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 court judges.

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

Revised July 2003, by John H. Duehr, Troy City Judge

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 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 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 not promulgated and recorded, as mentioned in 1-1-104, but which 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 men.
>
> 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 the constitution 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 to be 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 railed 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 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 powers 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 <u>Judge's Conduct off the Bench</u>. 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 relationship 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 most 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 act **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 the 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 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.

> MCA 3-1-101. 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.
>
> MCA 3-1-201 What courts have seals. Each of the following courts shall have seals:
> (1) the supreme court;
> (2) the district courts;
> (3) the municipal courts.
>
> MCA 3-6-101. 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 his 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 his term of office. The ordinance must be consistent with the provisions of this chapter.

MCA 3-10-101. Number and location of justices' courts – authorization to combine with city court – justice's court established as a 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) (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 established as a court of record and, in addition to the provisions of this chapter, is also subject to the provisions of [sections 8 through 10]. 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.

MCA 3-11-101. 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 non-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.

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

DISQUALIFICATION OF JUDGES

This section shall, it 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 judge 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 fourth 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.

MCA 3-1-805. Disqualification for cause.

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, such judge shall proceed no further in the cause. If the affidavit is filed against a district judge, the matter shall be referred to the Montana Supreme Court, whereupon 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 court, 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 (30) 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 made by the challenged judge and from which an appeal could have been taken.

(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.

MCA 3-1-1109. 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 him 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.

MCA 3-6-103. 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. MCA 40-4-123 gives concurrent jurisdiction to district courts, municipal courts, city courts, and justices' 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 sections were updated in 1995 and Section 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 MCA 40-1-301.

200.201 Term of Office.

MCA 3-6-201. Number of judges – election – term of office. (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 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 his 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.

200.202 Qualifications/Bonds/Restrictions.

MCA 3-6-202. 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 requirement 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 hold 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 requirement 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 in 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.

MCA 2-9-802. 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.

MCA 3-1-604. Restrictions on municipal court judges. No municipal court judge may practice law before his own municipal court or hold office in a political party during his term of office.

200.203 Election.

MCA 3-6-201. Number of judges – election – term of office. (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 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 his 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.

200.204 Official bond.

MCA 7-4-4109. Official bond. Each officer of a city or town who is required to give bond shall file the same, duly approved, within 10 days after receiving notice of his election or appointment or, if no notice be received, then on or before the date fixed for the assumption by him of the duties of the office to which he may have been elected or appointed.

200.205 Training/Certification.

MCA 3-11-204. 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 magistrate's convention. Actual and necessary travel expenses, as defined and provided in 2-18-501 through 2-18-503, and the cost of registration and books and other materials shall 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 cost imposed by this subsection are the joint responsibility of the county and the municipality, with the cost to be allocated and charged in proportion to the work done for each governmental entity. In all other cases, the costs shall be paid the city or town in which he holds or will hold court and shall be charged against that city or town.

(2) Each city judge shall attend the training sessions. Failure to attend disqualifies him 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.

MCA 3-1-1502. Training and certification of judges. Except as provided in 3-1-1503, no judge selected for a term of office may assume the functions of his office unless he has filed with the county clerk and recorder in his jurisdiction a certificate of completion of a course of education and training prescribed by the commission.

MCA 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 his 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.

MCA 3-1-1508. 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. As used in Title 3, chapter 1, part 15, the term, "judge" means 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.

MCA 3-6-203. 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 his official duties.

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

MCA 3-1-1506. 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.

200.207 Court Facilities and Sessions.

MCA 3-6-105. 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.

MCA 3-6-106. Sessions of the court. The municipal court shall 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 he, in his discretion, sees fit.

MCA 3-1-301. 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.

MCA 3-1-302. 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.

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

MCA 3-1-313. 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.

MCA 3-6-204. 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 justice of the peace for a justice's court established as a court of record provided for in 3-10-101; another municipal court judge; a retired municipal court judge or an attorney of the county in which the court is located 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.

MCA 7-4-4111. 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.

MCA 7-4-4113. 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.

MCA 3-11-204. Training sessions for judges. . . (2) Each city judge shall attend the training sessions. Failure to attend disqualifies him 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.

MCA 3-1-1507. 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. 10, 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.

MCA 2-16-502. 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

MCA 3-10-301. Civil Jurisdiction. (1) Except as provided in 3-11-103 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 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.

MCA 3-10-302. 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.

MCA 3-10-303. 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 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.

MCA 16-6-201. Jurisdiction of courts. As to misdemeanor actions, the district courts of this state shall have concurrent jurisdiction with justice of the peace courts in all prosecutions under this code.

200.301 Term of Office.

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

200.302 Qualifications/Bonds.

MCA 7-4-2201. 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.

MCA 3-10-204. Residence requirements. (1) Every justice of the peace must reside in the county in which his court is held.

(2) No person is eligible to the office of justice of the peace unless he shall have been a citizen of the United States and a resident of the county in which he is to serve for 1 year next preceding his election or appointment.

MCA 3-10-202. Oath – proof of certification. (1) Each justice of the peace, elected or appointed, after he has received his certificate of election or appointment, shall, before entering upon the duties of his 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 must satisfy the clerk that he is certified as provided in 3-1-1502 or 3-1-1503.

MCA 2-9-701. County officers and employees to be bonded. . . . (1) All elected and appointed county officers and employees shall be bonded.

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

200.303 Election/Appointment.

MCA 3-10-201. Election. (1) Each justice of the peace must be elected by the qualified electors of the county at the general state election next preceding the expiration of the term of office of his predecessor.

(2) A justice of the peace shall be nominated and elected on the nonpartisan judicial ballot in the same manner as are judges of the district court.

(3) Each judicial office shall be a separate and independent office for election purposes, and each office shall be numbered by the county commissioners, and each candidate for justice of the peace shall specify the number of the office for which he 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, shall also apply to justices of the peace.

MCA 3-10-06. 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.

200.304 Oath of Office.

MCA 3-10-302. Oath – proof of certification. (1) Each justice of the peace, elected or appointed, after he has received his certificate of election or appointment, shall, before entering upon the duties of his 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 must satisfy the clerk that he is certified as provided in 3-1-1502 or 3-1-1503.

200.305 Training/Certification.

MCA 3-10-203. 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 . . . .
(2) There shall be two mandatory annual 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. . . .
(3) Except as provided in subsection (4), 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.
(4) A justice of the peace for a justice's court established as a court of record , provided for in 3-10-101, must meet the requirements set for in 3-10-117.

MCA 3-10-117. Minimum Judicial Education Requirements – justice of the peace for justice's court established as a court of record. (1) The commission on courts of limited jurisdiction shall issue a certificate, as required by 3-1-1502, prior to the justice of the peace for a justice's court established as a court of record 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.
(2) A justice of the peace for a justice's court established as a court of record, provided for in 3-10-101, 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.
(3) Completion of a course approved for continuing judicial or legal education hours applies to the judicial education requirements under subsection (2).
(4) A justice of the peace for a justice's court established as a court of record is entitled to reimbursement by the county in which the justice of the peace holds or

will hold court for all actual and necessary expenses and costs incurred in attending a continuing judicial or legal education course.
(5) On or before December 31 of each year, a justice of the peace for a justice's court established as a court of record 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 justice of the peace for a justice's court established as a court of record or declare a vacancy in the office of the justice of the peace for failure to meet the training requirements established in this section.

MCA 3-1-1502. Training and certification of judges. Except as provided in 3-1-1503, no judge selected for a term of office may assume the functions of his office unless he has filed with the county clerk and recorder in his jurisdiction a certificate of completion of a course of education and training prescribed by the commission.

MCA 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 his 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.

