

# Montana's Rules of Professional Conduct

Betsy Brandborg, Bar Counsel, State Bar of Montana  
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## Regulatory Authority and Recent History

The Montana Supreme Court is granted the authority to regulate the practice of law by Article VII, Section 2(3) of the 1972 Montana Constitution.

Montana's Rules of Professional Conduct have used the American Bar Association's (ABA's) Model Rules as a template since 1985. In a comprehensive re-write of the Rules in 2004, the Montana's Supreme Court absorbed many of the ABA's "Ethics 2000" revisions, but enacted a series of significant Montana-specific departures from those Rules. Following that, Montana's advertising rules were amended July 2010 and Rules 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing With Unrepresented Person) were amended in 2011 to address the unmet legal needs of low to moderate-income Montanans.

## Preamble and Scope

Montana's Preamble and Scope sections are new in 2004, and contain significant departures from the Model Rules.

Read them. What Montana's Rules are and how we are to apply them is set out there. Why they apply and how to put them into perspective is set out there. Whether they can be used as tools in litigation and their use in the disciplinary process is set out there. Where lawyering fits and doesn't fit into the world of truth, justice and the American Way are packed into 21 short paragraphs.

The first words, unique to Montana, set the tone: "A lawyer shall always pursue the truth." Also, "...a lawyer shall behave consistently with the requirements of honest dealings with others." And: "[a]ll lawyers understand that, as Officers of the Court, they have a duty to be truthful, which engenders trust in both the profession and the rule of law." (Preamble, paragraphs 1, 3 and 14).

Why? "Trust in the integrity of the system and those who operate it is a basic necessity of the rule of law; accordingly truthfulness must be the hallmark of the legal profession, and the stock-in-trade of all lawyers." And "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." (Preamble, paragraphs 14 and 7.)

## Standard of Conduct v. Standard of Care

Paragraph 21 of the Scope of the Rules of Professional Conduct is significantly different than the Model Rules because of the tension between the standard of conduct and standard of care. This is what the Montana Supreme Court adopted, with the language unique to Montana in italics:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule *provides* just basis for self-assessment *by a lawyer of his/her conduct or a basis* for sanctioning a lawyer under the disciplinary process does not imply that an opposing party or lawyer has standing to seek enforcement of the Rules *in a collateral proceeding or transaction outside of the disciplinary process*.

## **Zealous Representation**

It was important to those submitting the 2004 Rules to the Montana Supreme Court that the Preamble reflect that fidelity to the legal system trumps fidelity of the relationship with the client. Agreeing, the Supreme Court removed the adjective "zealous" from the Rules.

Removing "zealous" is a significant Montana departure from the ABA's Model Rules. In Montana the following language provides a different focus, especially when read with an appreciation that the Court deliberately deleted the struck word:

- "As advocate, a lawyer ~~zealously~~ asserts the client's positions under the rules of the adversary system." (Preamble, paragraph 3.)
- "Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation "~~zealously~~ to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." (Preamble, paragraph 10).

In one instance, "dedicated" was accepted as a replacement: "A lawyer can be a ~~zealous~~ dedicated advocate on behalf of a client, even an unpopular one, but in doing so must comply with these Rules of Professional Conduct." (Preamble, paragraph 9.)

## **Terminology Section**

Always check it. If you have a question about the Rules, it's typically a balancing of several considerations (included in several different Rules) and there's bound to be a defined term.

## **Confidentiality**

The exceptions to the confidentiality rule, Rule 1.6, are significantly different from the ABA's Model Rules. What is the same as the Model Rule is the portion of the ABA Rule permitting revelation of confidence to prevent reasonably certain death or substantial bodily harm and that a lawyer may reveal

information to secure legal advice about the lawyer's compliance with the Rules and a lawyer also may reveal information to comply with other law or court order.

Montana departures from the Model Rules are that disclosures to prevent or rectify client financial fraud are NOT allowed. Also NOT allowed is the ABA exception to detect and resolve conflicts of interest arising from a lawyer's change in employment. So, where the Model Rules have 7 exceptions to the confidentiality rule, Montana has only 4.

