy of the judgment must be delivered to the sheriff or other officer, which is a sufficient warrant for its execution.

(3) If a judgment is rendered imposing a fine only without imprisonment for nonpayment and the offender is not detained for any other legal cause, the offender must be discharged as soon as the judgment is given.

(4) A judgment that the offender pay a fine may also direct that the offender be imprisoned until the fine is satisfied in the proportion of 1 day's imprisonment for every $75 of the fine. When the judgment is rendered, the offender must be held in custody for the time specified in the judgment unless the fine is paid.

(5) Any officer charged with the collection of fines under the provisions of this chapter shall return the execution to the judge within 30 days from its delivery to the officer and pay the money collected to the judge after deducting the officer's fees for the collection.

➔Comment: Use the preceding subsection (4) with great care. See 400.907 regarding the sentencing of indigents. To use subsection (4), the offender must clearly have the ability to pay or will have the ability to pay. (See 46-18-231(3)MCA).

400.913 Execution of a fine.

46-19-102 MCA. Execution of judgment. (1) If a judgment is for a fine alone or for a fine and imprisonment, execution may issue on the fine portion of the judgment, any unpaid interest accrued on the fine portion of the judgment, and costs and fees incurred in collecting the fine portion of the judgment as on a judgment in a civil case.

(2) If the judgment is for a fine and imprisonment until the fine is paid, the defendant must be committed to the custody of the proper officer and detained and allowed a credit for each day of incarceration as provided in 46-18-403.

(3) (a) The court may contract with a private person or entity for the collection of any fine portion of a judgment.

(b) In the event that a private person or entity is retained to collect the fine portion of a judgment, the court may assign the fine portion of the judgment to the private person or entity and the private person or entity may, as an assignee, institute suit or other lawful collection procedures and postjudgment remedies in the private person's or entity's own name.

(c) The court, after deducting the charges provided for in 46-18-236, may pay the private person or entity a reasonable fee for collecting the fine portion of a judgment. The fee incurred by the court must be added to the fine portion of the judgment amount.

400.914 Jail Work Release Programs.

46-18-701 MCA. Limited release during employment hours. (1) A court, after having sentenced a person to confinement in a county jail, may, in its discretion, upon request of the county attorney and sheriff of the county and with the consent of the convicted person, order that any part of the imprisonment imposed be served in confinement with limited release during the hours or periods the convicted person is actually employed.

(2) Upon the issuance of an order for limited release under this part, the sheriff shall arrange for the convicted person to continue the person's regular employment without interruption insofar as is reasonably possible. However, the prisoner must be confined in the county jail during the hours when the prisoner is not employed.

46-18-704 MCA. Reduction of sentence. The committing court may, in its discretion, upon request of the county attorney and sheriff of such county, reduce the sentence of the prisoner up to one-fourth of the full term if, in the opinion of the court, the prisoner's conduct, diligence, and general attitude merit such diminution.

7-32-2225 MCA. County jail work program. (1) A county may operate a county jail work program. The program may be established to allow jail inmates convicted of nonviolent offenses to serve a sentence of imprisonment in the county jail by performing county work without actual physical confinement in the county jail.
(2) A participant in a county jail work program is considered to be in confinement for the purposes of laws relating to confinement in jail, sentencing, and length of imprisonment.
(3) A county jail work program may be established in addition to any county jail labor, rehabilitation, or other program, including the authority of the board of county commissioners to require persons confined to the county jail to perform labor.

7-32-2226 MCA. Operation of county jail work program. (1) If a county establishes a county jail work program, it must be authorized by the board of county commissioners and supervised by the county sheriff. The sheriff may permit persons eligible under the provisions of 7-32-2227 to work on public projects as designated by the board of county commissioners. Upon a request of a federal or state agency, city government, or nonprofit corporation and upon mutually agreeable terms or on their own action for county projects, the board of county commissioners may designate projects as public projects for purposes of this section. A person participating in a county jail work program may not:

(a) have the person's labor or other work contracted out to a private party;
(b) be required to do labor or other work that furthers the private interests of a government employee or official;
(c) be permitted or required to do labor or other work that relates to anything other than public projects, public services, or other public matters;
(d) be used to displace any regular government employee;
(e) perform the duties of any vacant government position; or
(f) work on any construction or reconstruction project.

(2) A county may not reduce its current workforce in order to transfer the duties of a reduction to persons participating in a county jail work program.

(3) A person participating in a county work program may not be physically confined in the county jail during the course of the person's participation. The person may not be required to perform county work in excess of 8 hours each calendar day. Each calendar day in which a person has participated in a county jail work program is 2 days of incarceration for the purposes of serving a sentence of imprisonment.
(4) The sheriff, in conjunction with the board of county commissioners, shall establish a written policy on how jail inmates may volunteer for participation in the county work program and what criteria the sheriff shall use to choose volunteers if there are more eligible persons volunteering than are needed in the program.
(5) In order to ensure public safety, the sheriff may deny a person permission to participate in the program and may revoke a person's permission to participate at any time.
(6) A person participating in a program is under official detention as that term is used in defining the crime of escape in 45-5-306. An unexcused failure to appear for work at a time and place scheduled for participation in a program constitutes the offense of escape.
(7) Weed management, as defined in 7-22-2101, whether public or private land, and other maintenance projects authorized by a board of county commissioners are county projects for purposes of 7-32-2225 through 7-32-2227.

7-32-2227 MCA. Inmate eligibility for participation. A person may be permitted to participate in a county jail work program if the person:
(1) has been sentenced to the county jail for an offense and is not confined in the county jail upon process in a civil action or prior to examination or trial;
(2) is not serving a sentence for homicide, robbery, sexual intercourse without consent, arson, burglary, kidnapping, escape, assault, partner or family member assault, incest, or any other offense in which violence is an element of the crime or for an offense during the course of which bodily injury occurred;
(3) was not prohibited from participating in the county work program by the sentencing judge, magistrate, or justice of the peace or by the judge's, magistrate's, or justice's successor; and
(4) has applied to participate to the county sheriff and the sheriff, pursuant to written policy, has approved the participation.

7-32-2208 MCA. Actual confinement of inmates required. An inmate committed to a detention center for trial or examination or, except as provided in 7-32-2225 through 7-32-2227, a prisoner convicted must be actually confined in the detention center until the inmate or prisoner is legally discharged.

400.915 The Surcharges.

See Section 600.303 infra. for a discussion of the mandatory surcharges.

400.916 Consecutive Sentences.

(1) Unless the judge otherwise orders:

(a) whenever a person serving a term of commitment imposed by a court in this state is committed for another offense, the shorter term or shorter remaining term may not be merged in the other term; and

(b) whenever a person under suspended sentence or on probation for an offense committed in this state is sentenced for another offense, the period still to be served on suspended sentence or probation may not be merged in any new sentence of commitment or probation.

(2) The court, whether or not it merges the sentences, shall immediately furnish each of the other courts and the penal institutions in which the defendant is confined under sentence with authenticated copies if its sentence, which must cite any sentence that is merged.

(3) If an unexpired sentence is merged pursuant to subsection (1), the court that imposed the sentence shall modify it in accordance with the effect of the merger.

(4) Separate sentences for two or more offenses must run consecutively unless the court otherwise orders.

SECTION 500 — DOCKET, RECORDS, AND REPORTS.

500.100 INTRODUCTION.

Municipal courts, justice courts, and district courts are all established as courts of record. All in-court proceedings are recorded by a court reporter, electronic recording, or stenographer. Neither the justice courts nor the city courts are courts of record, and all recording of courtroom events must be done by the judge or by a clerk at the judge's direction. The record or docket must include all happenings and transactions of the court. For this purpose, court "minutes" and a court "docket" are required to be kept. These events should be recorded accurately and as soon as possible, in a chronological sequence.

> 3-10-501 MCA. Contents of docket— electronic filing and storage of court records. (1) Each justice shall keep a book, denominated a "docket", in which the justice shall enter:
>
> (a) the title of each action or proceeding;
>
> (b) the object of the action or proceeding and, if a sum of money is claimed, the amount;
>
> (c) the date of the summons and the time of its return and, if an order to arrest the defendant is made or a writ of attachment is issued, a statement of the fact;
>
> (d) the time when the parties or either of them appear or their nonappearance if default is made; a minute of the pleading and motions, if in writing, referring to them, if not in writing, a concise statement of the material parts of the pleadings;
>
> (e) each adjournment, stating on whose application and to what time;
>
> (f) the demand for a trial by jury, when the demand is made, and by whom made; the order for the jury; and the time appointed for the return of the jury and for the trial;
>
> (g) the names of the jurors who appear and are sworn and the names of all witnesses sworn and at whose request;
>
> (h) the verdict of the jury and when received; if the jury disagree and is discharged, the fact of disagreement and discharge;
>
> (i) the judgment of the court, specifying the costs included and the time when rendered, and an itemized statement of the costs;
>
> (j) the issuing of the execution, when issued, and to whom; the renewals of the execution, if any, and when made; and a statement of any money paid to the justice, when paid, and by whom;
>
> (k) the receipt of a notice of appeal, if any is given, and of the undertaking n appeal, if any is filed.
>
> (2) The justice may elect to keep court documents by means of electronic filing or storage, or both, as provided in 3-1-114 and 3-1-115, in lieu of or in addition to keeping paper records.

500.201 Small Claims Docket.

3-10-1005 MCA. Docket entries. The justice of the peace shall enter in the docket kept by the justice for small claims cases the following:
(1) the title of each action;
(2) the amount claimed;
(3) the date the order of court/notice to defendant was signed and the date of the trial as stated in the order;
(4) the date the parties appeared or the date on which default was entered;
(5) each adjournment, stating on whose application and to what time;
(6) the judgment of the court;
(7) a statement of any money paid to the justice, when, and by whom;
(8) the date of the issuance of any abstract of the judgment; and
(9) the date of the receipt of the notice of appeal, if any is given, and of the appeal bond, if any is filed.

500.202 Criminal Docket.

46-17-102 MCA. Record of proceedings. A docket must be kept by the justice of the peace or city judge, in which must be entered each action and the proceedings of the court therein.

➔Comment: The uniform notice to appear form is a complaint/summons and the entries made upon the reverse side become the docket. The docket must be completed according to 3-10-501 MCA.

➔Comment: The law refers to a docket. You will have a separate docket for each type of action, i.e., civil or criminal. These dockets may be hard bound or loose leaf binders.

Many code sections refer to court minutes. The minutes are the entries in the docket regarding the progress of the case. The minutes should refer to the facts relating to any proceeding and the legal steps taken. The minutes do not need to indicate what the witness may have said or the effect of the testimony, only that the witness was called, sworn, and testified by direct and cross-examination. For example: State's witnesses: #1. John Doe, sworn, testified direct, and cross-examined (or CX). #2. Jane Doe, sworn, testified direct., CX, and redirect.