MCA 3-1-1508. 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: As used in 3-1-15, MCA, the term "judge" means a municipal court judge, a justice of the peace, or a city judge. "Commission" means the Commission of Courts on Limited Jurisdiction established by the Supreme Court. The 2003 Legislature in House Bill 358, Chapter 389 of the Session Laws, 2003, established rules on training and certification for justices of the peace in justice's courts of record. On June 10, 2003 the Montana Supreme Court entered an order effective on

July 1, 2003 making attendance at the two annual training sessions provided for in Section 3-10-203 mandatory for all municipal court judges and justices of the peace for justice's courts established as courts of record.

200.306 Salary and Expenses.

MCA 3-10-207. 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(1).
(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 for a justice of the peace for a justice's court established as a court of record may not exceed 90% of the salary of a district court judge as provided in 3-5-211.
MCA 3-1-1506. 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.

MCA 3-10-203. 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 and 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 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) Subject to subsection (4) there must be two mandatory annual 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 and 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 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) Except as provided in subsection (4), 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.
(4) A justice of the peace for a justice's court established as a court of record, provided for in 3-10-101, must meet the requirements provided for in 3-10-117.

200.307 Court Facilities and Sessions.

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.

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

MCA 3-1-301. 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.

MCA 3-1-302. 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.

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

MCA 3-1-313. 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.

MCA 3-1-314. 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.

MCA 3-10-208. 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.

MCA 3-10-231. 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 shall 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 or city judge 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 3-10-302.

(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 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.

MCA 7-4-2208. Absence of county officers from state. (1) Except as provided in subsection (2), a county officer must in no case absent himself from the state for a period of more than 60 days and for no period longer than 15 days without the consent of the board of county commissioners, and if he does so absent himself, he forfeits his office.
(2) The sheriff, undersheriff, or deputy sheriffs of any county may absent themselves from the state, with the permission of the board, for a period of more than 60 days for the sole purpose of attending a recognized and accredited law enforcement training school without effecting forfeiture of their offices.

200.310 Vacancy/Removal/Resignation.

MCA 2-16-501. 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) the incumbent's removal 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) 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 or when absent from the state by permission of the legislature;
(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.

MCA 3-10-203. Orientation Course – annual training. . . .
(3) Each justice of the peace shall attend the training sessions provided for in subsection (2). Failure to attend disqualifies him 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.

MCA 3-1-1507. 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 200.309).

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 nor 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.

MCA 3-1-602. Restrictions on justices of the peace 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 his official duties in the conduct of cases and proceedings in his 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 such a justice, his law partner or associate, or a member, associate, or employee of a firm of which he is a member may not represent a party involved in a case which is filed or tried in his court or in any justice's court located in the same county as his court or which is appealed from such a court.
(3) A justice of the peace who violates any of the provisions of this section is guilty of malfeasance in office and shall be removed from his office of justice of the peace and thereafter be disqualified from holding such office.

MCA 3-1-606. 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 of any judgment or part thereof on his docket or on any docket in his possession . . . .
(2) Violation of subsection (1) is a misdemeanor.

MCA 7-4-2520. 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 same, the board of county commissioners must declare his office vacant and appoint his successor.

MCA 3-10-602. Penalty. Any justice of the peace violating 3-10-601 shall be deemed guilty of a misdemeanor, punishable by a fine not exceeding $1,000 or imprisonment not exceeding 6 months in the county jail, or both. He shall also be deemed guilty of malfeasance in office and, in the discretion of the court, may be removed from office, in which latter case he shall thereafter be disqualified from holding such office.

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

MCA 2-16-502. 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

MCA 3-11-102. 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.

MCA 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 any way interested;

(c) damages when the city or town is a party or is any way interested;

(d) the enforcement of forfeited recognizance 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.

Comment. Section 40-1-301 grants the authority to solemnize marriages to the city court judge.

MCA 3-11-104. 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.

MCA 40-4-123. 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 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.

200.401 Term of Office.

MCA 3-11-201. 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.

MCA 7-4-4104. 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.

MCA 3-11-202. Salary – qualifications. (1) A city judge, at the time of election or appointment, shall:
(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 his actual and necessary travel expenses, as defined and provided in 2-18-501 through 2-18-503, incurred in the performance of his official duties.

200.403 Election/Appointment.

In a city of first class, MCA 7-4-4101 provides that one city judge shall be elected. In a city of second class, MCA 7-4-4102 provides that one city judge shall be elected. MCA 7-4-4102 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. 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 or a city of another city to act as city judge as provided in 3-11-205. 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.

200.404 Official bond.

MCA 7-4-4109. Official bond. Each officer of a city or town who is required to give a bond shall file the same, duly approved, within 10 days after receiving notice of his election or appointment or, if no notice be received, then on or before the date fixed for the assumption by him of the duties of the office to which he may have been elected or appointed.

200.405 Training and Certification.

MCA 3-11-204. 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. . . .

MCA 3-1-1502. Training and certification of judges. Except as provided in 3-1-1503, no judge selected for a term of office may assume the functions of his office unless he has filed with the county clerk and recorder in his jurisdiction a certificate of completion of a course of education and training prescribed by the commission.

MCA 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 his 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.

MCA 3-1-1508. 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. As used in Title 3, Chapter 1, Part 15, the term "judge" means 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.

MCA 7-4-4201. 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.

MCA 3-11-202. Salary – qualifications. (1) A city judge at the time of election or appointment shall:
(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 his actual and necessary travel expenses, as defined and provided in 2-18-501 through 2-18-503, incurred in the performance of his official duties.

MCA 3-11-205. Justice of the peace or judge of another city as city judge. . . . If the justice of the peace or city judge of another city or town must travel from his place of residence to hold court, he shall be paid his actual and necessary travel expenses, as defined and provided in 2-18-501 through 2-18-503, by the town or city in which the court is held. . . .

MCA 3-11-204. Training sessions for judges. (1). . . . Actual and necessary travel expenses, as defined and provided in 2-18-501 through 2-18-503, and the costs of registration and books and other materials shall 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 government entity. In all other cases, the costs shall be paid by the city or town in which he holds or will hold court and shall be charged against that city or town.

MCA 3-1-1506. 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.

200.407 Court Facilities/Sessions.

MCA 3-11-206. 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 3-1-114 and 3-1-115, in lieu of or in addition to paper records.

MCA 3-1-301. 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.

MCA 3-1-302. 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.

MCA 3-11-101. 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.

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

MCA 3-1-313. 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.

MCA 3-1-314. 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.

MCA 3-11-203. 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 his stead when a disqualifying affidavit is filed against him pursuant to the supreme court's rule 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.

MCA 7-4-4111. 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 his 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 his 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.

MCA 7-4-4113. 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.

MCA 3-11-204. Training sessions for judges. . . . (2) each city judge shall attend the training sessions. Failure to attend disqualifies him 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.

MCA 3-1-1507. 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 200.409.

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 nor 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.

MCA 2-16-502. 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; . . . .

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.

MCA 45-1-201. 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.

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

(b) A prosecution for a felony offense under 45-5-502, 45-5-503, or 45-5-507(4) 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) A prosecution under 45-5-504, 45-5-505, 45-5-507(1), (2), (3), or (5), 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.

MCA 45-1-206. 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.

MCA 45-1-205 and 45-1-206 refer to time limitations on the filing of actions. These limitations are referred to as "Statutes of Limitations." 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 because there are many periods of time excluded from the statute. These are found in MCA 45-1-206 and cited above.

Criminal Jurisdiction.

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

MCA 3-10-303. 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 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 1983 Legislature increased jurisdiction by increasing the monetary amount of all misdemeanor damages or "losses in excess of" from $150 to $300; 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.

MCA 41-5-203, which sets forth youth court jurisdiction, grants courts of limited jurisdiction authority to handle juvenile offenses in five areas: traffic; fish and game; alcoholic beverage violations; gambling; and tobacco products.

Section MCA 41-5-332 gives courts of limited jurisdiction the authority 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 MCA 41-5-334 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:

> MCA 61-8-723. 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 done 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.

MCA 46-3-111. 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. . . .

MCA 46-11-101. 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.

MCA 46-11-110. 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.

MCA 46-11-111. 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.

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 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 or complaint 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.