Montana's Rule 1.6—Confidentiality of Information:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

## **Conflicts of Interest**

With Rules 1.7, Conflict of Interest: Current Clients, and 1.9, Conflict of Interest: Duties to Former Clients, the ABA Model Rules were followed verbatim. The other conflicts rules have language specific to Montana. For example, in Rule 1.8, Conflict of Interest: Current Clients: Specific Rules, the Court varied from the Model Rule by specifically eliminating the phrase "or individual with whom the lawyer or the client maintains a close, familial relationship" within the part prohibiting lawyers from creating instruments gifting them client property.

The Court did not depart from the ABA's specific prohibition in 1.8 of sex with a client "unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

## **Informed Consent, Confirmed in Writing**

A most significant departure from the ABA Model Rules is the regular appearance of the combined phrases "informed consent" and "confirmed in writing." Both are included in the Terminology section. "Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." (Terminology (g).)

"Confirmed in writing, when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. .. If it is not feasible to obtain or transmit the writing at the time

the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter." (Terminology (d).)

These two phrases are not limited to the conflicts rules. Excluding the Preamble, Scope and Terminology sections, the phrase "informed consent" appears in seventeen places in the Montana's Rules. "Confirmed in writing" appears in ten places. "Advised" or "Transmitted" in writing appears in six additional spots.

There was an effort in the ABA House of Delegates to strike the writing requirement, because it could lead to malpractice liability or disciplinary action. This effort failed 158-208. The defenders prevailed, explaining: "We need to make sure that clients have been confronted with something that allows them to decide whether to proceed with the representation when a breach of loyalty has occurred."

The informed consent and writing obligations appear in Montana's Rules more frequently than they appear in the ABA Model Rules. For example, informed consent appears in Rule 1.2 defining the allocation of authority between client and lawyer, the confidentiality rule, the statement of duties to prospective clients, Rule 1.20; Rule 2.2 specifying proper conditions for evaluation of a matter for use by third persons and elsewhere. Be alert.

The writing obligation is found in at least 16 places. In many instances, it's a new obligation. Not having a writing can get you into hot water, fast. Writing is defined in the Terminology section, and it includes electronic communications. The writing obligation is NOT a "best practices" recommendation. The word "writing" is usually preceded by the phrase "shall be in..."

## **Rule 1.20 -Duties to Prospective Clients Defined**

Montana's small town nature can get a lawyer cornered in a conflict. It happens at the grocery store or the Little League game where we hear too much information from someone seeking a little free advice. Is the gabby shopper or sports fan someone who can preclude us from taking as a client the other side of the case?

Rule 1.20 defines our duties to prospective clients. Who are prospective clients? Those with whom we've consulted about the possibility of forming a lawyer-client relationship. What's a consultation? It's a communication reasonably sufficient to permit the client to appreciate the significance of the matter in question. What's reasonable? That's defined in (u) of the Terminology section. And note: it's a consultation, not simply a discussion that triggers the bundle of responsibilities owed to a prospective client. That's a Montana-only departure from the ABA's Model Rules.

## **Meritorious Claims and Contentions**

Rule 3.1 provides generally that a lawyer shall not bring or defend a proceeding unless it is valid. The State Bar Ethics Committee was disturbed at the disparity between what the Rule purports to represent and what actually happens in practice. The ABA suggested a relatively minor change. The State Bar Ethics Committee did not feel that the proposal had much of an impact of the Rule. All involved acknowledged the subjectivity of the topic.

An alternative was drafted with a goal of giving the Rule teeth. The language developed by the Committee and adopted by the Montana Supreme Court provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein:

(A) (1) without having first determined through diligent investigation that there is a bona fide basis in law and fact for the position to be advocated; (2) for the purpose of harassment, advancement of a non-meritorious claim, or solely to gain leverage; or (3) to extend, modify, or reverse existing law unless a bona fide basis in law and fact exists for advocating doing so.

(B) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The definition of bona fide is included in the Terminology section (b), providing: "made in good faith, sincere."