502.203 Docket Entries.

3-10-502 MCA. How entries made ─ prima facie evidence. (1) The items listed in 3-10-501 must be entered in the docket under the title of the action to which they relate and, unless otherwise provided, at the time when they occur.
(2) The entries in a justice of the peace's docket or a transcript of the entries certified by the justice or the justice's successor in office are prima facie evidence of the facts stated.

➔Comment: Entries should be made at the conclusion of a hearing or trial, or as soon as possible to accurately reflect the proceedings. During a trial, keep notes of the names of witnesses, who examined them, etc. These may then be entered at the conclusion of the trial in your docket. The entry for contempt of court should be done immediately and before returning to the proceeding before the court. (See Contempt of Court, 300.502).

500.204 Index.

> 3-10-503 MCA. Index to docket— electronic filing and storage of court records. (1) A justice shall keep an alphabetical index to the docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs and defendants must be entered in the index in the alphabetical order of the first letter of the family name.
> (2) The justice may elect to keep the index by means of electronic filing or storage, or both, as provided in 3-1-114 and 3-1-115, in lieu of or in addition to keeping paper records.

➔Comment: If more than one docket is maintained, keep an index for all cases, either in each volume or one general index for all of them. The index entries should be made at the time of the case filing and should have unique numbers.

You should use boxes/binders as needed to establish a docket for the uniform notice-to-appear complaints. You should establish a new index for each calendar year. The names of the defendants must be arranged alphabetically within each section.

500.205 Dockets to Successor.

> 3-10-511 MCA. Records delivered to successor. Each justice of the peace, upon the expiration of the term of office, shall deposit with the justice's successor the official dockets and all papers or electronically filed or stored documents that were filed in the court during the justice's term of office or before, to be kept as public records.

500.300 Court Record.

➔Comment: When a judge is required to transfer "the record" to another court, as in an appear, it means the judge must transfer all of the original papers that have been filed and a certified copy of the docket entries. The record does not include any comments by the judge nor does it mean the judge must give the notes of the testimony taken at the trial. You may want to keep these notes to maintain a complete record in your court.

Municipal Court.

3-6-302 MCA. Records ─ electronic filing and storage. (1) The records of the court must be kept by the clerk. The records in civil causes must conform as nearly as possible to the records of district courts. In criminal causes, in cases arising under city ordinances, and in cases mentioned in 3-11-103, the records must be similar to the records now kept in justices' courts.

(2) The clerk may elect to keep court documents by means of electronic filing or storage, or both, as provided in 3-1-114 and 3-1-115, in lieu of or in addition to keeping paper records.

500.400 REPORTS.

500.401 Report to the County Attorney.

46-9-203 MCA. Report to county attorney concerning drug users. A city judge, judge of a municipal court, or justice of the peace shall report immediately to the county attorney of the county in which the judge's or justice's court is located any knowledge or information acquired by the judge or justice in a trial of a cause or hearing before the judge or justice that shows or tends to show that any person is a drug user or drug addict. If the person is under arrest or liberated on bail at the time the knowledge or information is acquired, the person may not be liberated, if under arrest, or the bail discharged by the judge or justice of the peace until the report is made to the county attorney.

500.402 Report to the Highway Patrol.

61-11-104 MCA. Justices of the peace─ availability of records . Justices of the peace shall make available to the department records of cases which involve the state highway patrol as the department may request.

➔Comment: The above requirement is met when the end-of-the-month forms are filed with the county treasurer. There are sufficient copies of the form to be sent to the highway patrol.

Every court having traffic jurisdiction is required to report to the department of justice any conviction or forfeiture of bail for an offense involving the operation of a motor vehicle. This report is due within 5 days of the conviction or bail forfeiture. The disposition copy of the highway NTA copy is used for this purpose. Remember, that should the complaint be filed by the county attorney's office, there is no disposition copy available for your use. A report must be made to the department upon conviction or forfeiture of bail. The department furnished forms for this purpose. These forms are called "abstracts of record". (See 61-11-101 MCA). All convictions must be reported regardless of the filing agency.

61-11-101 MCA. Report of conviction and suspension or revocation of driver's licenses ─ surrender of licenses. (1) If a person is convicted of an offense for which chapter 5 or chapter 8, part 8, makes mandatory the suspension or revocation of the driver's license or commercial driver's license of the person by the department, the court in which the conviction occurs shall require the surrender to it of all driver's licenses then held by the convicted person. The court shall, within 5 days after the conviction becomes final, forward the license and a record of the conviction to the department. If the person does not possess a driver's license, the court shall indicate that fact in its report to the department.

(2) A court having jurisdiction over offenses committed under a statute of this state or a municipal ordinance regulating the operation of motor vehicles on highways, except for standing or parking statutes or ordinances, shall forward a record of the conviction, as defined in 61-5-213, to the department within 5 days after the conviction becomes final. The court may recommend that the department issue a restricted probationary license on the condition that the individual comply with the requirement that the person attend and complete a chemical dependency education course, treatment, or both, as ordered by the court under 61-8-732.

(3) A court or other agency of this state or of a subdivision of the state that has jurisdiction to take any action suspending, revoking, or otherwise limiting a license to drive shall report an action and the adjudication upon which it is based to the department within 5 days on forms furnished by the department.

(4) A conviction becomes final for the purposed of this part upon the later of:

(a) expiration of the time for appeal of the court's judgment or sentence to the next highest court;

(b) forfeiture of bail that is not vacated; or

(c) imposition of a fine or court cost as a condition of a deferred imposition of a sentence or a suspended execution of a sentence.

(5) (a) On a conviction referred to in subsection (1) of a person who holds a commercial driver's license or who is required to hold a commercial driver's license, a court may not take any action, including deferring imposition of judgment, that would prevent a conviction for any violation of a state or local traffic control law or ordinance, except a parking law or ordinance, in any type of motor vehicle, from appearing on the person's driving record. The provisions of this subsection (5)(a) apply only to the conviction of a person who holds a commercial driver's license or who is required to hold a commercial driver's license and do not apply to the conviction of a person who holds any other type of driver's license.

(b) For purposes of this subsection (5), "who is required to hold a commercial driver's license" refers to a person who did not have a commercial driver's license but who was operating a commercial motor vehicle at the time of a violation of a state or local traffic control law or ordinance resulting in a conviction referred to in subsection (1).

500.403 Report to the Clerk of Court.

The solemnization of a marriage is reported to the clerk of court by the filing of the certificate of marriage. This filing MUST be accomplished within 30 days of the marriage or the judge shall forfeit not less than $10 or more than $50 in accordance with 40-1-321 MCA.

500.404 Report to the County Treasurer.

3-10-601 MCA. Collection and disposition of fines, penalties, forfeitures, and fees. (1) Except as provided in 61-8-726 and 75-7-123, a justice's court shall collect the fees prescribed by law for justices' courts and shall pay them into the county treasury of the county in which the justice of the peace holds office, on or before the 10th day of each month, to be credited to the general fund of the county.

(2) Except as provided in 61-8-726, 75-7-123, and subsection (4) of this section, all fines, penalties, and forfeitures that are required to be imposed, collected, or paid in a justice's court must, for each calendar month, be paid by the justice's court on or before the 5th day of the following month to the treasurer of the county in which the justice's court is situated, except that they may be distributed as provided in 44-12-206 if imposed, collected, or paid for a violation of Title 45, chapter 9 or 10.

(3) Except as provided in 46-18-236(7), 61-8-726, and 75-7-123, the county treasurer shall, as provided in 15-1-504, distribute money received under subsection (2) as follows:

(a) 50% to the department of revenue for deposit in the state general fund; and

(b) 50% to the county general fund.

(4) (a) The justice's court may contract with a private person or entity for the collection of any final judgment that requires a payment to the justice's court.

(b) In the event that a private person or entity is retained to collect a judgment, the justice's court may assign the judgment to the private person or entity and the private person or entity may, as an assignee, institute a suit or other lawful collection procedure and other postjudgment remedies in its own name.

(c) The justice's court may pay the private person or entity a reasonable fee for collecting the judgment. The fee incurred by the justice's court must be added to the judgment amount.

500.405 Report to the County Commissioners.

7-6-2213 MCA. Repealed in 2001.

500.406 Report to Department of Justice.

Upon conviction of a Title 16 offense, such as selling alcohol after hours or selling to a minor, the name of the license holder should be sent to the Department of Revenue, along with a certified copy of the conviction. While the bartender may be the one cited, the license holder is responsible for the actions of his employees.

16-6-314 MCA. Penalty for violating code— revocation of license — penalty for violation by underage person. (1) A person who violates a provision of this code is guilty of a misdemeanor punishable as provided in 46-18-212, except as otherwise provided in this section.
(2) If a retail licensee is convicted of an offense under this code, the licensee's license must be immediately revoked or, in the discretion of the department, another sanction must be imposed as provided under 16-4-406.
(3) A person under 21 years of age who violates 16-3-301(5) or 16-6-305(3) is subject to the penalty provided in 45-5-624(2) or (3).

46-18-212 MCA. When no penalty is specified. The court, in imposing sentence upon an offender for which no penalty is otherwise provided or if the offense is designated a misdemeanor and no penalty is otherwise provided, may sentence the offender to a term of imprisonment not to exceed 6 months in the county jail or a fine not to exceed $500, or both.

16-4-406 MCA. Renewal — suspension or revocation — penalty. (1) The department shall upon a written, verified complaint of a person request that the department of justice investigate the action and operation of a brewer, winery, wholesaler, or retailer licensed under this code.
(2) Subject to the opportunity for a hearing under the Montana Administrative Procedure Act, if the department, after reviewing admissions of the licensee or receiving the results of the department of justice's or a local law enforcement agency's investigation, has reasonable cause to believe that a licensee has violated a provision of this code or a rule of the department, it may, in its discretion and in addition to the other penalties prescribed:

(a) reprimand a licensee;
(b) proceed to revoke the license of the licensee;
(c) suspend the license for a period of not more than 3 months;
(d) refuse to grant a renewal of the license after its expiration; or
(e) impose a civil penalty not to exceed $1,500.

SECTION 600 — FEES, FINES, AND FORFEITURES.

600.100 INTRODUCTION.

A bookkeeping manual is available to the judges of limited jurisdiction courts from the Commission on Courts of Limited jurisdiction. The goal here is not to duplicate any of that material, but to compile the statutes which are the basis of our financial accountability.

600.200 Fees.

3-10-601 MCA. Collection and disposition of fines, penalties, forfeitures, and fees. (1) Except as provided in 61-8-726 and 75-7-123, a justice's court shall collect the fees prescribed by law for justices' courts and shall pay them into the county treasury of the county in which the justice of the peace holds office, on or before the 10th day of each month, to be credited to the general fund of the county.
(2) Except as provided in 61-8-726, 75-7-123, and subsection (4) of this section, all fines, penalties, and forfeitures that are required to be imposed, collected, or paid in a justice's court must, for each calendar month, be paid by the justice's court on or before the 5th day of the following month to the treasurer of the county in which the justice's court is situated, except that they may be distributed as provided in 44-12-206 if imposed, collected, or paid for a violation of Title 45, chapter 9 or 10.
(3) Except as provided in 46-18-236(7), 61-8-726, and 75-7-123, the county treasurer shall, as provided in 15-1-504, distribute money received under subsection (2) as follows:

(a) 50% to the department of revenue for deposit in the state general fund; and

(b) 50% to the county general fund.