> MCA 46-6-201. 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.
>
> MCA 46-11-401. 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, on motion of the defendant, may strike surplusage from an indictment or information.
> (6) A charge 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:

> MCA 7-4-2403. Official mention of principal officer includes deputies. Whenever the official name of any principal officer is used in any law conferring power of imposing duties or liabilities, it includes his 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. MCA 46-11-101, 46-11-102, 46-11-110, and 46-11-111 set out the requirements for filing a complaint.

> MCA 46-6-201. Issuance of arrest warrant upon complaint. If it appears from the contents of the complaint and the examination of the complainant and from 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.

MCA 46-11-404. 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.

MCA 46-6-105. 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 46-6-311 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.*

MCA 46-6-201. 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 . . . . More than one warrant or summons may issue on the same complaint.

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

MCA 46-6-214. 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.

MCA 46-6-215. 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.

MCA 46-6-204. 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 MCA 46-6-216(2), arrest may follow.

Arrest without Warrant.

MCA 46-6-210. 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.

MCA 61-8-703. 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.

MCA 46-6-502. 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 agency 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 on the initial appearance of 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.

MCA 46-7-101. 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.

MCA 46-6-213. 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.

MCA 46-6-201. Issuance of arrest warrant upon complaint. . . . 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 compliant.

MCA 46-6-212. 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 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.

MCA 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. It must be sworn to in order to meet the requirements of a complaint, otherwise no other process, such as a warrant or order to show cause may be issued against the defendant. 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. (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.

MCA 46-7-102. 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.

MCA 46-8-101. 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 counsel, is unable to employ counsel, and is entitled to have counsel assigned, the court shall assign counsel to the defendant without unnecessary delay.
(3) The defendant, if unable to employ counsel, is entitled to have counsel assigned if:

(a) the offense charged is a felony;
(b) the offense charged is a misdemeanor and the court desires to retain imprisonment as a sentencing option; or
(c) the interests of justice would be served by assignment.

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 docketed and explained to the defendant. *Argersinger vs. Hamlin 93 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.

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

MCA 46-8-111. Eligibility for court-appointed counsel – determination of indigence. (1) The court shall make a determination of indigence.
(2) In applying for court-appointed counsel, a defendant shall submit a sworn financial statement demonstrating financial inability to obtain legal representation without substantial hardship in providing for personal or family necessities. The statement is not admissible in a civil or criminal action except when offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false swearing.

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.

MCA 46-9-102. 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) . . . .

MCA 46-9-201. 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 in 46-9-206.

MCA 46-9-111. 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 apprised 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, MCA, 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 MCA 46-9-505)

MCA 46-9-301. 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.

MCA 46-9-302. 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 officer's permission accept an unexpired driver's license in lieu of bail for a violation of any offense in Title 61, chapters 3-10, 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 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 after; (a) 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, a $25 administrative fee has been paid to the court.

MCA 46-9-311. 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.

MCA 46-9-108. Conditions upon defendant's release – notice to victim of stalker's release. (1) The court may impose 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 an alleged victim of the crime and 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 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 lease 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 court 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.

MCA 46-9-505. 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 written 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 46-23-1003 and that is designated by a district court, justice's court, municipal court, or city court to provide services pending a trial.

MCA 46-9-115. 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.

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.

MCA 46-9-401. 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. 46-9-403, MCA.

MCA 46-9-414. 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.

(2) A guaranteed arrest bond certificate is subject to the same forfeiture and enforcement provisions established by this chapter unless otherwise provided by law.

MCA 44-1-1103. 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.

MCA 46-9-502. 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. If the bail is a written undertaking or a commercial surety bond, it shall be discharged and the sureties exonerated.

MCA 46-9-512. 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 MCA 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.

MCA 46-10-105. 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.

MCA 46-10-106. 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 exam 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)

MCA 46-10-202. 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.

(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 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.

MCA 46-12-102. 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.

MCA 46-12-201. 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. 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 observed and heard in the courtroom by all present, 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, 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, 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 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 who is not physically present in the courtroom.

MCA 46-12-210. 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, one will be appointed 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 acknowledgement of the information contained in subsection (1).

MCA 46-12-203. 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.

MCA 46-12-213. 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.

MCA 46-12-204. 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 refuses 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.

MCA 46-17-203. 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 justices' 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 appoint counsel, 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 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***.

> MCA 46-16-606. 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.
>
> MCA 46-16-603. 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." (MCA 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. See MCA 46-17-303 (2)(b)

enacted in 2003 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.

MCA 46-13-401. 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, 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.

MCA 46-16-122. 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.

MCA 46-16-123. 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. . . .


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 MCA 27-1-103.) A civil action arises out of: (1) an obligation; (2) an injury.

> MCA 27-1-105. 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.

> MCA 27-1-106. 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 MCA 25-30-101.

> MCA 25-5-101. 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 acts, 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 type 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 tending to show right to possession is admissible in such courts.

Territorial Extent.

MCA 3-10-304. Territorial extent of civil jurisdiction. The civil jurisdiction of a justice's court extends to the limits of the county in which it is held, and intermediate and final process of a justice's court in a county may be issued to and served in any part of the county. A summons of a justice's court may be served in any county of the state.

Comment. Although there is no specific in the municipal court chapter defining the territorial extent of civil jurisdiction, MCA 3-6-103 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, M.J.C.C. Rules of Civil Proc. describes venue.

MCA 25-31-205. 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.

Rule 3(C), M.J.C.C. Rules of Civil Proc. 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 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 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 transferree 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 papers, 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, M.J.C.C. 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 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, M.J.C.C. 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, M.J.C.C. 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, M.J.C.C. 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, M.J.C.C. 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, M.J.C.C. 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), M.J.C.C. 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), M.J.C.C. 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, M.J.C.C. 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, M.J.C.C. 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 Procedures 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.

MCA 25-31-601. 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. MCA 25-31-602 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 MCA 25-31-602.

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.

M.J.C.C. Rule 4B. 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.

M.J.C.C. Rule 4C. 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, M.J.C.C. Rules of Civil Proc., 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), M.J.C.C. Rules of Civil Procedure. 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 4D(10) 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.

Rule 4C(2)(b), M.J.C.C. Rules of Civil Proc. states 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, and served a copy upon the plaintiff or the plaintiff's attorney. (See 25-31-406 MCA.)

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, M.J.C.C. 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, is 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, M.J.C.C. Rules of Civil Proc.

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, M.J.C.C. Rules of Civil Proc. 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

to accept may not be given in evidence or affect the recovery except as to costs.

(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 improper venue under 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. of Civil Prod.

(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.

(c) A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment in the complaint or counterclaim.

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.

300.314 Relief from Judgment.

Rule 22, M.J.C.C. 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.

MCA 3-1-111. 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 & Exemptions.

Rule 23, M.J.C.C. 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 6 years from the entry of judgment or within the time extended pursuant to 25-13-102, 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.

Comment. It is important to note **there is a conflict** between Rule 23B and Sections 25-13-101 and 27-2-201, MCA. These statutes were amended in the 2001 legislative session to allow a judgment to be enforceable for up to 10 years in a court not of record. Section 25-13-102, cited in Rule 23B, which stated that a judgment was enforceable for 6 years was repealed in 2001. However, it appears that the legislative intent is clear and points to a 10 year judgment.

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".

Comment: It is important to note there is a conflict between Rule 23B that refers to Section 25-13-102, MCA (Repealed), and Section 27-2-201(2), MCA. Section 27-2-201(2), MCA, states that a judgment in a court not of record is valid for 10 years. This is not in accordance with the rule, however it appears that the legislature intended the time for judgment to be 10 years.

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 cost 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.

MCA 25-10-201. 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 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, M.J.C. Rules of Civil Proc. (Superceded) 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, ..."

Municipal Court Costs.

MCA 25-30-107. 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.

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, M.J.C.C. Rules of Civil Proc. Costs. Jury fees and other costs as defined in 3-15-203, M.C.A., and Title 25, Chapter 10, M.C.A., 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), M.J.C.C. 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.