## **Affirmative Duty to Correct Misinformation**

Candor Toward the Tribunal is the title of Rule 3.3. Montana's Rule is the same as the ABA Model Rule, in which the currently adopted revision made it clearer that a lawyer must not allow the introduction of false evidence. If that happens, the lawyer is obligated to take remedial steps, including, if necessary, disclosure to the tribunal-regardless of the client's wishes.

In addition, a lawyer's obligation in the former rule to avoid assisting client crime or fraud is replaced by a broader obligation to ensure the integrity of the adjudicative process. The lawyer must take remedial measures whenever the lawyer comes to know that any person is or has engaged in criminal or fraudulent conduct related to a proceeding, such as jury tampering or document destruction.

## **Clients with Diminished Capacity-Rule 1.14**

The ABA and Montana Rules are the same. The 2004 changes are an excellent example of why change is progress. The title changes from "Client Under a Disability" to "Client with Diminished Capacity," and the modifications are not about political correctness. Instead, they reflect how far society has come in understanding the incredibly varying legal needs of children, seniors, and those who are in some way impaired, and the corresponding burden it places on lawyers.

The changes to this Rule give lawyers more options for protective action short of a request for guardian. They also require as a standard that the client be at "risk of substantial harm" unless action is taken. Critically, the newer Rule protects lawyers in these sensitive representations -granting implied authorization under the confidentiality rule "to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

## **Obligations for Neutrals**

The Montana Supreme Court adopted the ABA Model Rule 2.4 as Montana Rule 2.3, Lawyer Serving as Third Party Neutral. Rule 2.3, defines the role of lawyers serving as third party neutrals (i.e., arbitrators, settlement masters, mediators and others). In defining the role, the Rule is clear that the disputants are

not clients of the lawyer. In fact, in another Montana-unique requirement, a lawyer serving as a neutral shall inform all parties that the lawyer is not representing them. Further, the Rule mandates that the lawyer neutral explain the difference between the lawyer's role as a neutral and a lawyer's role as one who represents clients.

## **Fees**

The first line of the ABA's Rule 1.5 sets the tone for Montana-specific departures from the Model Rules: "A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses." From there, the Montana's unique Rule requires lawyers to communicate their fee, scope of representation and expenses in writing, with a limited exception. It clarifies that contingent fee agreements must be signed by the client. It requires additional notification regarding expenses in contingent fee agreements. And it mandates that any division of fees between lawyers not in the same firm be made only if the client agrees and confirms in writing.

## **Advertising & Solicitation**

Montana's rules on advertising and solicitation are very different than the Model Rules. Montana's rules are specific and detailed. It's critical that you review the set before implementing your marketing plan. See Rule 7.1 to 7.5.

## **Unauthorized Practice and Multi-Jurisdictional Practice**

Montana has a unique perspective when it comes to reciprocity. If you are already admitted in some other jurisdiction and taking this course, you've already learned a little about it. For those licensed only in Montana, the short version is that there is no automatic reciprocity from another jurisdiction to Montana (with occasional exceptions too complex to be examined here).

Montana has very specific rules on jurisdiction and unauthorized practice:

### **Rule 5.5 – Unauthorized Practice of Law**

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

### **Rule 8.5- Jurisdiction and Certification**

A lawyer who is not an active member in good standing of the State Bar of Montana and who seeks to practice in any state or federal court located in this State pro hac vice, by motion, or before being otherwise admitted to the practice of law in this State, shall, prior to engaging in the practice of law in this State, certify in writing and under oath to this Court that, except as to Rules 6.1 through 6.4, he or she will be bound by these Rules of Professional Conduct in his or her practice of law in this State and will be subject to the disciplinary authority of this State. A copy of said certification shall be mailed, contemporaneously, to the business offices of the State Bar of Montana in Helena, Montana. A lawyer not admitted to practice in this State is subject to the disciplinary authority of this State for conduct that constitutes a violation of these

Rules and that: (1) involves the practice of law in this State by that lawyer; (2) involves that lawyer holding himself or herself out as practicing law in this State; (3) advertises, solicits, or offers legal services in this State; or (4) involves the practice of law in this State by another lawyer over whom that lawyer has the obligation of supervision or control. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

## **Sale of Practice Rule**

Montana's Rule on Sale of Practice, Rule 1.19, allows sellers to sell parts of their practice to different lawyers or firms. But where the old Rule allowed purchaser to change the fee charged to the transferred client, the current Rule does not: "The fees charged clients shall not be increased by reason of the sale."