(4) (a) The justice's court may contract with a private person or entity for the collection of any final judgment that requires a payment to the justice's court.

(b) In the event that a private person or entity is retained to collect a judgment, the justice's court may assign the judgment to the private person or entity and the private person or entity may, as an assignee, institute a suit or other lawful collection procedure and other postjudgment remedies in its own name.

(c) The justice's court may pay the private person or entity a reasonable fee for collecting the judgment. The fee incurred by the justice's court must be added to the judgment amount.

25-30-102 MCA. Fees and fines— collection . (1)(a) The fees and fines in municipal must be the same as the fees and fines provided by law or ordinance, and except as provided in subsection (2), all fees and fines collected by the court must be paid into the city treasury.

(b) Fees assessed in municipal court may not exceed the fees authorized to be paid to a justice's court in 25-31-112.

(2) (a) The municipal court may contract with a private person or entity for the collection of any final judgment that requires a payment to the municipal court. The fee incurred by the municipal court must be added to the judgment.
(b) In the event that a private person or entity is retained to collect a judgment, the municipal court may assign the judgment to the private person or entity and the private person or entity may, as an assignee institute suit or other lawful collection procedure and other postjudgment remedies in its own name.
(c) The municipal court, after deducting the charges provided in 46-18-236, may pay the private person or entity a reasonable for collecting the judgment.

7-4-2516 MCA. Fees not required in certain cases. No fees must be charged the state, any county, or any subdivision thereof, any public officer acting therefor, or in habeas corpus proceedings for official services rendered, and all such services must be performed without the payment of fees.

➔Comment: The justice court will not charge civil filing fees when the county attorney files a case with the county as plaintiff. Likewise, you will not be charged fees when filing official papers with the clerk and recorder.

7-4-2511 MCA. Collection and disposal of fees. (1) Each salaried county officer shall charge and collect for the use of the county and pay into the county treasury by the 10th day of each month all fees allowed by law, paid or chargeable in all cases, except as provided in 25-10-403. This subsection does not apply to the compensation received by the sheriff as mileage while in the performance of official duties or for the board of prisoners or other persons while in the sheriff's custody.
(2) A salaried county officer may not receive for the officer's own use any fees, penalties, or emoluments of any kind, except the salary as provided by law, for any official service rendered. Unless otherwise provided, all fees, penalties, and emoluments of every kind collected by a salaried county officer are for the sole use of the county and must be accounted for and paid to the county treasurer as provided by subsection (1) and credited to the general fund of the county.

➔Comment: The exceptions mentioned in subsection (1) above are:
(a) government entities not required to prepay fees; and
(b) public officers not to be personally taxed with costs or damages.

61-12-702 MCA. Court costs — fees and expenses of counties. The court, after deducting all costs and fees, shall immediately transmit the balance of the fine to the state or county treasurer as provided by law. The expenses of the county, except fees of officers who are paid a regular salary, are a proper claim against the state or county and claims must be paid in the manner provided by law out of the funds appropriated for such purposes.

➔Comment: Note that in the following statute, it is not the judge's duty to prepare the bill of costs. The prosecution or issuing officer should present the bill of costs.

> 87-1-104 MCA. Payment of cost bill to county. In a prosecution for the violation of fish and game laws where costs are incurred, a cost bill shall be prepared. The cost bill shall include the cost of board of prisoners and shall be presented to the department of administration. If the costs are allowed, the state treasurer shall pay them out of the fish and game moneys in the state special revenue fund to the treasurer of the county where the costs were incurred.

600.201 Criminal Fees.

➔Comment: There are no fees charged for the filing of criminal cases. There may be costs assessed against the defendant after a finding of guilty, however, there is no "fee" for a criminal case.

600.202 Civil Fees.

> 25-31-112 MCA. Fees. The following is the schedule of fees which, except as provided in 25-35-605, shall be paid in every civil action in a justice's court:
> (1) $25 when complaint is filed, to be paid by the plaintiff;
> (2) $10 when the defendant appears, to be paid by the defendant;
> (3) $10 to be paid by the prevailing party when judgment is rendered. In cases where judgment is entered by default, no charge except the $25 for the filing of the complaint shall be made for any services, including issuing and return of execution.
> (4) $10 for all services in an action where judgment is rendered by confession;
> (5) $10 for filing notice of appeal and transcript on appeal, justifying and approving undertaking on appeal, and transmitting papers to the district with certificate.

➔Comment: The exception (25-35-605 MCA) referred to in 25-31-112 MCA, Page 6-3, is when small claims actions are removed to justice's court in which case no additional filing is required.

Remember that poor persons are not required to prepay fees. With the filing of an affidavit, as required in 25-10-404 MCA, stating that the party has a good cause of action or defense is present and that the party is unable to pay the fees, you must file the pleading without fee.

600.203 Small Claims Fees.

25-35-608 MCA. Fees. (1) The clerk of the justice's court shall collect a fee of:

(a) $10 from the plaintiff upon the filing of the sworn complaint; and

(b) $5 from the defendant upon the defendant's appearance and contesting of the complaint or execution of a counterclaim.

(2) The laws relating to paupers' affidavits apply to action before the small claims court.

600.204 Jurors' Fees.

3-15-203 MCA. Fees in courts not of record and coroner inquests. (1) A jury panel member in civil actions, criminal actions, and coroner inquests is entitled to a fee of $12 per day for attendance before a court not of record and a mileage allowance, as provided in 2-18-503, for traveling each way between the member's residence and the court. A jury panel member selected for a case is entitled to an additional $13 per day while serving.

(2) In civil actions, the juror's fees must be paid by the party demanding the jury and taxed as costs against the losing party.

(3) A juror who is excused from attendance upon the juror's own motion on the first day of appearance in obedience to a notice or who has been summoned as a special juror and not sworn in the trial of the case shall forfeit per diem and mileage.

600.205 Witnesses' Fees.

26-2-503 MCA. Witnesses in courts not of record criminal actions and on coroner's inquests. Witnesses in courts not of record in criminal actions and on coroner's inquests shall receive $10 per day for actual attendance and mileage as provided in 2-18-503 for each mile actually and necessarily traveled from their places of residence to the court and return.

➔Comment: Rather than try to determine the current rate for mileage, check with the board of county commissioners or city council for the current rate after the first of each calendar year.

600.300 Fines, Forfeitures, and Fees.

600.301 Introduction.

Black's Law Dictionary, Seventh Edition, defines "fine" as: "...5. A pecuniary criminal punishment or civil penalty payable to the public treasury...." As such, it may include a forfeiture or penalty recoverable in a civil, and, in criminal convictions, may be in addition to imprisonment. A fine constitutes a "sentence", defined as: "The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer...."

Black's Law Dictionary, Seventh Edition, defines "fee" as: "1. A charge for labor or services, esp. professional services...."

Black's Law Dictionary, Seventh Edition, defines "conviction" as: "1. The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty...."

600.302 Fines and Forfeitures.

61-12-701 MCA. Disposition of fines and forfeitures. All fines and forfeitures collected in any court, except a justice's court, for violation of the laws and regulations relating to the use of state highways and the operation of vehicles on state highways, if the apprehension or arrest was by a highway patrol officer, must be paid to the department of revenue for credit to the state general fund or, if the apprehension or arrest was by a sheriff or deputy sheriff, must be paid to the county treasurer for deposit in the county general fund, except for that portion of the fines otherwise allocated by law, which must be paid into the appropriate accounts in the state special revenue fund.

61-10-148 MCA. Disposition of fines and forfeited bonds. (1) Except as provided in 61-12-701 and subsection (2) of this section, all the money collected as fines and forfeited bonds for violations of Title 61, chapter 10, must be remitted monthly by the county treasurer to the state, as provided in 15-1-504, for deposit in the state general fund. This subsection does not apply to fines and forfeited bonds paid to justices' courts.

(2) If the apprehension or arrest was for a violation of Title 61, chapter 10, and if the offense occurred on a road or highway not included under the provisions of 60-2-128 and 60-2-203, all money collected as fines and forfeited bonds must be deposited in the state general fund.

46-17-303 MCA. Deposit of fines— collection . (1) Except as provided in subsection (2), all fines imposed and collected by the court must be paid to the appropriate treasurer of the county, city, or town within 30 days of receipt. The judge shall file a copy of any receipt given for a collected fine with the appropriate county, city or town clerk.

(2)(a) The court may contract with a private person or entity for the collection of any final judgment that requires a payment to the court.

(b) In the event that a private person or entity is retained to collect a judgment, the court may assign the judgment to the private person or entity and the private person or entity may, as an assignee, institute suit or other lawful collection procedure and other postjudgment remedies in its own name.

(c) The court, after deducting the charges provided for in 46-18-236, may pay the private person or entity a reasonable fee for collecting the judgment. The fee incurred by the court must be added to the judgment amount.

(3) If the judgment is for a fine alone, execution may issue on the judgment for any unpaid interest accrued on the judgment, costs, and fees in collecting the fine as on a judgment in a civil case.

46-17-402 MCA. Fees and fines— collection . (1) The fees and fines in municipal court must be the same as the fees and fines provided by law or ordinance, and except as provided in 61-8-726 and subsection (2) of this section, all fees and fines collected by the court must be paid into the city treasury.

(2) (a) The municipal court may contract with a private person or entity for the collection of any final judgment that requires a payment to the municipal court.

(b) In the event that a private person or entity is retained to collect a judgment, the municipal court may assign the judgment to the private person or entity and the private person or entity may, as an assignee, institute suit or other lawful collection procedure and other postjudgment remedies in its own name.

(c) The municipal court, after deducting the charges provided for in 46-18-236, may pay the private person or entity a reasonable fee for collecting the judgment.

46-18-603 MCA. Deposition of fines and forfeitures. All fines and forfeitures collected in any court except city courts must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred. After those costs are paid, the remainder, if not paid to a justice's court or otherwise provided by law, must be forwarded to the department of revenue for deposit in the state general fund.

600.303 Surcharges.

46-18-236 MCA. ***(Temporary)*** Imposition of charge upon conviction or forfeiture — administration. (1) Except as provided in subsection (2), there must be imposed by all courts of original jurisdiction on a person upon conviction for any conduct made criminal by state statute or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or fines, as follows:

(a) $15 for each misdemeanor charge;

(b) the greater of $20 or 10% of the fine levied for each felony charge; and

(c) an additional $50 for each misdemeanor and felony charge under Title 45, 61-8-401, or 61-8-406.