MCA 25-31-119. 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.

MCA 3-10-1001. 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 n which such claim may be heard and disposed of without the necessity of a formal trial.

MCA 3-10-1002. 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."

MCA 3-10-1003. 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.

MCA 3-10-1004. 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.

MCA 25-35-504. 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.

MCA 25-35-505. 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.

An 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)

MCA 25-35-603. Hearing date. The date for the appearance of the defendant to be set forth in the order shall be determined by the justice of the peace or by his 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 shall be made upon the defendant not less than 5 days prior to the date set for his 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 his 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 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.

MCA 25-35-606 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 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 MCA 25-35-607)

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. The small claims court has the subpoena power granted to justice courts in all civil cases.

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:

> MCA 25-35-803. Appeals to district court – commencement and scope. (1) If either party is dissatisfied with the judgment of the small claims court, he may appeal to the district court of the county where the judgment was rendered. An appeal shall 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 shall 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.

> MCA 25-35-508. 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 n 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.)

300.500 OTHER PROCEEDINGS

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

Criminal Actions:

MCA 46-17-311. 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 established as a 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 filing the notice of appeal, the court shall transfer the entire record of the court of limited jurisdiction to the district court.

(4) A defendant may appeal a justice's court, other than a justice's court established as a 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.

MCA 3-10-115 - Appeal to district court from justice's court established as court of record -- record on appeal. (1) A party may appeal to district court from a justice's court established as a court of record judgment or order. 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 established as a 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 from the justice's court established as a court of record to district court.

 Comment. As far as the defendant is concerned, the appear 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.

MCA 46-17-404. 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.

MCA 46-20-103. 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.

> MCA 46-20-104. 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 court 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. Release or detention pending appeal – revocation – sentencing 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, the judge has 30 days to transmit the record. In the 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.

MCA 25-33-102. 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.

MCA 25-33-103. How appeal taken. The appeal is taken by serving a copy of the notice of appeal on the adverse party or his attorney and by filing the original notice of appeal with the justice or judge. The order of serving and filing is immaterial.

MCA 25-33-104. 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 must, within 10 days, upon the payment of the fees therefor, transmit to the clerk of the district court a certified copy of his docket, the pleadings, all notices, motions, and other papers filed in the cause, the notice of appeal, and the undertaking; and the justice or judge may be compelled by the district court, by an order entered upon motion, to transmit such papers and may be fined for neglect or refusal to transmit the same. A certified copy of each order may be served on the justice or judge by the party or his attorney.

MCA 25-33-201. Undertaking on 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 be 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 be withdrawn or dismissed or the amount of any judgment and all costs that may be recovered against him 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 be filed, with two or more sureties, in a sum equal to twice the value of the property, including costs, 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 therein if the appeal be withdrawn or dismissed or pay any judgment and costs that may be recovered against him in said action in the district court and obey any order made by the court therein.

(3) Except as provided in subsection (4), when the judgment appealed from directs the delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that:

(a) during the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon; and

(b) if the appeal be dismissed or withdrawn or the judgment affirmed or judgment be recovered against him in the action in the district court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof or he will pay any judgment and costs that may be recovered against him in said 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.

MCA 25-33-202. 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 he will pay all costs that may be awarded against him and obey any order of the court made in the action.

MCA 25-33-207. 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.

MCA 25-35-803. Appeal to district court – commencement and scope. (1) If either party is dissatisfied with the judgment of the small claims court, he may appeal to the district court of the county where the judgment is rendered. An appeal shall 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 shall be limited to questions of law.

MCA 25-35-804. Record on appeal. (1) Within 30 days of the notice, the entire record of the small claims court proceedings shall be transmitted to the district court or the appeal shall 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 him 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.

300.502 Contempt of Court/Handling Contempt Matters.

MCA 3-1-111. 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.

MCA 3-1-402. Powers of judicial officers as to conduct of proceedings. Every judicial officer has power to:
(1) preserve and enforce order in his immediate presence and in proceedings before him when he is engaged in the performance of official duty;
(2) compel obedience to his official orders, as provided in this code;
(3) compel the attendance of persons to testify in a proceeding before him in the cases and manner provided in this code;
(4) administer oaths to persons in a proceeding pending before him and in all other cases where it may be necessary in the exercise of his powers and duties.

MCA 3-1-403. 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.

MCA 3-10-401. Contempts a justice may punish for. A justice may punish for contempt persons guilty of the following acts and no other:
(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 of the justice or in the immediate vicinity of the court held by him tending to interrupt the due course of a trial or other judicial proceeding;
(3) disobedience or resistance to the execution of a lawful order of 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.

MCA 3-11-303. 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 3-1-501(3) and (4), 3-1-511 through 3-1-518, and 3-1-520 through 3-1-523 apply.

MCA 3-10-402. 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.

Several changes in the contempt statutes were enacted by the 2001 legislature including repealing MCA 3-10-403 and 3-10-404, which set forth the penalty for contempt in a justice court. The new statutes increase the possible penalty for courts of limited jurisdiction, however, a judge should use these proceedings sparingly.

> MCA 3-1-501. What acts or omissions are contempts – civil and criminal contempt. ....
> (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 or 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 with a court order. If the court's purpose in imposing 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.

> MCA 3-1-511. 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.

MCA 3-1-512. Procedure – contempt not in presence of the 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.

MCA 3-1-513. 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.

MCA 3-1-514. Endorsement allowing bail on warrant. Whenever a warrant of attachment is issued pursuant to this part, the court or judge must direct, by an endorsement on such warrant, that the person charged may be left to bail for his appearance in an amount to be specified in such endorsement.

MCA 3-1-515. Arrest and detention by sheriff. Upon executing the warrant of attachment, the sheriff must keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises unless the person arrested entitle himself to be discharged as provided in 3-1-516

MCA 3-1-516. Bail bond – form and conditions of. When a direction to let the person arrested to bail is contained in the warrant of attachment or endorsed thereon, he 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 thereupon or they will pay, as may be directed, the sum specified in the warrant or ordered by court or judge.

MCA 3-1-517. Return of warrant undertaking. The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested by the return day specified therein.

MCA 3-1-518. 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 arrested 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.

MCA 3-1-520. 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.

MCA 3-1-521. 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.

MCA 3-1-522. Illness sufficient excuse – confinement under arrest. (1) Whenever by the provisions of this part an officer is required to keep a person arrested on a warrant of attachment in custody and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend is sufficient excuse for not bringing him up.
(2) The officer must not confine a person arrested upon a warrant in a prison or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

MCA 3-1-523. 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.

Comment. 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 the 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. State that there will not be another warning. 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. Searches 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.

MCA 46-5-101. 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.

MCA 46-5-103. 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.

MCA 46-5-220. 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.

MCA 46-5-221. 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.

> MCA 46-5-223. 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.
>
> MCA 46-5-226. 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 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 be filed by counsel; this is 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.

> MCA 46-5-224. 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.

> MCA 46-5-225. 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".

> MCA 46-5-310. 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.

> MCA 46-5-301. 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 of, 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.

> MCA 46-5-312. 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.

MCA 46-5-305. 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 through 46-5-309.

MCA 46-5-103. 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.

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 10-1-89. 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 40-15-303 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 40-4-125 have been amended and are primarily used for those situations that involve a dissolution of marriage or a legal separation.

In MCA 40-4-122 and MCA 40-15-203, 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 court's 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 and 1997 amendments and additions are significant revisions and the pertinent sections of law 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 not 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:

Has it been sworn to?

Does it allege physical abuse, harm, bodily injury or reasonable apprehension of any of the above?

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, an example from the Benchbook, or 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 MCA 40-15-303, **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 (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 or a 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 MCA 40-4-124 or MCA 40-15-302).

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 or 40-15-201.

> MCA 40-4-121. 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 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 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.

MCA 40-4-122. 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.

MCA 40-4-123. 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 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.