## **Pro Bono**

For the lawyer who wants to do more pro bono but worries about conflicts with existing firm clients, Montana's unique Rule 6.5 is the solution. Rule 6.5 protects from the conflict and imputation of conflict rules attorneys who, while representing a client pro bono (under a sponsored pro bono program) discover a conflict with a paying client. Now, an attorney in a firm can provide short term or limited representation by staffing hotlines and pro se clinics with less worry of imputation of conflict.

Not interested in doing pro bono? Take note: the Supreme Court made several important amendments to Model Rule 6.1. Before 2004, Rule 6.1 was titled "Voluntary Pro Bono Publico Service." In 2004, Montana's Court dropped the word "voluntary" from the title. The second amendment is that where the old Rule said "[a] lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year" the Court removed the word "aspire." These changes don't make pro bono mandatory, a direction some encouraged the ABA to take. But the Montana Court's direction is clear, especially given the Rule's third change: addition of a new first line: "Every lawyer has a professional responsibility to provide legal services to those unable to pay."

In 2011, the Montana Supreme Court adjusted several rules to encourage pro bono and modest means representations by enhancing the rules concerning limited scope:

Rule 1.2 -- Scope of Representation and Allocation of Authority Between Client and Lawyer  
(c) A lawyer may limit scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing.

(1) The client's informed consent must be confirmed in writing unless:

- (i) the representation of the client consists solely of telephone consultation;
- (ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or
- (iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent in writing signed by the client, there shall be a presumption that:

- (i) the representation is limited to the attorney and the services described in writing;  
and
- (ii) the attorney does not represent the client generally or in matters other than those identified in the writing.

Rule 4.2 -- Communication with Person Represented by Counsel

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Rule 4.3 -- Dealing with Unrepresented Person

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

## **Rule 8.3 Reporting Professional Misconduct**

Part 8 of Montana's Rules of Professional Conduct is titled "Maintaining the Integrity of the Profession." The five subparts address the admission and discipline processes, offer a definition of professional misconduct, establish jurisdictional perimeters and in Rule 8.3, set out the mandate for reporting professional misconduct of attorneys and judges.

The core portion of Rule 8.3 provides:

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

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(c) This rule does not require disclosure of information otherwise protected by Rule 1.6. [Montana's Rule on confidentiality.]

For the conscientious lawyer trying to comply with Rule 8.3, life can be difficult. The rule is loaded with ambiguous terms and subjective judgments. But when confronted with apparent misconduct, the questions to ask are: 1. Do I have *knowledge* that another lawyer has committed a violation of the Rules of Professional Conduct? 2. Has a "substantial" question as to that lawyer's honesty, trustworthiness or fitness "as a lawyer in other respects" been raised? 3. When should the report be filed? 4. Who is the "appropriate professional authority"? and 5. Is the information protected from disclosure by the duty of confidentiality?

**A Very Important Case: Schuff v. A.T. Klemens**, 303 Mont. 274, 16 P.3d 1002, 2000 MT 357 (2000)

The case arose when Mr. Schuff died of severe burns two weeks following a fire in an underground gasoline storage tank where he was repairing a submersible pump. Schuff's family hired a firm that was, at the time, also representing one of the John Doe defendants, later identified in the amended complaint as A.T. Klemens & Sons. When the conflict came to light, defendant Klemens' new counsel moved to disqualify Schuff's counsel. Schuff's counsel responded that there was no substantial relationship between the work performed over the years for Klemens and Schuff's wrongful death claim. Still, Schuff's firm terminated its relationship with Klemens before the court's ruling on the motion to disqualify. The district court denied the motion to disqualify Schuff's counsel, a decision affirmed by the Supreme Court.