(2) If a convicting court determines under 46-18-231 and 46-18-232 that the person is not able to pay the fine and costs or that the person is unable to pay within a reasonable time, the court shall waive payment of the charge imposed by this section.

(3) The charges imposed by this section are not fines and must be imposed in addition to any fine and may not be used in determining the jurisdiction of any court.

(4) When the payment of a fine is to be made in installments over a period of time, the charges imposed by this section must be collected from the first payment made and each subsequent payment as necessary if the first payment is not sufficient to cover the charges.

(5) The charges collected under subsection (1), except those collected under subsections (1)(a) and (1)(b) by a justice's court, must be deposited with the appropriate local government finance officer or treasurer. If a city municipal court or city or town court is the court of original jurisdiction, the charges collected under subsection (1) must be deposited with the city or town finance officer or treasurer. If a district court or justice's court is the court of original jurisdiction, the charges collected under subsection (1) must be deposited with the county finance officer or treasurer. If the court of original jurisdiction is a court within a consolidated city-county government within the meaning of Title 7, chapter 3, the charges collected under subsection (1) must be deposited with the finance officer or treasurer of the consolidated government.

(6) (a) A city or town finance officer or treasurer may retain the charges collected under subsections (1)(a) and (1)(b) by a city municipal court or a city or town court and may use that money for the payment of salaries of the city or town attorney and deputies.

(b) Each county finance officer or treasurer may retain the charges collected under subsections (1)(a) and (1)(b) by district courts for crimes committed or alleged to have been committed within that county. The county finance officer or treasurer shall use the money for the payment of salaries of its deputy county attorneys and for the payment of other salaries in the office of the county attorney, and any funds not needed for those salaries may be used for the payment of any other county salaries.

(7) (a) Except as provided in subsection (7)(b), each county, city, or town finance officer or treasurer may retain the charges collected under subsection (1)(c) for payment of the expenses of a victim and witness advocate program, including a program operated by a private, nonprofit organization, that provides the services specified in Title 40, chapter 15, and Title 46, chapter 24, and that is operated or used by the county, city, or town.

(b) The appropriate county, city, or town finance officer or treasurer shall deposit $1 of each charge collected under subsection (1)(c) in the collecting court's fund for mitigation of administrative costs incurred by the court in the collection of the charge. The funds deposited under this subsection (7)(b) are not subject to allocation under 46-18-251.

(c) Except as provided in subsection (7)(b), if the county, city, or town does not operate or use a victim and witness advocate program, all charges collected under subsection (1)(c) must be paid to the account provided for in 53-9-113. *(Terminates June 30, 2015—sec. 14, Ch.374, L. 2009.)*

46-18-236 MCA. ***(Effective July 1, 2015)*** Imposition of charge upon conviction or forfeiture— administration . (1) Except as provided in subsection (2), there must be imposed by all courts of original jurisdiction on a person upon conviction for any conduct made criminal by state statute or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or fines, as follows:

(a) $15 for each misdemeanor charge;

(b) the greater of $20 or 10% of the fine levied for each felony charge; and

(c) an additional $50 for each misdemeanor and felony charge under Title 45, 61-8-401, or 61-8-406.

(2) If a convicting court determines under 46-18-231 and 46-18-232 that the person is not able to pay the fine and costs or that the person is unable to pay within a reasonable time, the court shall waive payment of the charge imposed by this section.

(3) The charges imposed by this section are not fines and must be imposed in addition to any fine and may not be used in determining the jurisdiction of any court.

(4) When the payment of a fine is to be made in installments over a period of time, the charges imposed by this section must be collected from the first payment made and each subsequent payment as necessary if the first payment is not sufficient to cover the charges.

(5) The charges collected under subsection (1), except those collected under subsections(1)(a) and (1)(b) by a justice's court, must be deposited with the appropriate local government finance officer or treasurer. If a city municipal court or city or town court is the court of original jurisdiction, the charges collected under subsection (1) must be deposited with the city or town finance officer or treasurer. If a district court or justice's court is the court of original jurisdiction, the charges collected under subsection (1) must be deposited with the county finance officer or treasurer. If the court of original jurisdiction is a court within a consolidated city-county government within the meaning of Title 7, chapter 3, the charges collected under subsection (1) must be deposited with the finance officer or treasurer of the consolidated government.

(6) (a) A city or town finance officer or treasurer may retain the charges collected under subsections (1)(a) and (1)(b) by a city municipal court or a city or town court and may use that money for the payment of salaries of the city or town attorney and deputies.

(b) Each county finance officer or treasurer may retain the charges collected under subsections (1)(a) and (1)(b) by district courts for crimes committed or alleged to have been committed within that county. The county finance officer or treasurer shall use the money for the payment of salaries of its deputy county attorneys and for the payment of other salaries in the office of the county attorney, and any funds not needed for those salaries may be used for the payment of any other county salaries.

(7) (a) Except as provided in subsection (7)(b), each county, city, or town finance officer or treasurer may retain the charges collected under subsection (1)(c) for payment of the expenses of a victim and witness advocate program, including a program operated by a private, nonprofit organization, that

provides the services specified in Title 40, chapter 15, and Title 46, chapter 24, and that is operated or used by the county, city, or town.

(b) The appropriate county, city, or town finance officer or treasurer shall deposit $1 of each charge collected under subsection (1)(c) in the collecting court's fund for mitigation of administrative costs incurred by the court in the collection of the charge. The funds deposited under this subsection (7)(b) are not subject to allocation under 46-18-251.

(c) Except as provided in subsection (7)(b), if the county, city, or town does not operate or use a victim and witness advocate program, all charges collected under subsection (1)(c) must be paid to the crime victims compensation and assistance program in the department of justice for deposit in the state general fund to be used to provide services to crime victims as provided in Title 53, chapter 9, part 1.

3-1-317 MCA. User surcharge for court information technology ─ exception.

(1) Except as provided in subsection (2), all courts of original jurisdiction shall impose:

(a) on a defendant in criminal cases, a $10 user surcharge upon conviction for any conduct made criminal by state statute or upon forfeiture of bond or bail;

(b) on the initiating party in civil and probate cases, a $10 user surcharge at the commencement of each action, proceeding, or filing; and

(c) on each defendant or respondent in civil cases, a $10 user surcharge upon appearance.

(2) If a court determines that a defendant in a criminal case or determines pursuant to 25-10-404 that a party in a civil case is unable to pay the surcharge, the court may waive payment of the surcharge imposed by this section.

(3) The surcharge imposed by this section is not a fee or fine and must be imposed in addition to other taxable court costs, fee, or fines. The surcharge may not be used in determining the jurisdiction of any court.

(4) The amounts collected under this section must be forwarded to the department of revenue for deposit in the state general fund to be used for state funding of court information technology.

➔Comment: A court may not impose any fine, fee, or surcharge unless specified by statute. Although we may want to impose "user fees" to supplement inadequate court budgets, we cannot do so.

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THE STATE OF MONTANA

No. AF 08-0203

IN THE MATTER OF THE 2008 MONTANA CODE OF JUDICIAL CONDUCT

ORDER

In June of 2003, observing that Montana was the only jurisdiction in the nation which continued to subscribe to the Canons of Judicial Ethics, this Court established a Commission on the Code of Judicial Conduct (the Commission) to study and consider the adoption of a version of the American Bar Association Model Code of Judicial Conduct (ABA Code). The Court determined that adopting a version of the ABA Code would serve the current needs of Montana's judicial branch, provide uniformity, and provide access to a national database of decisions and ethics opinions.

The Commission was chaired by Justice Patricia Cotter and included as its members Chief Justice Karla Gray, Justice James C. Nelson, Justice John Warner, Hon. Katherine Curtis, Hon. Blair Jones, Hon. Karen Orzech, G. Lewis Scott, Esq., Richard J. Dolan, Esq., Professor David J. Patterson, and Holly Kaleczyc.

The Commission's work was delayed while the ABA undertook a significant revision of the existing ABA Model Code of Judicial Conduct. It was the desire of the Commission to tailor the Montana Code as closely as possible to the ABA national code, as revised, while adapting it to the realities of the operation of the judicial system and judicial elections in the state of Montana. Once the ABA Code was finalized the Commission convened duly noticed open meetings on eight occasions. Ultimately, the Commission's recommendations for the Montana Code of Judicial Conduct were approved by the members of the Commission, and then submitted for comment to the members of the judiciary and the members of the State Bar, with a comment period closing on June 18, 2008. Thereafter, the Commission revisited its recommendations in light of the comments received. Certain changes to the recommended rules were made as a

result of the comments, and the final proposed Code was then presented to this Court for its review and approval. Having now considered the Commission's recommendations, and with our thanks and gratitude to the Commission for its hard work and service, we adopt the following Order:

IT IS HEREBY ORDERED that the 2008 Montana Code of Judicial Conduct attached hereto as Exhibit A, is approved and adopted. The comments to the rules are not adopted as rules, but are provided for interpretation and guidance only. These rules shall be effective January 1, 2009.

IT IS FURTHER ORDERED that a copy of this Order, together with Concurrences and Dissent, and with the attached Exhibit A in Word and PDF document links, be electronically published on the website for the Judicial Branch, http://www.courts.mt.gov, and on the State Bar of Montana website, http://www.montanabar.org, and that a copy of this Order be published in the next available issue of *The Montana Lawyer*, the next *Lawyer's Deskbook and Directory*, and in the next available issue of the *Montana Reports*. Persons unable to access these documents electronically may request a paper copy of the same through the State Law Library, P.O. Box 203004, Helena, MT, 59620-3004 (406-444-1977) upon advance payment of reasonable photocopying and postage charges.

IT IS FURTHER ORDERED that the Clerk of this Court send a copy of this Order, together with Concurrences and Dissent and Exhibit A, either electronically or by U.S. Mail to the following persons and organizations:

the Clerk of each District Court of the state of Montana;

each District Court Judge of the state of Montana;

the Judge of the Workers' Compensation Court;

the Chief Judge of the Water Court;

the State Bar of Montana;

the Supreme Court Administrator, who shall serve each of the judges of the Courts of Limited Jurisdiction;

the chairperson of the Commission on Courts of Limited Jurisdiction;

the Presidents of the Montana Judges' Association and the Montana Magistrates' Association;

the Presidents of the Clerk of Court's Association for the Clerks of the District Courts and the Clerks of the Courts of Limited Jurisdiction;

the Judicial Standards Commission for the state of Montana;

Greg Petesch, Code Commissioner and Director of Legal Services for the Montana Legislative Services Division; and

the Dean of the University of Montana School of Law.

DATED this 12th day of December, 2008.