MCA 40-4-124. 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 appear. 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.

MCA 40-4-125. 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 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 a protective order are informed of the existence and terms of the order.

MCA 40-15-101. 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.

MCA 40-15-102. 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 45-5-202;
(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 45-5-203; 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 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.

MCA 40-15-103. 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 pay 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 an order of protection.
The following agencies may be able to give you additional information or emergency help. (List of telephone numbers and addresses of agencies other than shelters will 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.

MCA 40-15-201. 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, regardless of ownership of the residence, automobile, or 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 elapsed.

MCA 40-15-202. 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 proposes 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).

MCA 40-15-203. Attorney general to provide forms. The attorney general shall provide 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 court judges shall make forms available to the public at no charge.

MCA 40-15-204. Written orders of protection. (1) The court may determine, 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 or permanently if the court finds that the minor was a victim of abuse, a witness to abuse, or 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 by 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."

MCA 40-15-301. 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 court 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 or 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 protections issued within the state.

(7) A certified copy 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.

MCA 40-15-302. 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.

MCA 40-15-303. 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.

MCA 41-5-203. 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 youth 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 alcoholic beverage, tobacco products, and gambling violations alleged to have been committed by a youth.

(3) The court has jurisdiction to:

(a) transfer a youth case to the district after notice and hearing;

(b) with respect to extended jurisdiction juvenile prosecution:

(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 of an extended jurisdiction sentence; and

(vii) transfer a juvenile case to district 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.

> MCA 41-5-332. 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 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 is: the highway patrol has charged the

defendant with a DUI occurring on June 18, 2003. Since then, the defendant has had his/her 18th birthday. 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 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 his/her 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 Issuing a warrant of arrest.

Can a warrant of arrest be issued for a juvenile? Yes, BUT 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. Issue a warrant when court opens and expect service before court is over. The officer may go to the school and bring the defendant directly 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 *****

(Exception: Contempt that takes place in the Courtroom)

300.603 Basic legal rights.

The same 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 defendant 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:

> MCA 61-8-723. 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 uses the vehicle; or

(4) any combination of subsections (1) through (3).

Fish, Wildlife, and Parks:

There is no specific sentencing statute for juveniles. MCA 87-1-102 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. **You must not jail a youthful offender as part of the sentence.**

Alcoholic beverage violations:

MCA 45-5-624. 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 of an intoxicating substance if the person knowingly consumes or has in the person's possession an intoxicating substance. A person does not commit the offense if the person consumes or gains possession of the 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 offense, 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; and

(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;

(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) 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, and shall be ordered perform 60 hours of community service, shall be ordered and the person's parent or parents or guardian shall be ordered to 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).

(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.

(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, shall be fined an amount not to exceed $200 and may be ordered to perform community service;

(b) for a second offense, shall be fined an amount not to exceed $200 and may be ordered to perform community service;

(c) for a third or subsequent offense shall be fined an amount not to exceed $500 and:

(i) may be ordered to perform community service;

(ii) shall be ordered to complete 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

(iii) 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 ordered to complete chemical dependency treatment under this subsection (8). The department of public health and human services shall maintain a list of those persons who have been ordered to complete treatment under this subsection (8). 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), or (2)(a)(iii) must be:

(i) approved by the department of public health and human services under 53-24-208; 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)(c)(ii) must be provided at an alcohol treatment program:

(i) approved by the department of public health and human services under 53-24-208; 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 at a treatment program:

(i) approved by the department of public health and human services under 53-24-208; 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.

MCA 3-10-518. 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 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 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:

MCA 45-5-637. 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:

MCA 23-5-158. 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.

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.

399.701 Oath.

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 MCA 1-6-101).

300.702 Form of Oath.

> MCA 1-6-102. Form of ordinary oath. An oath or affirmation in an action or proceeding may be administered as follows: the person who swears or affirms expressing his assent when addressed in the following form, "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue (or matter), pending between ..... and ....., shall be the truth, the whole 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 MCA 1-6-102.

300.703 Certificates.

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 their 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.

> MCA 26-1-1002. Permissible uses of 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 complaints in Title 25, chapter 35 of the MCA.

> MCA 26-1-1003. 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 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) 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 MCA 40-1-321). The law calls for a fine of $10 to $50 for failure to deliver the completed certificate to the clerk of 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 – 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.

MCA 3-15-101. 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.

MCA 3-15-102. Kinds of juries. Juries are of three kinds:

(1) grand juries;
(2) trial juries;
(3) juries of inquest.

MCA 3-15-104. *(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.

MCA 3-15-104. *(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 MCA 3-15-104 has to do with asbestos related claims only. See MCA 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.

MCA 46-17-201. 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.

MCA 3-15-107. Number in justices' courts. 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

MCA 46-17-201. 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 action 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.

Rule 15, MJCC Rules of Civil Proc. Right to jury trial. A. RIGHT PRESERVED. The right of 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 rule;
(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.

MCA 46-13-101. 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 Section 46-13-110, MCA, for criminal cases and provided for in Rule 14, MJCC Rules of Civil Procedure for civil cases.

MCA 46-13-110. 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. 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 admission 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 taken unless modified by a subsequent order.

C. SANCTIONS. If a party or a party's attorney fails to obey a pretrial order, if no appearance is made on behalf of a party at the pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or 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 was substantially justified or that other circumstances make an award of expenses unjust.

Comment. Section 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.

MCA 25-31-710. Pretrial conferences or hearings – appearance by telephone conference. (1) At the discretion of the court, 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; and

(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.

(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, motion to set aside judgment, or motion to dismiss.

400.104 Issues Defined.

MCA 25-31-801. 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.

MCA 25-31-803. 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.

MCA 25-31-802. 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.

MCA 26-1-202. 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 questions.

400.107 Presence of Defendant.

MCA 46-16-122. 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) .....
(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 Proc. 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 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:

MCA 46-16-101. Who given precedence on calendar. Prosecution 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.

MCA 46-16-106. Time to prepare for trial. After plea, the defendant shall be entitled to a reasonable time to prepare for trial.

MCA 25-31-702. 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.

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.

MCA 46-13-401. 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.

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.

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.

MCA 46-17-202. Formation of trial jury for justices', municipal, and city courts. (1) At the time of preparing the district court jury list, the county commissioners and clerk and recorder 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. 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.

MCA 3-15-321. 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.

MCA 3-15-401. Jury lists – by whom and when made. The chairman or, in his absence, any member of the board of county commissioners and the county clerk and recorder of each county must meet at the county seat of each county at the office of the county clerk and recorder on the second Monday of June of each year for the purpose of making a list of persons to serve as trial jurors for the ensuing year. If they fail to meet on the day specified in this section, they must meet as soon thereafter as practicable.

MCA 3-15-404. 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.

MCA 3-15-411. 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 of not exceeding 90 days.
(3) Notwithstanding such 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

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.

MCA 3-15-701. When and by whom jurors summoned. When jurors are required in any court of limited jurisdiction, they:
(1) must, upon the order of the judge thereof, be summoned by the sheriff, constable, marshal, or policeman of the jurisdiction; or

(2) may be summoned by the judge of the court of limited jurisdiction or by the clerk of that court.

MCA 3-15-702. 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.

MCA 3-15-703. 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.

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.

MCA 3-15-704. 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.

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

juror "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 he/she feels some old feelings that he/she 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 3 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 towards 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 1999 MT 309 and State v. Freshment 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 3 names if the case is criminal, 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, however, many representative 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 was requested will be done, or "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 amend the complaint
(d) to issue duplicate warrant or summons
(e) 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.

MCA 46-13-202. 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.

MCA 25-31-703. Postponement by motion of court. The court may, of its own motion, postpone the trial for not exceeding 4 months for good cause shown.

MCA 25-31-704. 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.

MCA 25-31-705. Postponement upon application of a 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 must prove, by his own oath or otherwise, that he cannot, for want of material testimony which he expects to procure, safely proceed, safely proceed to trial and must show in what respect the testimony expected is material and that he has used due diligence to procure it 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.