But, the Court wrote, "that does not end this matter. Pursuant to this Court's singular jurisdiction...over matters pertaining to lawyer discipline and claimed violations of the [Montana Rules of Professional Conduct], we conclude that the conduct of Schuff's counsel and of Klemens' trial and appellate counsel...must be referred to the Commission on Practice. If the Commission's further investigation reveals violations of the [Montana Rules of Professional Conduct] as regards counsels' conduct in this case, then the Commission may pursue appropriate prosecutions and recommendations for discipline as the facts and law may, in the Commission's discretion, warrant."

The Court elaborated: "the practicing bar should understand that the situation presented in this case is unusual. On the one hand, both in the trial court and on appeal, Klemens' counsel have maintained that Schuff's counsel engaged in unethical conduct so serious that we should reverse the trial judge's pretrial disqualification of counsel ruling; that we should set aside a substantial jury verdict in favor of an innocent widow and her children; and that we should send a case that already has been in litigation for ten years back to the District Court for retrial. We assume that Klemens' counsel has made these arguments in good faith with the view and expectation that we would grant the relief requested. And if, in fact, the Commission determines that Schuff's counsel did engage in unethical conduct as serious as Klemens' counsel claims, then, no doubt, the Commission will deal with that in an appropriate manner."

"On the other hand, if Klemens' counsel did view Schuff's counsel's conduct as being as serious as claimed, then it is, likewise, appropriate that the Commission make inquiry into why such violations were not reported to the disciplinary authority with jurisdiction to address those."

"We...emphasize that the Montana Rules of Professional Conduct are not to be ignored for economic gain nor are they to be used—or rather abused—by opposing parties as procedural weapons to gain a tactical or strategic advantage in litigation...The rules encompass ethical standards by which all attorneys are expected to conduct their practice of law; the rules are there to protect the public in general and the lawyer's clients in particular...Quite simply, a serious [Montana Rule of Professional Conduct] violation is a serious matter that needs to be taken seriously and reported promptly to the Commission."

## **Conclusion**

Prior to their enactment in 2004, Montana's Rules of Professional Conduct were vetted by no fewer than five political bodies: The ABA's Ethics 2000 Commission (a four-year process initiated in 1997); then the

ABA's House of Delegates; the State Bar's Ethics Committee, the State Bar's Board of Trustees, and finally, the Montana Supreme Court. These Rules reflect the best tools for lawyering for our time. Don't rely on this outline to highlight all of the departures from the ABA Model Rules. Read Montana's Rules. You'll be glad you did.

# MONTANA RULES OF PROFESSIONAL CONDUCT

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. 03-264

IN RE: REVISING THE  
MONTANA RULES OF  
PROFESSIONAL CONDUCT

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) ORDER  
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On April 25, 2003, the State Bar of Montana, together with its Ethics Committee, petitioned this Court to revise the Montana Rules of Professional Conduct. On May 20, 2003, we issued an order inviting the bench and bar and any interested persons to file written comments, suggestions or criticisms with the Clerk of this Court regarding the proposed revisions to the Montana Rules of Professional Conduct by September 1, 2003. We received all comments on that date.

The Court has considered each and every proposed revision and comment. We have accepted most, but not all, of the proposed revisions and have, after discussion, amended several of the proposed revisions. The attached Rules are the complete Montana Rules of Professional Conduct. Many existing Rules are not changed, others are changed subtly, some include entire new subsections and a few are entirely new. For ease of reading, no underlining or strikeouts are shown. In addition, we are deferring consideration of the proposed revisions to Rule 5.5 on the unauthorized practice of law and Rule 8.5 on disciplinary authority and choice of law until the comment period has run on the State Bar's petition for proposed revisions to the Rules which would—if adopted—establish multijurisdictional practice in Montana. Accordingly, the attached Rules 5.5 and 8.5 do not reflect any revisions.