/S/ KARLA M. GRAY
/S/ PATRICIA COTTER
/S/ JAMES C. NELSON
/S/ W. WILLIAM LEAPHART
/S/ BRIAN MORRIS

Justice W. William Leaphart, concurring;

I concur in the Court's adoption of the 2008 Montana Code of Judicial Conduct. I write separately to point out what I see as an internal inconsistency in Rule 3.6. We, as United States citizens have a constitutionally protected right to the freedom of association and the free exercise of religion. First Amendment, U.S. Const. Rule 3.6(A) restricts the freedom of association by requiring that a judge "shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity or sexual orientation." Rule 3.6(C) however, provides that a judge's membership in a religious organization as a lawful exercise of the freedom of religion and is not a violation of this Rule.

It goes without saying that there are many religious organizations that discriminate on the basis of gender, race and/or sexual orientation. If, under the auspices of free exercise of religion, it is permissible to belong to a religious organization that discriminates against gays or prohibits women from being part of the church clergy, it would seem that the freedom of association would likewise allow one to belong to a nonreligious private club or "klan" that discriminates on the basis of race, gender or sexual orientation.

If, in the spirit of the Code of Judicial Conduct, affiliation with entities that engage in discriminatory conduct is abhorrent, the Code should be consistent in its prohibition and not carve out an exception for organizations that practice invidious discrimination under the name of religion.

/S/ W. WILLIAM LEAPHART

Justice Jim Rice, concurring in part and dissenting in part.

I join the Court in expressing thanks to the Commission for its work in crafting a code of judicial conduct for Montana. I support adoption of the Code and have only a couple of concerns, as follows:

1. Rule 2.11. Although I have reservations about this Rule in light of the U.S. Supreme Court's decision in *Republican Party v. White*, I accept it as a good faith effort to provide a rule which conforms with *White*, as represented in the ABA's Annotations to the Model Code, Canon 5A(3)(d), p. 355, and thus support the Rule as written. In light of pending litigation, I would caution that the Rule may need to be revisited to accommodate future court decisions.

2. Rule 3.6(A). This Rule prohibits a judge from holding membership in an organization which practices discrimination (see also Comment [3] to Rule 3.1, which similarly provides that "a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination."). These rules list out the bases on which the organization may not discriminate, including sexual orientation. Unlike the other listed bases, sexual orientation is not a protected class under Montana law (see generally, Title 49, MCA) and the extension of such protection is a controversial public policy issue, as evidenced by legislative measures and voter initiatives addressing aspects of the issue here and around the country. Montana's most recent statement related to the issue was the adoption in 2004 of CI-96, a constitutional prohibition on same-sex marriage. For these reasons, I believe we should use the law as our guide, and not restrict a judge's constitutional right to be a member of an organization that may be perceived as practicing discrimination, but on a basis which is not prohibited by law. The anomaly here created is that a judge would be subject to sanction because of membership in an organization which is doing nothing illegal. Although the Code contains a religious exemption, some nonreligious organizations also restrict membership for legal reasons. If Montana law would change in this regard, that would present a different situation.

3. Rule 4.1(A)(5). I would delete this provision from the Code and allow judges or judicial candidates to attend events sponsored by a partisan political candidate. I believe such practices reflect the reality of Montana culture, particularly within our many small, rural communities. There, judicial candidates often buy tickets or appear at a local politician's event, and do so without endorsing the candidate. I recall attending a Republican dinner in a rural county which was also attended by a large contingent of local Democrats. Everyone was

grinning from ear to ear, because it was more about community than anything else. Further, events such as campaign visits by presidential candidates are often historical events which judges should be able to observe without fear of sanction.

/S/ JIM RICE

Justice John Warner joins in the concurrence and dissent of Justice Jim Rice.

I too thank the many that have worked very hard to draft long overdue updated Code of Judicial Conduct for Montana. It was truly a difficult task which was well performed. I understand that no written canons of judicial ethics can be perfect. I have every confidence that the Montana Judicial Standards Commission and this Court will interpret and apply the Code adopted today in a fair and reasonable manner, considering the myriad difficulties facing Montana's judicial officers, and to the benefit of the citizens of Montana. I join in Justice Rice's concurrence and dissent.

/S/ JOHN WARNER

2008 MONTANA CODE OF JUDICIAL CONDUCT

PREAMBLE

[1] An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at

all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

SCOPE

[1] The Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology paragraphs provide additional guidance in interpreting and applying the Code. An Application paragraph establishes when the various Rules apply to a judge or judicial candidate. The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek to change a judge's decision, to seek collateral remedies against each other, or to obtain tactical advantages in proceedings before a court.

[2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

[3] The comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term "must," it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

[4] Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

[5] The Rules of the Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.

[6] Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

TERMINOLOGY

The first time any term listed below is used in any given Rule in its defined sense, it is followed by an asterisk (*).

"Appropriate authority" means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. See Rule 2.16.

"Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. See Rules 3.7, 4.1, and 4.4.

"Courts of limited jurisdiction" means justice courts, justice courts of record, city courts, and municipal courts. Where the context allows and for simplicity, the justices of the peace and judges of such courts may be collectively referred to as judges. See Rules 2.9 and 2.10.

"De minimis," in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge's impartiality. See Rule 2.12.

"Domestic partner" means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.12, 3.13, and 3.14.

"Economic interest" means ownership of more than a de minimis legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge of the judge's spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) an interest in the issuer of government securities held by the judge.
See Rules 1.3, 2.12, and 3.2.

"Ex parte communication" is any oral communication to a judge concerning a pending or impending matter, outside the presence of all the parties to the proceeding or their attorneys or outside the confines of a duly noticed proceeding, or any written communication received by a judge that is not simultaneously provided to all parties or their attorneys. See Rules 2.9 and 2.10.

"Fiduciary" includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.12, 3.12, and 3.8.

"Impartial," "impartiality," and **"impartially"** mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Cannons 1, 2, and 4, and Rules 1.2, 2.2, 2.9, 2.11, 2.12, 2.14, 3.1, 3.12, 3.13, 4.1, and 4.2.

"Impending matter" is a matter that is imminent or expected to occur in the near future. See Rule 2.9.

"Impropriety" includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality. See Canon 1, and Rules 1.2 and 3.10.

"Independence" means a judge's freedom from influence or controls other than those established by law. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

"Independent candidate" means a candidate for a non-judicial public office who is not a member or representative of a political organization. See Rules 4.1 and 4.2.

"Integrity" means probity, fairness, honesty, uprightness, and soundness of character. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

"Judicial candidate" means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. See Rules 2.12, 4.1, 4.2, and 4.4.

"Knowingly," "knowledge," "known," and "knows" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 2.12, 2.16, 2.17, 3.2, 3.5, 3.6, and 4.1.

"Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. See Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 2.10, 3.1, 3.2, 3.4, 3.7, 3.9, 3.10, 3.12, 3.13, 3,14, 4.1, 4.2, and 4.4.

"Member of the judge's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.

"Member of a judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Rules 2.12 and 3.13.

"Nonpublic information" means information that is not available to the public. Nonpublic information includes any information regarding rulings or decisions the court is inclined to or intends to make, and any communications shared among judges during the decision-making process. It may also include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Rule 3.5.

"Partisan candidate" means a candidate for public office who seeks election as a member of or representing a political organization. See Rules 4.1 and 4.2.

"Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.11, and 4.1.

"Political organization" means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate's campaign committee created as authorized by Rule 4.4. See Rules 4.1, 4.2, and 4.3.

"Public election" includes primary and general elections, partisan elections, nonpartisan elections, and retention elections. See Rule 4.4.

"Third degree of relationship" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.12.

APPLICATION

The Application paragraph establishes when the various Rules apply to a judge or judicial candidate.

I. APPLICABILITY OF THIS CODE

(A) The provisions of this Code apply to justices of the supreme court, district court judges, the chief water judge, the workers compensation court judge, justices of the peace, municipal court judges, city court judges and judges of courts of limited jurisdiction created by the legislature, including judges pro tempore, as hereinafter set forth, and, where specifically indicated, to judicial candidates.

(B) The provisions of this Code do not apply to special masters, referees, administrative law judges, or persons appointed to perform quasi-judicial functions.

II. JUDGE PRO TEMPORE

(A) A judge pro tempore is a person who, pursuant to the law, is called to serve temporarily as a judge.

(B) While presiding over any stage of a pending case under temporary appointment, a judge pro tempore must comply with this Code except for Rules 3.4, 3.7, 3.9, and 3.11(B).

III. EFFECTIVE DATE – COMPLIANCE

(A) The provisions of this Code are effective on the date specified by the supreme court.

(B) A person to whom this Code becomes applicable shall comply immediately with its provisions, unless otherwise provided in this Code.

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

RULE 1.1
Compliance with the Law

A judge shall comply with the law,* including the Code of Judicial Conduct.

RULE 1.2
Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety* and the appearance of impropriety.

COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

RULE 1.3
Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests* of the judge or others, or allow others to do so.

COMMENT

[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office.

[4] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

CANON 2

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

RULE 2.1
Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law,* shall take precedence over all of a judge's personal and extrajudicial activities.

COMMENT

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.

RULE 2.2
Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

COMMENT

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] A judge should manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.

[5] A judge may make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.

RULE 2.3
Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

COMMENT

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include, but are not limited to, epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

RULE 2.4
External Influences on Judicial Conduct

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests of relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

COMMENT

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

RULE 2.5
Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. In accomplishing these critical goals in the increasing number of cases involving self-represented litigants, a judge may take appropriate steps to facilitate a self-represented litigant's ability to be heard.

RULE 2.6
Ensuring the Right to be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

COMMENT

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are: (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.12(A)(1).

RULE 2.7
Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.12 or other law.*

COMMENT

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

RULE 2.8
Decorum, Demeanor, and Communication with Jurors

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

[1] The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

[3] A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

RULE 2.9
Ex Parte Communications;* Investigations — Courts of Limited Jurisdiction

(A) Except as permitted in paragraph (C) of this Rule, a judge of a court of limited jurisdiction shall not investigate the substantive facts, circumstances, or merits of a pending* or impending* matter.

(B) Except as permitted in paragraph (D) of this Rule, a judge of a court of limited jurisdiction shall not initiate, permit, or consider ex parte communications.*

(C) When circumstances or the interests of justice require it or when expressly authorized by law,* a judge of a court of limited jurisdiction may examine the criminal record, driving record, and on-line court records repository pertaining to a defendant in a pending or impending matter which is on file within an agency of the state of Montana for the purpose of determining whether the charge is lawful or for purposes of setting bail or sentencing. A judge may not amend the charge except on motion of the prosecutor and as otherwise provided by law.

(D) When circumstances or the interests of justice require it or when expressly authorized by law, a judge of a court of limited jurisdiction may:

(1) engage in ex parte communications involving administrative, ministerial or scheduling matters provided:

(a) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication; and

(b) the judge notifies all other parties, if necessary to prevent any party from gaining a procedural or tactical advantage.