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 upon 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.

** Final closing argument by plaintiff. (state).

** 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 his or her 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 his bail.

** If the judgment is guilty, the defendant is entitled to a reasonable time before sentencing. They 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 the **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 qualification 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 witness 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

MCA 25-7-404. 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.

MCA 46-16-504. 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 court for further instructions.

> MCA 46-16-503. Conduct of jury after retirement – 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.
>
> MCA 25-7-405. 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 and 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.

MCA 46-16-603. 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.

MCA 46-16-604. 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.

MCA 46-16-605. 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.

MCA 46-16-606. 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.

MCA 25-7-501. Return of verdict – polling the jury. (1) When the jurors or two-thirds of them have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing and signed by the foreman and must be read by the clerk to the jury, and the inquiry made whether it is their 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 his verdict. If upon such inquiry or polling more than one-third of the jurors disagree thereto, the jury must be sent out again, but if not such disagreement be 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

_____ vs _____ Case No. _____

* * * * * *

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 Defendant Challenge Waived

1. 2. 3. 1. 2. 3.

400.500 JURY INSTRUCTIONS

400.501 Introductions.

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 instruction 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 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 hear 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 his or her 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 him. This presumption remains with him 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 his 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: MCA 61-8-101).

Comment. Cite as MCJI 10-101; Authority: MCA 61-8-101.

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: MCA 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 was 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: MCA 61-8-401(1)(a).

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: MCA 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 MCA 61-1-103. Cite as MCJI 10-401(3); Authority: MCA 61-8-401(3).

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 is 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 testimony 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 (See 46-16-603, 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.

MCA 26-2-101. Subpoena defined. The process by which the attendance of a witness is required is by a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents or other things under his control, which he is bound by law to produce in evidence.

MCA 46-15-101. 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 court in which the action was filed or to which the action was transferred.

400.603 Service of Subpoenas.

MCA 46-15-107. 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 for service in 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.

MCA 3-10-304. Territorial extent of civil jurisdiction. The civil jurisdiction of a justice's court extends to the limits of the county in which it is held, and intermediate and final process of a justice's court in a county may be issued to and served in any part of the county. A summons of a justice's court may be served in any county of the state.

400.604 Problems in Service of Subpoenas.

Problems in serving a witness with a subpoena or the witness's failure to obey the subpoena and addressed in Title 26, Chapter 2, Part 1. Disobedience to a subpoena can be punished as a contempt of court.

Specific sections are:

MCA 26-2-103. 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 him, any court or 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 must serve it accordingly and, for that purpose, may break into the building or vessel where the witness is concealed.

MCA 26-2-104. 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 so sworn, to so answer, or to so subscribe; and if the witness be a party, his complaint or answer may be stricken out.

MCA 26-2-105. Disobedience – civil damages. A witness disobeying a subpoena also forfeits to the party aggrieved the sum of $100 and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered n a civil action.

MCA 26-2-106. 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 thereof and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

MCA 26-2-107. Contents of warrant – execution. Every warrant of commitment issued by a court or officer pursuant to this part must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. Every 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 him in the same manner as process by the district court.

400.605 Duties of Witnesses.

MCA 26-2-301. Witness required to attend when subpoenaed. A witness served with a subpoena must attend at the time appointed, with any papers under his control required by the subpoena, and answer all pertinent and legal questions and, unless sooner discharged, must remain until the testimony is closed.

MCA 26-2-302. Witness required to answer questions. A witness must answer questions legal and pertinent to the matter in issue though his answer may establish a claim against himself, but he need not give answer which will have a tendency to subject him to punishment for a felony, nor need he give an answer which will have a direct tendency to degrade his character unless it be 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 him, 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).

MCA 26-2-303. 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 he were in attendance upon a subpoena issued by such 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.

MCA 26-2-401. Rights 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.

MCA 26-2-402. 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.

MCA 46-15-120. 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 EVIDENCE

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.

MCA 26-1-301. 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.

A different standard of proof exists for civil and criminal cases.

(1) **Civil.**

MCA 26-1-401. Who has the 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 him in the absence of further evidence.

(2) **Criminal.**

MCA 26-1-403. 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 all 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.

MCA 26-1-402. Who has the 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 he 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 MCA 46-13-301(2).

400.705 Rules of Evidence, Criminal.

The Montana Rules of Evidence are included in the Montana Codes 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 MCA 46-16-201.)

A special rule applicable only in criminal cases is:

> MCA 46-16-212. 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).*"

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.

> MCA 46-16-403. 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.

> MCA 46-16-105. "....(2) 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 plea of not guilty substituted. ...."

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.

MCA 46-18-101. 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 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 court-appointed counsel as provided in 46-18-113, 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.

MCA 46-18-102. Rendering judgment and pronouncing sentence – use of two-way electronic audio-video communications. (1) The judgment must be rendered in open court. For purposes of this section, in cases in which the defendant is charged with a misdemeanor offense, a judgment rendered 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 a judgment rendered 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.
(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 punishment imposed on a

criminal wrongdoer...." In civil cases, the terms "judgment," "decision," "award," "findings," etc., are used.

400.905 Sentences that may be Imposed.

MCA 46-18-201. 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 of 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) 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:

(a) a fine as provided by law for the offense;

(b) payment of costs, as provided in 46-18-232, or payment of costs of court-appointed counsel as provided in 46-8-113;

(c) 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;

(d) commitment of:

(i) an offender not referred to in subsection (3)(d)(ii) 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; or

(ii) 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;

(e) 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;

(f) 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;

(g) chemical treatment of sex 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

(h) any combination of subsections (2) through (3)(g).

(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 court-appointed 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 established pursuant to 53-30-403;

(n) any other reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society; or

(o) any combination of the restrictions or conditions listed in subsections (4)(a) through (4)(n).

(5) In addition to any other penalties imposed pursuant to this section, 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 a victim, as defined in 46-18-243, has sustained a pecuniary loss, the sentencing judge shall, as a 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 se the offender unless the court specifies otherwise.

Comment. Statutes that may help the judge concerning crime victims and 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: advises of victim's rights to attend hearings and trials, including sentencing hearings;

46-18-249, MCA: pertains to separate civil actions that may be taken by the victim against the offender. These actions may well impact both criminal and civil jurisdiction issues.

Note that the 2003 legislature added in 46-18-201(6) a provision allowing 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.

400.906 Presentence Investigation.

46-18-111, MCA, lists those offenses where a presentence investigation must be prepared for the court prior to sentencing. The section concludes with "...The district court may order a presentence investigation for a defendant convicted of a misdemeanor...."

Comment. There is no statutory provision for courts of limited jurisdiction to conduct formal presentence investigations, however, this is done informally by questioning of the defendant by the court. Section 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 that 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, MCA 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:

Williams v. Illinois, 399 U.S. 235

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 could be said to be willful on the part of the defendant.

400.908 Sentence when Code Silent on Punishment.

MCA 46-18-212. 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.

MCA 46-18-204. 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, 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 from the record and order that the charge or charges against the defendant be dismissed. 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 only be obtained by district court order upon good cause shown.

400.910 Revocation.

MCA 46-18-203. 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 or any condition of a deferred imposition of sentence, 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) At the hearing, the prosecution shall prove, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence. 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.

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.

MCA 46-18-403. Credit for incarceration prior to conviction. (1) Any person incarcerated on a bailable offense and 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) Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of the offense must 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 with the court. Anyone not posting the required bail must be allowed the credit. As stated recently in ***State v. Fisher*** 2003 MT 33, a sentencing court has no discretion 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.

MCA 46-17-302. Execution of judgment. (1) The judgment must be executed by the sheriff, constable, marshal, or policeman of the jurisdiction in which the conviction was had.

(2) When a judgment of imprisonment is entered, a certified copy thereof 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 defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.
(4) A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied in the proportion of 1 day's imprisonment for every $25 of the fine. When the judgment is rendered, the defendant must be held in custody 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 must return the execution to the judge within 30 days from its delivery to him and pay over to the judge the money collected deducting his 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.