THEREFORE, pursuant to the authority granted this Court by Article VII, Section 2(3) of the 1972 Montana Constitution, IT IS ORDERED that the Montana Rules of Professional Conduct attached to this order are ADOPTED.

IT IS FURTHER ORDERED that any existing Rules which are attached but were not revised remain in full force and effect. IT IS FURTHER ORDERED that Rules revised during this process are effective April 1, 2004.

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and mail copies of this Order with attached Montana Rules of Professional Conduct to: Robert J. Sullivan, President of the State Bar of Montana; Michael G. Alterowitz, Chair of the State Bar of Montana Ethics Commission; Chris Manos, Executive Director of the State Bar of Montana with the request that this Order be published in the next available issue of The Montana Lawyer and that this Order and the attached Montana Rules of Professional Conduct be posted to the State Bar's webpage; The State Law Librarian with a request that this Order and attached Montana Rules of Professional Conduct be posted to the State Law Library webpage; The State Reporter Publishing Company with the request that this Order and the attached Montana Rules of Professional Conduct be published in State Reporter; West Group with the request that this Order and the attached Montana Rules of Professional Conduct be published in the annual update of Montana Rules of Court; Gregory Petesch, Code Commissioner and Director of Legal Services for the Montana Legislative Services Division.

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and mail copies of this Order only to the Clerks of all of the District Courts of the State of Montana and to each District Court Judge with the request that each Clerk and each District Judge print their copy of the Montana Rules of Professional Conduct from the State Law Library webpage at: <http://www.lawlibrary.state.mt.us>

DATED this 17th day of February, 2004.

/S/ KARLA M. GRAY  
/S/ JOHN WARNER  
/S/ W. WILLIAM LEAPHART  
/S/ JAMES C. NELSON  
/S/ PATRICIA O'BRIEN COTTER  
/S/ JAMES A. RICE

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. 09-0688

IN RE: THE RULES OF  
PROFESSIONAL CONDUCT  
ON ADVERTISING

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On November 30, 2009, the Trustees of the State Bar of Montana and the Ethics Committee (Petitioners) filed with this Court a Petition and Memorandum in Support of Revision of the Rules of Professional Conduct on Advertising.

The Petition alleges the proposed amendments would (1) clarify Montana disciplinary jurisdiction over attorney advertising; (2) specifically identify types of misleading lawyer communications; and (3) recognize that Montana does not have a procedure to "qualify" a lawyer referral service.

On January 8, 2010, this Court ordered members of the bench and bar of Montana and any other interested persons 90 days to file comments and/or suggestions to the Proposed Revision to the Rules of Professional Conduct on Advertising.

We have reviewed the Petition, Memorandum and all comments and/or suggestions received and conclude that the attached amendments to the Rules of Professional Conduct on Advertising should be adopted. Therefore, good cause appearing,

IT IS HEREBY ORDERED that Rules 7.1 (Communications Concerning a Lawyer's Services), 7.2 (Advertising), and (Jurisdiction and Certification) of the Rules of Professional Conduct on Advertising are hereby amended in accordance with the attached, and by this reference made a part hereof. The deleted language of the attached, amended Rules is stricken and the underlined language is added.

IT IS FURTHER ORDERED that these amendments shall be effective immediately.

IT IS FURTHER ORDERED that the Clerk of this Court shall give notice hereof to each District Court Judge; each Clerk of the District Court; the Executive Director of the State Bar of Montana, with a request that the State Bar publish a reference or link to this order on the State Bar's website and that notice of this order be published in the Montana Lawyer; to the Montana State Law Library, with a request that it publish a reference or link to this order on the Law Library's website.

DATED this 20th day of July, 2010.