(2) consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, with other judges or with peace officers, prosecutors, and defense counsel provided:

(a) that the judge avoids receiving factual information that is not a part of the record or part of the defendant's criminal or driving record; and

(b) that the judge does not abrogate his or her responsibility to personally adjudicate the matter fairly and impartially.*

(3) receive ex parte communications in proceedings in open court if the prosecutor is not present, provided:

(a) that the prosecutor has not otherwise informed the judge in writing of his or her desire or willingness to appear; and

(b) that the judge shall not try a case to the court or to a jury without the presence of a prosecutor.

(4) verify whether a party has a valid driver's license and mandatory automobile insurance and whether a party is complying with any restitution requirement or conditions imposed in a sentence.

(5) receive ex parte communications in proceedings involving temporary orders of protection provided that the respondent has been given notice and an opportunity to appear to the extent required by law.

(6) Except as set forth in subparagraphs (1) through (5), if a judge receives an ex parte communication or other information having a potentially significant bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the content of the communication or information and provide the parties with an opportunity to respond. If such communication or information is in writing, a copy of it shall be made available to the parties and retained.

(E) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

COMMENT

[1] This Rule is tailored to accommodate the unique circumstances in which Montana's courts of limited jurisdiction operate. This rule acknowledges that these courts exist in both large metropolitan and isolated rural locations; that the judges of these courts may or may not have clerks or other staff; that prosecutors may or may not be able to be present at all proceedings of the court; that it is necessary for these judges to sometimes speak directly with a party, peace officer, administrative personnel, or insurance agent to verify or clarify administrative or ministerial facts; and that such courts must administer large case loads consisting primarily of misdemeanor criminal and traffic offenses and civil matters involving amounts limited by law.

[2] This Rule provides some flexibility to the judges of courts of limited jurisdiction in dealing with procedural, administrative, and ministerial matters, while retaining requirements that the judge may not independently investigate the substantive facts or merits of any pending or impending matter; that notice and opportunity to be heard be provided if the judge receives or obtains information which may have a significant bearing upon a pending or impending matter; and that the judge personally adjudicate the matter at issue impartially and fairly. While the judge may use discretion and common sense, those must be exercised in accordance with the law and keeping in mind constitutional rights of the parties. Nothing is this Rule abrogates the judge's obligation to comply with all applicable laws, court rules, or administrative regulations.

[3] The prohibition against a judge independently investigating the substantive facts or merits of any matter that is or may come before the court extends to information available in all mediums, including electronic.

[4] Judges are admonished that they are members of a distinct branch of government—the judiciary; that they are always to perform their duties as neutral and detached magistrates; and that they do not function as arms of local government, law enforcement, or as members of either the prosecution or defense "team." Judges do not and may not "represent" either party.

[5] This Code also controls the conduct of a judge if and when the judge functions as the court clerk or administrator.

RULE 2.10
Ex Parte Communications* — All Courts Except for Courts of Limited Jurisdiction*

(A) A judge shall not initiate, permit, or consider ex parte communications, except as follows:

> **(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:**
>
> > **(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and**
> >
> > **(b) the judge makes provision promptly to notify all other parties of the content of the ex parte communication, and gives the parties an opportunity to respond.**
>
> **(2) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge avoids receiving factual information that is not part of the record, does not abrogate the responsibility personally to decide the matter.**
>
> **(3) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so, or when serving on therapeutic or problem-solving courts, mental health courts, drug courts, or the water court. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.**

(B) If a judge receives an ex parte communication having a potentially significant bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the content of the communication and provide the parties with an opportunity to respond. If such communication is in writing, a copy of it shall be made available to the parties and retained.

(C) A judge shall not investigate matters independently.*

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

COMMENT

[1] Whenever notice to a party is required by this Rule, it is the party's lawyer, of if the party is unrepresented, the party to whom notice is to be given.

[2] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[3] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, drug courts, or the water court. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[4] A judge must avoid ex parte discussions of a case with judges who have previously been substituted or disqualified from hearing the matter, and with judges who have trial or appellate jurisdiction over the matter.

[5] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic. The prohibition does not apply to a judge's effort to obtain general information about a specialized area of knowledge that does not include the application of such information in a specific case. Nor does the prohibition apply to interstate or state-federal communications among judges on the general topic of case management decisions in mass torts or other complex cases, such as discovery schedules, standard interrogatories, shared discovery depositories, appointment of liaison counsel, committee membership, or common fund structures.

[6] Consultations with ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code are permitted.

[7] It is acknowledged that judges frequently receive unsolicited ex parte communications. Judges should apply their discretion and common sense when called upon to determine whether any such communication qualifies as one having a potentially significant bearing upon the substance of a matter, for purposes of paragraph (B).

RULE 2.11
Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court,

or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

COMMENT

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. Incases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter.

RULE 2.12
Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

> **(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.**
>
> **(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:**

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose in writing or on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court

personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification. even if the judge believes there is no basis for disqualification.

[6] "Economic interest," as set forth in the Terminology paragraph, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(a) an interest in the individual holdings within a mutual or common investment fund;

(b) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;

(c) A deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(d) an interest in the issuer of government securities held by the judge.

RULE 2.13
Supervisory Duties

(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

COMMENT

[1] A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control. A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads promptly.

RULE 2.14
Administrative Appointments

(A) In making administrative appointments, a judge:

(1) shall exercise the power of appointment impartially* and on the basis of merit; and

(2) shall avoid nepotism, favoritism, and unnecessary appointments.

(B) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

COMMENT

[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).

[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.

RULE 2.15
Disability and Impairment

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

COMMENT

[1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include, but is not limited to, speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as report the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.16.

RULE 2.16
Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.*

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

COMMENT

[1] Taking action to address known misconduct is a judge's obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority of other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include, but are not limited to, communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

RULE 2.17
Cooperation with Disciplinary Authorities

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

COMMENT

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public.

CANON 3

A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

RULE 3.1
Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law* or this Code. However, when engaging in extrajudicial activities, a judge shall not:

(A) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(B) participate in activities that will lead to frequent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality;*

(D) engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

COMMENT

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal, or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's

extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

RULE 3.2
Appearances before Governmental Bodies and Consultation with Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official except:

(A) in connection with matters concerning the law,* the legal system, or the administration of justice;

(B) in connection with matters about which the judge acquired knowledge* or expertise in the course of the judge's judicial duties; or

(C) when the judge is self-representing in a matter involving the judge's legal or economic interests,* or when the judge is acting in a fiduciary* capacity.

COMMENT

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.11, governing public comment on pending and impending matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

RULE 3.3
Testifying as a Character Witness

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

COMMENT

[1] A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

RULE 3.4
Appointments to Governmental Positions

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law,* the legal system, or the administration of justice.

COMMENT

[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

RULE 3.5
Use of Nonpublic Information

A judge shall not intentionally disclose or use nonpublic information* known* or acquired in a judicial capacity for any purpose in contravention of or unrelated to the judge's judicial duties.

COMMENT

[1] A judge is, by definition, uniquely privy to the inclination of the court to resolve a matter or issue pending before it in a particular manner. A judge shall not, under any circumstances, disclose such information to a third party in advance of the court's release of its decision. With

respect to the parties in the case, a judge shall not disclose such information to a party or counsel unless the court simultaneously shares such information openly with all parties to the proceeding.

[2] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.

[3] This rule is not intended, however, to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

RULE 3.6
Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows* or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

(C) A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule. This Rule does not apply to national or state military service.

COMMENT

[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is

an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

RULE 3.7
Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law,* the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;

(2) soliciting* contributions* for such an organization or entity, but only from members of the judge's family,* or from judges over whom the judge does not exercise supervisory or appellate authority;

(3) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with a non-fund-raising event of such an organization or entity;

(4) serving as an officer, director, trustee, or non-legal advisor of such an organization or entity, unless it is likely that the organization or entity:

(a) will be engaged in proceedings that would ordinarily come before the judge; or

(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(5) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;

(6) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only

if the organization or entity is concerned with the law, the legal system, or the administration of justice; and

(7) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting her or his title to be used in connection with a fund-raising event of an organization which concerns the law, the legal system, or the administration of justice.

(B) A judge may encourage lawyers to provide pro bono publico legal services.

COMMENT

[1] The activities permitted by paragraph (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations. The activities permitted by paragraph (A) do not include those sponsored by or on behalf of organizations which have as a primary purpose advocating in political processes for or against change in the laws related to limited subject areas. Activities relating to such political advocacy organizations are subject to the requirements of Rule 3.1, as well as Canon 4 and the Rules thereunder.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.

[3] Mere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of paragraph (A). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

[4] Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate this Rule if comparable designations are used for other persons.

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office.

[6] Subject to the requirements of Rule 3.1 and paragraph (A), a judge may provide leadership in improving equal access to the justice system; developing public education programs; engaging in outreach activities to promote the fair administration of justice; and convening and participating in advisory committees and community collaborations devoted to the improvement of the law, the legal system, the provision of legal services, and/or the administration of justice.

RULE 3.8
Appointments to Fiduciary Positions

(A) A judge shall not accept appointment to serve in a fiduciary* position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family,* and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(D) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than one year after becoming a judge.

COMMENT

[1] A judge should recognize that other restrictions imposed by this Code may conflict with a judge's obligation as a fiduciary; in such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary might require frequent disqualification of a judge under Rule 2.12 because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than de minimis. This Rule does not prohibit a judge from assuming guardianship of a minor child, as authorized by law.

RULE 3.9
Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.*

COMMENT

[1] A "judge's official duties" may include acting as a mediator in a case pending before another judge.

RULE 3.10
Practice of Law

(A) A judge authorized by law to engage in the practice of law* must scrupulously avoid conduct in the practice of law which may create a conflict with judicial duties or create the appearance of impropriety.* If a conflict arises between the judge's obligations as judge and the private practice of law, the judge shall resolve the conflict in such a way that accomplishes the fulfillment of judicial duties.

(B) A judge may self-represent and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,* but is prohibited from serving as the family member's lawyer in any forum.

COMMENT

[1] A judge may self-represent in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

RULE 3.11
Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and members of the judge's family.*

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

(1) a business closely held by the judge or members of the judge's family; or

(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the judge;

(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or

(4) result in violation of other provisions of this Code.

COMMENT

[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.12.

[2] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

RULE 3.12
Compensation for Extrajudicial Activities

A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law* unless such acceptance would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*

RULE 3.13
Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value

(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law* or would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*

(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following:

> **(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;**
>
> **(2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending* or impending* before the judge would in any event require disqualification of the judge under Rule 2.12;**
>
> **(3) ordinary social hospitality;**

(4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;

(5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;

(6) scholarships, fellowships, and similar benefits or awards:

(a) related to training in the law, the legal system or the administration of justice; or

(b) available to similarly situated persons who are not judges, based on the same terms and criteria;

(7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use;

(8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner,* or other family member of a judge residing in the judge's household,* but that incidentally benefit the judge.

(9) gifts incident to a public testimonial; and

(10) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:

(a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or

(b) an event associated with any of the judge's educational, religious, charitable, fraternal, or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge.