MCA 46-19-102. Execution of judgment. (1) If the judgment is for a fine alone, execution may issue on the judgment, any unpaid interest accrued on the judgment, and costs and fees incurred in collecting 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 judgment.
(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 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 judgment. The fee incurred by the court must be added to the judgment amount.

400.914 Jail Work Release Programs.

MCA 46-18-701. 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 the 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 such 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 hours when the prisoner is not employed.

MCA 46-18-704. 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.

MCA 7-32-2225. 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 law 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.

MCA 7-32-2226. 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 county projects or for county departments as designated by the board of county commissioners. 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 county employee;
(e) perform the duties of any vacant county 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 1 day 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 45-7-306. 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 on 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.

MCA 7-32-2227. 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.

MCA 7-32-2208. 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 he is legally discharged.

400.915 The Surcharges.

See **Section 600.303** infra. for a discussion of the mandatory surcharges.

400.916 Consecutive Sentences.

MCA 46-18-401. 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 penal institutions in which the defendant is confined under sentence with authenticated copies of 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 such 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.

The municipal court is a court of record, as is the justice's court established as a court of record and the district court. All in-court proceedings are recorded by a court reporter, electronic recording or stenographer. Neither the justice court nor the city court is a court 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.

500.200 DOCKET

MCA 3-10-501. 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 same 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 names of the jurors who appear and are sworn and 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 on appeal, if any 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.

MCA 3-10-1005. Docket entries. The justice shall enter in the docket kept by him 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.

MCA 46-17-102. 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.

500.203 Docket Entries.

MCA 3-10-502. 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) Such entries in a justice's docket or a transcript thereof certified by the justice or his successor in office are prima facie evidence of the facts so stated.

Comment. Entries should be made at the conclusion of the 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.

MCA 3-10-503. Index to the 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 the boxes/binders provided 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.

MCA 3-10-511. 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.

When a judge is required to transfer "the record" to another court, as in an appeal, 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.

MCA 3-6-302. 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.

MCA 46-9-203. 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 where in his court is located any knowledge or information acquired by him in a trial or a cause or hearing before him, which knowledge or information shows or tends to show that any person is a drug user or drug addict. If such person is under arrest or liberated on bail at the time the knowledge or information is acquired, such 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.

MCA 61-11-104. 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.

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 MCA 61-11-101). All convictions must be reported regardless of the filing agency.

MCA 61-11-101. Report of convictions 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, 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 shall forward a record of the conviction or forfeiture to the department within 5 days after a conviction or a forfeiture of bail that is not vacated, except for a conviction or a forfeiture of bail for a standing or parking statute or ordinance. 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.

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 MCA 40-1-321.

500.404 Report to the County Treasurer.

MCA 3-10-601. Collection and disposition of fines, penalties, forfeitures, and fees. (1) Except as provided in 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 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) 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.

500.405 Report to the County Commissioners.

MCA 7-6-2213 Repealed in 2001.

500.406 Report to Department of Revenue.

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, 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. In accordance with 42.12.221 ARM Penalties for Violation of Rules or Statutes, mail your certified copy of conviction to:

Department of Revenue
License Bureau Chief
2517 Airport Road
Helena, MT 59620

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.

MCA 3-10-601. Collection and disposition of fines, penalties, forfeitures, and fees.
(1) Except as provided in 75-7-123, each 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 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) 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.

MCA 25-30-102. Fees and fines – collection. (1)(a) 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 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.

(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.

MCA 7-4-2516. 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.

MCA 7-4-2511. Collection and disposal of fees. (1) Each salaried county officer must charge and collect for the use of his county and pay and pay into the county treasury on the 10th day in each month all fees now or hereafter allowed by law, paid or chargeable in all cases, except as provided in 25-10-403. Nothing in this subsection applies 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 his custody.

(2) No salaried county officer may received for his own use any fees, penalties, or emoluments of any kind, except the salary as provided by law, for any official service rendered by him. 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) governmental entities not required to prepay fees; and
(b) public officers not to be personally taxed with costs or damages.

> MCA 61-12-702. 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.

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.

> MCA 87-1-104. 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.

> MCA 25-31-112. 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 court with certificate.

 Comment. The exception (MCA 25-35-605) referred to in MCA 25-31-112, Page 6-3, is when small claims actions are removed to justice's court in which case no additional filing fee is required.

Remember that poor persons are not required to prepay fees. With the filing of an affidavit, as required in 25-10-404, 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.

MCA 25-35-608. 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 his 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.

600.204 Jurors' Fees.

MCA 3-15-203. 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 his 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 his own motion on the first day of his appearance in obedience to 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.

MCA 26-2-503. 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 of 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 "forfeiture" as: "1. The divestiture of property without compensation. 2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty....3. Something (esp. money or property) lost or confiscated by this process; a penalty...."

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.

MCA 61-12-701. 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.

MCA 61-10-148. 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 department of revenue, 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.

MCA 46-17-303. Deposit of fines – collection. (1) Except as provided in subsection (2), all fines imposed and collected by a city court must be paid to the treasurer of the county, city, or town, as the case may be, within 30 days of receipt. The city judge shall file a copy of any receipt given for a collected fine with the county, city, or town clerk, as the case may be.

(2) (a) The city court may contract with a private person or entity for the collection of any final judgment that requires a payment to the city court.

(b) In the event that a private person or entity is retained to collect a judgment, the city 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 city court, after deducting the charges provided for in 46-18-236, may pay the private person or entity a reasonable for collecting the judgment.

MCA 46-17-402. 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 subsection (2), 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.

MCA 46-18-603. Disposition 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.

MCA 46-18-236. 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 $25 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.

MCA 3-1-317. **(This act is effective June 28, 2003** 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, fees, or fines. The surcharge may not be used in determining the jurisdiction of any court.

(4) The amount collected under this section must be forwarded to the department of revenue for deposit in the account established in 3-5-904 for state funding of court information technology. *(This act terminates June 30, 2005 – Amends Sec. 4, Chapter 361, Laws of 1995 and Sec 1, Chapter 71, Laws of 1999 and provides an effective date and a termination date)*

MCA 3-5-904. Account established for court information technology. (1) There is an account in the state special revenue fund for state funding of court information technology.

(2) Money collected pursuant to 3-1-317 must be deposited in this account.

Comment. The above entry for MCA 3-1-317 was amended by the 2003 Legislature to change the $5 surcharge to $10, and was

effective June 28, 2003. A new surcharge of $10 for the Law Enforcement Academy was also passed and was effective July 1, 2003.

For routine traffic misdemeanors (except 61-8-401 and 61-8-406 convictions), the total amount of surcharges for each conviction is now $35.

For Title 45 and for 61-8-401 and 61-8-406 convictions, an additional $25 must be collected (See MCA 46-18-236). These surcharges now add up to: $10 – Court; $15 – Misdemeanor; $10 – Law Enforcement Academy; and the additional $25 for a total of $60 surcharge for each conviction. The surcharges are distributed differently. PLEASE READ THE PREVIOUS SECTIONS AND THE UNIFORM ACCOUNTING MANUALS FOR GUIDANCE.

 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.

SECTION 700 – JUDICIAL RESOURCES

700.100 CANONS OF JUDICIAL ETHICS

Adopted by the Montana Supreme Court, May 1, 1963.
Canon 35 Amended April 18, 1980.

The Supreme Court of Montana, being mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Court accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

1. Relations of the Judiciary.

The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, and the witnesses, jurors and attendants who aid him in the administration of its functions.

2. The Public Interest.

Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community. He should avoid unconsciously falling into the attitude of mind that the litigants are made for the courts instead of the courts for the litigants.

3. Constitutional Obligations.

It is the duty of all judges to support the federal Constitution and that of this state; in so doing, they should fearlessly observe and apply fundamental limitations and guarantees.