/S/ MIKE MCGRATH  
/S/ W. WILLIAM LEAPHART  
/S/ PATRICIA O'BRIEN COTTER  
/S/ MIKE WHEAT  
/S/ JAMES A. RICE  
/S/ JAMES C. NELSON

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. AF 09-0688

IN RE: CHANGES TO THE MONTANA RULES OF )  
PROFESSIONAL CONDUCT to encourage ) ORDER  
limited scope representation (LSR) in Montana )

In September of 2010, the Montana Supreme Court Equal Justice Task Force, the Montana Supreme Court Commission on Self-Represented Litigants, and the State Bar Access to Justice Committee petitioned the Court to adopt rule changes in order to encourage limited scope representation (LSR) by Montana attorneys, as one means of addressing the unmet legal needs of low-to moderate-income Montanans. For that purpose, changes were proposed to the Montana Rules of Civil Procedure and the Montana Rules of Professional Conduct.

We invited and received written public comment on the proposed rule changes. At the end of the comment period, we also heard public comment at several public meetings. At our public meeting on March 1, 2011, we voted to adopt most, but not all, of the changes proposed to the Montana Rules of Professional Conduct and the Montana Rules of Civil Procedure.

IT IS NOW ORDERED:

Rules 1.2, 4.2, and 4.3 of the Montana Rules of Professional Conduct are amended by the addition of the language highlighted and underlined below:

Rule 1.2 -- Scope of Representation and Allocation of Authority Between Client and Lawyer

[existing subsections (a) and (b) ]

(c) A lawyer may limit scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing.

(1) The client's informed consent must be confirmed in writing unless:

(i) the representation of the client consists solely of telephone consultation;

(ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or

(iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent in writing signed by the client, there shall be a presumption that:

(i) the representation is limited to the attorney and the services described in writing; and

(ii) the attorney does not represent the client generally or in matters other than those identified in the writing.

[existing subsection (d)]

Rule 4.2 -- Communication with Person Represented by Counsel

(a) [existing rule]

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Rule 4.3 -- Dealing with Unrepresented Person

(a) [existing rule]

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

The above changes to the Montana Rules of Professional Conduct shall be effective on October 1, 2011.

This Order shall be published on the Montana Supreme Court website. The Clerk is directed to provide copies of this Order to the Montana State Law Library, the State Bar of Montana, Court Services Director Beth McLaughlin, Thomson-Reuters, Chair of the State Bar Ethics Committee Michael Alterowitz, and the Montana Legislative Services Division. The Clerk is further directed to provide copies of this Order to the Chairs of the Montana Supreme Court Equal Justice Task Force, the Montana Supreme Court Commission on Self-Represented Litigants, the State Bar of Montana Access to Justice Committee, and the Advisory Commission on Rules of Civil and Appellate Procedure.

## PREAMBLE: A LAWYER'S RESPONSIBILITIES

(1) A lawyer shall always pursue the truth.

(2) A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

(3) As a representative of clients, a lawyer performs various functions. In performance of any functions a lawyer shall behave consistently with the requirements of honest dealings with others. As advisor, a lawyer endeavors to provide a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements under these Rules of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them.

(4) In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.3. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

(5) In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

(6) A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

(7) As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot

afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

(8) Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

(9) A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are harmonious. A lawyer can be a dedicated advocate on behalf of a client, even an unpopular one, but in doing so must comply with these Rules of Professional Conduct. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

(10) In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

(11) The legal profession is self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested in the courts.

(12) Self-regulation helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

(13) The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these



(i) “Partner” denotes a member of a law partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(j) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(k) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(l) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(m) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(n) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(o) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(p) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A “signed” writing includes the electronic equivalent of a signature, such as an electronic sound, symbol or process, which is attached to a writing and executed or adopted by a person with the intent to sign the writing.

## CLIENT-LAWYER RELATIONSHIP

### **RULE 1.1 - COMPETENCE**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

### **RULE 1.2 - SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing.

(1) The client’s informed consent must be confirmed in writing unless:

(i) the representation of the client consists solely of telephone consultation;

(ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating

in a nonprofit court-annexed legal services program and the lawyer’s representation consists solely of providing information and advice or the preparation of court-approved legal forms; or

(iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent in writing signed by the client, there shall be a presumption that:

(i) the representation is limited to the attorney and the services described in writing; and

(ii) the attorney does not represent the client generally or in matters other than those identified in the writing..