COMMENT

[1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Gift-giving between friends and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of friends or relatives in a case would require the judge's disqualification under Rule 2.12, there would be no opportunity for a gift to influence the judge's decision making.

[2] Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. A judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[3] Rule 3.13 applies only to acceptance of gifts or other things of value by a judge. Nonetheless, if a gift or other benefit is given to the judge's spouse, domestic partner, or member of the judge's family residing in the judge's household, it may be viewed as an attempt to evade Rule 3.13 and influence the judge indirectly. Where the gift or benefit is being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced. A judge should, however, remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits.

[4] Rule 3.13. does not apply to contributions to a judge's campaign for judicial office. Such contributions are governed by other Rules of this Code.

RULE 3.14
Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,* a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner,* or guest.

COMMENT

[1] Educational, civic, fraternal, and charitable organizations often sponsor meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of their duty to remain competent in the law. Participation in a variety of other extrajudicial activity is also permitted and encouraged by this Code.

[2] Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this Code.

[3] A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. The factors that a judge should consider when deciding whether to accept the reimbursement or a fee waiver for attendance at a particular activity include:

(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;

(b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;

(c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;

(d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;

(e) whether information concerning the activity and its funding sources is available upon inquiry;

(f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.12;

(g) whether differing viewpoints are presented; and

(h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

CANON 4

A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

RULE 4.1
Political and Campaign Activities of Judges and Judicial Candidates in General

(A) Except as permitted by law,* or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate* shall not:

(1) act as a leader in, or hold an office in, a political organization;*
(2) make speeches on behalf of a political organization, or any partisan* or independent* non-judicial office-holder or candidate for public office;
(3) publicly endorse or oppose a partisan or independent candidate for any non-judicial public office;
(4) solicit funds for, pay an assessment to, or make a contribution* to a political organization, or to or on behalf of any partisan or independent office-holder or candidate for public office;
(5) attend or purchase tickets for dinners or other events sponsored by a partisan or independent candidate for non-judicial public office;
(6) publicly identify himself or herself as a candidate of a political organization;
(7) seek, accept, or use endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate;
(8) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;
(9) use court staff, facilities, or other court resources in a campaign for judicial office;
(10) knowingly,* or with reckless disregard for the truth, make any false or misleading statement;
(11) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court; or
(12) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

COMMENT

General Considerations

[1] Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. This Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates, taking into account the various methods of selecting judges.

[2] When a person becomes a judicial candidate, this Canon becomes applicable to his or her conduct. If a judicial candidate who is not a judge violates this Canon and is elected, he or she may be referred to the Judicial Standards Commission for discipline on assuming office.

Participation in Political Activities

[3] Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. Judges and judicial candidates are prohibited by paragraph (A)(1) from assuming leadership roles in political organizations.

[4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing partisan candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3. These Rules do not prohibit candidates from campaigning on their own behalf, or from endorsing or opposing candidates for a judicial office, because judges are in the unique position to know and share with interested persons the qualifications of judicial candidates. See Rule 4.2(B)(2) and (3). However, note that while it is acceptable for candidates for judicial office to seek and accept endorsements from another judge, and have the supportive judge attend the candidate's dinners, judges are prohibited from soliciting or collecting money on their behalf.

[5] Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no "family exception" to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity.

[6] Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections.

Statements and Comments Made During a Campaign for Judicial Office

[7] Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their campaign committees. Paragraph (A)(10) obligates candidates and their committees to refrain from making statements that are false or misleading, or that omit facts necessary to make the communication considered as a whole not materially misleading.

[8] Judicial candidates are sometimes the subject of false, misleading, or unfair allegations made by opposing candidates, third parties, or the media. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate's integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(10), (A)(11), or (A)(12), the candidate may make a factually accurate public response. In addition, when an independent third party has made false attacks on a candidate's opponent, the candidate should disavow the attacks, and request the third party to cease and desist.

[9] Subject to paragraph (A)(11), a judicial candidate is permitted to respond directly to false, misleading, or unfair allegations made against him or her during a campaign, although it is preferable for someone else to respond if the allegations relate to a pending case.

[10] Paragraph (A)(11) prohibits judicial candidates from making comments that might impair the fairness of pending or impending judicial proceedings. This provision does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

Pledges, Promises, or Commitments Inconsistent With Impartial Performance of the Adjudicative Duties of Judicial Office.

[11] The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.

[12] Paragraph (A)(12) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.11(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

[13] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has

specifically undertaken to reach a particular result. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

[14] A judicial candidate may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action outside the courtroom, such as working toward an improved jury selection system, or advocating for more funds to improve the physical plant and amenities of the courthouse.

[15] Judicial candidates may receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues. Paragraph (A)(12) does not specifically address judicial responses to such inquiries. Depending upon the wording and format of such questionnaires, candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(12), therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification. See Rule 2.12.

RULE 4.2
Political and Campaign Activities of Judicial Candidates in Public Elections

(A) A judicial candidate* shall:

(1) act at all times in a manner consistent with the independence,* integrity,* and impartiality* of the judiciary;

(2) comply with all applicable election, election campaign, and election campaign fund-raising laws* and regulations of this jurisdiction;

(3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination; and

(4) take objectively reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1.

(B) A candidate for elective judicial office may, unless prohibited by law:

(1) establish a campaign committee pursuant to the provisions of Rule 4.4;

(2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;

(3) publicly support or oppose candidates for judicial office;

(4) attend or purchase tickets for dinners or other events sponsored by a political organization* or a candidate for judicial office;

(5) seek, accept, or use endorsements from any person or organization other than a partisan political organization or partisan* or independent* office-holder or candidate for non-judicial public office; and

(6) contribute to a candidate for judicial office, but not more than the amount prescribed by law.

COMMENT

[1] Paragraph (B) permits judicial candidates in public elections to engage in some political and campaign activities otherwise prohibited by Rule 4.1.

[2] Despite paragraph (B), judicial candidates for public election remain subject to many of the provisions of Rule 4.1. For example, a candidate continues to be prohibited from soliciting funds for a political organization, or any partisan or independent office-holder or candidate for public office, from knowingly making false or misleading statements during a campaign, or making certain promises, pledges, or commitments related to future adjudicative duties. See Rule 4.1(A), subparagraphs (4), (10), and (12).

[3] In judicial elections, paragraph (B)(5) prohibits a candidate from seeking, accepting, or using nominations or endorsements from a partisan political organization or a partisan or independent non-judicial office-holder or candidate for public office.

[4] Judicial candidates are permitted to attend or purchase tickets for dinners and other events sponsored by political organizations or judicial candidates, but not by partisan or other independent office-holders or candidates for public office.

[5] In endorsing or opposing another judicial candidate, the judge or judicial candidate doing so must abide by the same rules governing campaign conduct and speech as apply to the candidate's own campaign.

RULE 4.3
Activities of Candidates for Appointive Judicial Office

A candidate for appointment to judicial office may:

(A) communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar agency; and

(B) seek endorsements for the appointment from any person or organization other than a political organization.*

COMMENT

[1] When seeking support or endorsement, or when communicating directly with an appointing or confirming authority, a candidate for appointive judicial office must not make any pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. See Rule 4.1(A)(12).

RULE 4.4
Campaign Committees

(A) A judicial candidate* subject to public election* may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.*

(B) A judicial candidate who establishes a campaign committee shall direct his or her campaign committee:

(1) to solicit and accept only such campaign contributions* as are permitted by law;

(2) not to solicit or accept contributions for a candidate's campaign in an amount or in a manner that is prohibited by law; and

(3) to comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions, and to file all reports required by law with the official or agency prescribed by law.

COMMENT

[1] This Rule recognizes that judicial candidates may raise campaign funds in an amount and in a manner permitted by law to support their candidacies, and permits candidates, other than candidates for appointive judicial office, to solicit financial or in-kind campaign contributions personally or to establish campaign committees to solicit and accept such contributions.

[2] Campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns. Candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees.

[3] If a campaign committee is established, the candidate must instruct the campaign committee to solicit or accept contributions in conformity with applicable law.

700.200 NEW JUDGES

WELCOME!

You are now a judge in one or more of the courts of limited jurisdiction. As a member of the judiciary of the state of Montana, you are embarking on a new journey. The duties of a judge are varied, harried, and in come instances, complex. This portion of the *Deskbook* is meant to be a guide for you as you assume the bench.

You should have received a packet from the Supreme Court Administrator's Office listing duties you must perform, requirements that must be met, and a list of resource material that you will need in your judicial position. You will be required to attend formal training sessions twice a year. You also will be required to take a certification test within 6 months after assuming office.

The list of resources includes a set of *Montana Codes Annotated* or the statutes of Montana laws. These laws are referred to as the "MCA". This set of books is a must. You will need to refer to this set of books on a daily basis. This set of books contains the rules of civil procedures, rules of court, rules of evidence, and each law enacted and current in the state of Montana.

First and foremost, you must become familiar with a new language and a different way of dealing with people. There is glossary of terms at the end of the *Benchbook* that will assist you. It is important that you become familiar with the precise meanings of the words and phrases that you will encounter in the court. You have now become an "expert" in the law, at least that is what the public expects from you. Do not panic. . . . in time you will become familiar with the procedures and duties that are expected of you.

The public, for the most part, does not understand the law or the court system and yet they have an expectation that anyone who assumes the bench has a level of understanding and knowledge that surpasses their own. You will be expected to solve all of their problems with the wisdom of Solomon, and that's only the first day! Seriously, you have embraced a position that requires that you have a general working knowledge of the law. The people who appear before you expect that you will protect their constitutional rights and that justice will be done in each of their cases. Of course, you cannot satisfy everyone who may appear before you, but you must give each person the opportunity to be heard fairly and completely. This is of primary importance for the image of justice. The statutes, the *Deskbook,* the *Benchbook,* other written sources, and your fellow judges will assist you in performing this obligation

As a new judge, it most helpful if you can observe an established court several times before you take the bench. Any judge near you will be happy to have you visit their courtroom and will be pleased to answer your questions. The Montana Magistrates Association, which is made up of judges of courts of limited jurisdiction, has a training and education committee that

will come in to help you get started and assist you with your new duties. This committee or any fellow judge will offer the assistance you need, including coming to your court to critique your procedures and offer helpful advice or solutions.

The information you need, in and out of the courtroom, will be found in the *Deskbook*, including current statutes and some comments. The statutes or rules cited must be followed and the comments are merely to help your understanding of the statutes. The *Benchbook* contains many sample forms and scripts that will "walk" you through most court appearances. As we discuss each point here, it will be helpful to refer to one of these two reference materials for guidance. This section is a general overview of your duties and the procedures that need to be followed.