4. Avoidance of Impropriety.

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.

5. Essential Conduct.

A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

6. Industry.

A judge should exhibit an industry and application commensurate with the duties imposed upon him.

7. Promptness.

A judge should be prompt in the performance of his judicial duties, recognizing that the time of litigants, jurors and attorneys is of value and that habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the court.

8. Court Organization.

A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

It is desirable too, where the judicial system permits, that he should cooperate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice.

9. Consideration for Jurors and Others.

A judge should be considerate of jurors, witnesses and others in attendance upon the court.

10. Courtesy and Civility.

A judge should be courteous to counsel, especially to those who are young and inexperienced and also to all others appearing or concerned in the administration of justice in the court.

He should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

11. Unprofessional Conduct of Attorneys and Counsel.

A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counselors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities.

12. Appointees of the Judiciary and Their Compensation.

Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments.

While not hesitating to fix or approve just amounts, he should be most scrupulous in granting or approving compensation for the services or charges of such appointees to avoid excessive allowances, whether or not excepted to or complained of. He cannot rid himself of this responsibility by the consent of counsel.

13. Kinship or Influence.

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

14. Independence.

A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.

15. Interference in Conduct of Trial.

A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

16. Ex parte Applications.

A judge should discourage ex parte hearings of applications for injunctions and receiverships where the order may work to the detriment of absent parties; he should act upon such ex parte applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

17. Ex parte Communications.

A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex parte application.

While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

18. Continuances.

Delay in the administration of justice is a common cause of complaint; counsel are frequently responsible for this delay. A judge, without being arbitrary or forcing cases unreasonably or unjustly to trial when unprepared, to the detriment of parties, may well endeavor to hold counsel to a proper

appreciation of their duties to the public interest, to their own clients, and to the adverse party and his counsel, so as to enforce due diligence in the dispatch of business before the court.

19. Judicial Opinions.

In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that Courts of Appeals in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resorts.

20. Influence of Decisions Upon the Development of the Law.

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depositary of arbitrary power, but a judge under the sanction of law.

21. Idiosyncrasies and Inconsistencies.

Justice should not be molded by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

22. Review.

In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of

exceptions or otherwise; any failure in this regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable.

23. Legislation.

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies, and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

24. Inconsistent Obligations.

A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.

25. Business Promotions and Solicitations for Charity.

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade, or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.

26. Personal investments and Relations.

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information coming to him in a judicial capacity for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.

27. Executorships and Trusteeships.

While a judge is not disqualified from holding executorships or trusteeships, he should not accept or continue to hold any fiduciary or other position if the holding of it would interfere or seem to interfere with the proper performance of his judicial duties, or if the business interest of those represented require investments in enterprises that are apt to come before him judicially, or to be involved in questions of law to be determined by him.

28. Partisan Politics.

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interest of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

29. Self-Interest.

A judge should abstain from performing or taking part in any judicial act in which his personal interest is involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

30. Candidacy for Office.

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

31. Private Law Practice.

The justices of this court and the district judges are forbidden to practice law. In justice and police courts where it is permitted one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

He should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy.

He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefore if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law.

32. Gifts and Favors.

A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.

33. Social Relations.

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

34. A Summary of Judicial Obligation.

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private, political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

35. Improper Publicizing of Court Proceedings.

The presiding judge in any court proceedings open to the public shall permit the recording and broadcasting by radio and television and the taking of photographs in the courtroom unless he is convinced from the particular circumstances of the individual case, or any portion thereof, that such recording, broadcasting, or photography would substantially and materially interfere with the primary function of the court to resolve disputes fairly under the law.

In any case, or portion thereof, in which the presiding judge prohibits such recording, broadcasting, or photography, he must state his reasons for such prohibition in the record of such case.

No provision herein shall grant the media any greater access or rights than permitted by statute in those proceedings wherein public or media access or publication is prohibited, restricted or limited by law.

The provisions hereof shall apply to the Supreme Court of Montana and all other courts of the State of Montana over which the Supreme Court has supervisory control.

The following illustrative guidelines are presented as an aid to the judiciary and the media in implementing the provisions of this Canon:

Illustrative Broadcast Guidelines

1. Judge. The judge has the authority to direct whether equipment may be taken within the courtroom. The broadcast news person should advise the judge prior to the start of a court session that he or she desires to electronically record and/or broadcast live from within the courtroom. The

judge may issue instructions as to where the broadcast reporter and/or camera operator may position themselves. In the absence of any directions from the judge, the position should be behind the front row of spectator seats by the least used aisle way or other unobtrusive but viable location.

2. Pooling. The number of cameras in the courtroom shall be at the discretion of the presiding judge. Where coverage is by both radio and TV, the microphones used by TV should also serve for radio, and radio should be permitted to feed from the TV sound system. Multiple radio feeds, if any, should be provided by a junction box. It should be the responsibility of each broadcast news representative present at the opening of each session of court to achieve an understanding with all other broadcast representatives as to who will function at any given time, or, in the alternative, how they will pool their photographic coverage. This understanding should be reached outside the courtroom and without imposing on the judge or court personnel.

3. Broadcast Equipment. All running wires used should be securely taped to the floor. All broadcast equipment should be handled as inconspicuously and quietly as reasonably possible. Sufficient film and/or tape capacities should be provided to obviate film and/or tape changes except during court recess. No additional lights should be used without the specific approval of the presiding judge and then only as he may specifically approve as may be needed in the case of appellate hearings.

4. Decorum. Broadcast representatives' dress should not set them apart unduly from other trial spectators. Camera operators should not move tri-pod cameras except during court recesses. All broadcast equipment should be in place and ready to function no less than 15 minutes before the beginning of each session of court.

Illustrative Print Media Guidelines

1. Judge. The judge has authority to decide whether photographs may be taken within the courtroom. The photographer should advise the judge, prior to the start of a court session, that he or she desires to take photographs. The judge may issue instructions as to where the photographer may position himself or herself. In the absence of any directions from the judge, the photographer should remain behind the front row of spectator seats.

2. Pooling. Unless the judge allows otherwise, no more than one still picture photographer is to be taking pictures in the courtroom at any one time. It is the responsibility of each photographer present at the opening of each session of court to achieve an understanding with all other photographers present as to which will function at any given time, or, in the alternative, how they will pool their photographic coverage. This understanding must be reached outside the courtroom and without imposing on the judge or court personnel.

3. Equipment. The photographer's dress and equipment should not set him or her apart unduly from other trial spectators. Cameras which operate without flash and with a minimum of noise should be utilized.

4. Decorum. The photographer's movements in and out of the courtroom and while taking pictures should not be obtrusive. He or she should not, for example, assume body positions inappropriate for spectators.

These illustrative guidelines are subject to modification by a majority of the judges of any court to meet local conditions in their area and within their jurisdiction. Any such modification shall be in writing and disseminated to the affected media by appropriate means.

36. Conduct of Court Proceedings. Proceedings in court should be so conducted as to reflect the importance and seriousness of the inquiry to ascertain the truth.

The oath should be administered to witnesses in a manner calculated to impress them with the importance and solemnity of their promise to adhere to the truth. Each witness should be sworn separately and impressively at the bar or at the court, and the clerk should be required to make a formal record of the administration of the oath, including the name of the witness.


Comment: As announced in the August, 2003 issue of "The Montana Lawyer", the Montana Supreme Court has created a Commission on the Code of Judicial Conduct. The commission will study and consider drafting a Code of Judicial Conduct.

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 some 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 procedure, 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 a 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 is 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 Johns, 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 "7-1-03, 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 is 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 not the time for "Hi ya, Joe,", but it is certainly not necessary to wear the "executioners" 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 let him sit.

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. This 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:

"7-1-03 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 a $35 surcharge." or

"7-1-03 Defendant appeared, was duly arraigned and pleaded not guilty. Defendant waived a jury trial and a bench trial is set for 9-17-03 with omnibus set for 8-12-03 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 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 it is 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 with 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 !!