The court system in Montana is divided into three parts; the Montana Supreme Court which is a court of appeals, several "District" courts of general or unlimited jurisdiction, and city, justice, or municipal courts named courts of limited jurisdiction. Each level of court is granted certain powers or "jurisdiction" to act or hear distinctive types of cases. Your court will hear a variety of misdemeanor cases ranging from seatbelt violations to partner assault to cases for the recovery of specific damages or the return of property. **Be sure you have jurisdiction, in each case, before you act or sign any process.** Jurisdiction is explained, in detail, in the *Deskbook,* in Section 200, and in the statutes.

Your courtroom should have a raised bench and an American flag. These are minimum standards for a courtroom. Please refer to Section 100.200 in the *Deskbook* for assistance in this area. One other important asset is a judicial robe. The robe is another symbol of authority and respect and will help you set the stage for the important functions you will be performing.

Your court is basically divided into two general parts; criminal and civil. The criminal caseload includes cases filed by the city or county attorney and several law enforcement agencies. (If you are a city judge, you will normally deal only with the police department of your town or city and the prosecutor). These criminal cases are generally brought in the name of the "State of Montana" (or plaintiff) against a person (now a defendant) for the violation of some state statute or city ordinance.

The civil caseload differs in that the cases are brought person against person for an action to recover money,, property, or damages. The person filing the complaint is the "plaintiff" and the person against whom recovery is sought is the "defendant", i.e., John Jones, Plaintiff vs. Pete Brown, Defendant.

The sequence of receiving cases, whether civil or criminal is basically the same. The first order of business is the filing of a complaint. The complaint is the document that alleges a violation of the law or the document that asks for the recovery of a specific thing, i.e., money, property, or damages.

When the complaint is filed in your court, you must enter the heading of the case into an index. The index must be listed alphabetically by surname with a corresponding unique "docket number" assigned to it. In a criminal case you need only list the defendant in the index, but in a civil case you need to alphabetize both the plaintiff and the defendant. Your predecessor will

have had some procedure in place which you may modify, as long as your modification conforms to the statute that addresses dockets (See *Deskbook* ─ Section 500).

After the complaint is filed, you will need to issue some process, usually a "summons" to notify the defendant that their presence is required in court to answer the complaint. The summons form, either criminal or civil, will advise the defendant of the time and place to appear and will generally notify the defendant of the consequences of failing to appear. With each step, you will be required to "docket" or record each event. For example, in a civil case, after the complaint and summons are issued (signed by the judge or clerk), the docket will read "2-11-2010, Plaintiff John Smith filed a debt action against the Defendant Jim Brown for recovery of a loan in the amount of $500. The filing fee ($25 plus $10 court surcharge) was paid and summons was issued." You would also note if the Plaintiff filed the complaint by an attorney and would list the attorney's name. Most courts have docket books already in place and generally filing a new case is a matter of filling in the blanks.

As mentioned above, a civil case requires a filing fee. You are responsible for each amount of money paid into the court from the time of receiving it until it properly disbursed. There is both a city and a county bookkeeping manual available that will instruct you on how to handle funds. (These manuals are enumerated as resources from the list provided by the Court Administrator's Office.) The judge is responsible for all funds paid into the court and stringent accounting methods are a must. There is no filing fee required in a criminal case.

As you begin to file cases and request appearances of people into your court, you need to set up a "court calendar" that will assist you in keeping track of when a specific case is set. In some courts, specific days or hours are set aside for certain events, i.e., all Wednesdays are for civil cases and bench trials will be set on Mondays. You must set up a schedule that is convenient to you, your staff, and the number of hours or days you are open each week or month.

After the case is filed and the initial docket entries are made, you are ready to "hear" the defendant in court. The first time you sit behind the bench is both exhilarating and frightening. The responsibility may seem overwhelming but remember that the person in front of you is as much in awe as you may be. Relax but be prepared. It is generally helpful to make sure you have all the papers, filings, code books, or whatever else you may need in the courtroom, before you take the bench.

Typically, if the appearance is for an "NTA" (Notice to Appear) or better known as a ticket, you will need the court copy of the ticket, the law book that cites the violation listed on the face of the ticket (Title 61, generally), an appearance sheet, waiver forms for speedy trial or attorney time-pay cards, and the uniform bail schedule. You might also want to have a script for an initial appearance or arraignment handy. (The *Benchbook* contains scripts and forms for you to use while you are in court). On occasion, the issuing officer or the prosecutor will be present during an initial appearance or arraignment. Their appearance is not required at this stage of the proceedings, however, you should discuss this issue with the prosecutor and set up a procedure acceptable to both of you.

When the defendant appears, it is acceptable to be courteous and friendly. This is not the time for "Hi ya, Joe,", but it is certainly not necessary to wear the "executioner's" mask. Remember you now represent the law, the judiciary, and your city or county, but you are still a member of the community. Your attitude about yourself, the bench, and the people you are serving is significant. Presiding as a judge is an important function that demands respect, but you should perform your duties without degrading others or treating anyone as a second class citizen. Respect is earned, after all and these same citizens will help elect or unelect you.

Ask the defendant to stand during the initial appearance or arraignment. After bail is set or a plea is entered and sentencing is pronounced, you may ask the defendant to be seated. If there is a lot of paperwork left to be done, there is no harm in letting the defendant sit during this time. Of course, there is no requirement for the defendant to stand while in court , but the practice is respectful and widely accepted. If there is a physical (or emotional) reason that the defendant cannot stand, by all means allow the defendant to be seated.

One step that is necessary in either an initial appearance or arraignment is the verification of the defendant's name, address, date of birth, social security number, and telephone number. The information will be extremely helpful later in the process for purposes of notification to the defendant, record keeping, and if a warrant or show cause order must be issued. You have an obligation to verify that the person standing before you is the person charged or filed against. The *Benchbook* contains a sample form of an "appearance sheet" and you need only fill in the blanks or make check marks. The information recorded can then later be transferred to the docket.

Be sure you clearly explain to the defendant all that you expect to be accomplished from this point forward, whether it be conditions of bail, conditions of suspended sentence, or time-pay schedules. If you do not notify the defendant in open court of your expectations, you cannot, in fairness, discipline the defendant later for non-compliance with a court order. It is extremely important that the defendant understands you and any terms you may impose and is a "due process" expectation in the constitution.

After the court appearance, be sure that you document (docket) all the proceedings. The docket does not need to include a word for word report, rather a synopsis of the events that occurred. An example of a traffic citation appearance for a stop sign violation would be as follows:

"02-12-2010. Defendant appeared, was duly arraigned and pleaded guilty. Plea was accepted as given voluntarily and with knowledge. A finding of guilty was made and the court sentenced the defendant to: Fined $50 and assessed $35 in surcharges." or

"02-12-2010. Defendant appeared, was duly arraigned and pleaded not guilty. Defendant waived a jury trial and a bench trial is set for 03-12-2010 with omnibus set for 02-24-2010 at 9:30 a.m. Defendant signed a waiver of attorney form. Bail was set as Own Recognizance (OR) and (with or without conditions)."

Most courts are now using pre-written docket stamps or checklists attached to the citation that allow for checking boxes or making other choices. This helps keep the paperwork to a minimum.

As you proceed through with a case, either civil or criminal, there is a general flow of events to the final disposition. In a criminal case this disposition is the verdict, a finding of guilty and sentencing or the finding of not guilty and release of the defendant. In a civil case the final disposition is the entry of judgment. The case does not end there, but it is referred to as a final disposition.

After sentencing, the court will have to "follow-up" a case through the collection of fines and fees, completion of counseling, completion of community service, or other court requirements. In a civil case, the follow-up is to the "execution" stage or the collection of the judgment. In either case, the follow-up can be complicated and time consuming but it is a necessity.

The court cannot issue judgments or pronounce sentences and then promptly forget them. It is important that the court track the payments of fines and judgments and the completion of other conditions. Otherwise, we may as well close the doors of justice and go home. Most defendants will make an honest effort to comply with court orders, but there are those that continue to be irresponsible and avoid compliance with the court. A small percentage of people cause about 90% of the cases in non-compliance with the court system.

If, in the example cited above, the defendant pleads not guilty, another route for the case is followed. Ultimately you will end up at a final disposition. If the defendant pleads not guilty, you must determine whether the defendant wants a jury or a bench trial. The differences are that in a jury trial six citizens will determine the innocence or guilt of the defendant. This trial is more formal than a bench trial where the judge will hear the evidence and make the decision regarding the innocence or guilt of the defendant. The procedures and forms will be found in the *Deskbook* or the *Benchbook* for each of these situations. There are several steps that must be followed before the day of trial and you will want to review the procedure before you go further.

When the day of trial arrives you will be required to orchestrate the proceedings. Whether a jury or bench trial, as the judge, **you are in charge.** You should review the procedures before the trial date and become as familiar with them as possible. Since you will have some time between the initial entry of plea and the trial, you should visit another court and observe a trial in progress. This visit will be beneficial to you and will allow you time to discuss the questions that you have before you will be asked to make some of the same decisions.

You must keep control of the courtroom, the parties, the witnesses, and the presentation of evidence. This may sound overwhelming, but many procedures are already in place and you have several resource materials available for you to review. You should review the sections on contempt and be familiar with your duties. Finding a person in contempt is not to be done lightly, however, this is a tool given to you as an inherent power of the court. Do not be afraid to use it, but use it with discretion.

There are other administrative functions that you will be asked to perform including the issuance of search warrants, restraining orders, and marriages. You must review the search warrants and petitions for restraining orders presented to you. The procedure for search warrants is listed in Section 300.503 of the *Deskbook.* Section 300.504 discusses restraining orders.

The *Benchbook* contains forms necessary to accomplish these functions. Both of these procedures require a deliberate finding by the judge and are not to be issued without your full attention to the requirements of the law.

Both of these procedures are extraordinary and must be accomplished with a great deal of thought. In both cases you are interfering with someone's right to privacy and other constitutional rights. As the judge, you must make a decision independent of the wishes of law enforcement or the party appearing before you. This duty is extremely important and must be done with a great deal of care.

Performing weddings is a personal choice, not a requirement. Weddings can be fun and they are a service to the community, but the choice is yours whether or not you want to become involved. If you perform weddings at the courthouse, during regular court hours, you should probably not charge the parties for the service.

This is obviously a very brief overview of your duties. Actual experience is the best teacher and you will imprint your own personality on everything you do. This is acceptable, as long as you remain within the statutory guidelines. Remember always that everything you do, on or off the bench, is of public interest and subject to scrutiny. As a judge, you have one of the most important functions in society to perform. This duty is not to be taken lightly and is not the platform for you to cure all the ills of the world. Take each case as it comes with an open mind and a goal to obtain justice.

You are the judge. You are not the prosecutor, the police, a social worker, or your brother's keeper. You should not become a socialite, dictator, or king of the castle. A blending of humility, concern, and justice should mold your attitudes and actions. You should always think and act in such a way that you would be comfortable appearing before yourself. When all else fails, tune into the higher authority for guidance. Good Luck !!