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

### **RULE 1.3 - DILIGENCE**

A lawyer shall act with reasonable diligence and promptness in representing a client.

### **RULE 1.4 - COMMUNICATION**

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(g), is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

### **RULE 1.5 - FEES**

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except

when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing. This paragraph does not apply in any matter in which it is reasonably foreseeable that total cost to a client, including attorney fees, will be \$500 or less.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of maintenance or support or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

### **RULE 1.6 - CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

### **RULE 1.7 - CONFLICT OF INTEREST: CURRENT CLIENTS**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

### **RULE 1.8 - CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) in matters in which a lawyer wishes to assert a retaining lien against client property, papers or materials in the lawyer's possession to secure payment for the lawyer's services and costs advanced relating to such property, papers or materials, a written agreement for such a lien shall expressly set forth the limitations contained in paragraph (i)(3);

(3) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(4) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client;

(3) a lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial

assistance before being retained by the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives written informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer:

(1) may acquire and assert a charging lien only against causes of action or counterclaims in litigation pursuant to and only to the extent specified in MCA 37-61-420(2); such a charging lien does not extend to other client property, papers or materials in the lawyer's possession, to any matter not in litigation, or to any matter otherwise not covered by the specific language of MCA 37-61-420(2);

(2) may contract with a client for a reasonable contingent fee in a civil case; and

(3) may not acquire or assert a retaining lien to secure payment due for the lawyer's services against any client property, papers or materials other than those related to the matter for which payment has not been made and, upon termination of representation, shall deliver to the client any client property, papers or materials reasonably necessary to protect the client's interest in the matter to which the property, papers or materials relate as provided in Rule 1.16(d).

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

### **RULE 1.9 - DUTIES TO FORMER CLIENTS**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter

or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

### **RULE 1.10 - IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

### **RULE 1.11 - SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES**

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to Rule 1.9(c); and
- (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a



authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

### **RULE 1.15 - SAFEKEEPING PROPERTY**

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in accordance with Rule 1.18 and this Rule. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

### **RULE 1.16 - DECLINING OR TERMINATING REPRESENTATION**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and

property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. A lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer except as required by the limitations on the retaining lien in Rule 1.8(i). Except for those client papers which a lawyer may properly retain under the preceding sentence, a lawyer shall deliver either the originals or copies of papers or materials requested or required by a client or former client and bear the copying costs involved.

### **RULE 1.17 - GOVERNMENT EMPLOYMENT**

An attorney employed full time by the State of Montana or a political subdivision shall not accept other employment during the course of which it would be possible to use or otherwise rely on information obtained by reason of government employment that is injurious, confidential or privileged and not otherwise discoverable.

### **RULE 1.18 - INTEREST ON LAWYER TRUST ACCOUNTS (IOLTA) PROGRAM**

(a) Purpose. The purpose of the Interest on Lawyer Trust Accounts (IOLTA) program is to provide funds for the Montana Justice Foundation to pay the reasonable costs of administering the program and to make grants to entities with missions within the following general categories:

(1) Providing legal services, through both paid staff program(s) and pro bono program(s), to Montana's low income citizens who would otherwise be unable to obtain legal assistance;

(2) promoting a knowledge and awareness of the law; and

(3) improving the administration of justice.

(b) Required participation. IOLTA program participation is mandatory, except as provided in subsection (d), below. Every non-exempt lawyer admitted to practice in Montana, and/or every law firm composed of any such lawyers, which receives client funds, shall establish and maintain an interest-bearing trust account for pooled client funds, termed an "IOLTA Trust Account." Each lawyer/firm shall also establish separate interest-bearing trust accounts for individual clients, termed "Client Trust Accounts," when appropriate pursuant to this Rule.

(c) Administration.

(1) Deposits of clients' funds.

(A) All client funds paid to a lawyer/firm, including advances for costs and expenses, shall be deposited and maintained in one or more identifiable interest-bearing trust accounts (Trust Accounts) in the State of Montana. No funds belonging to the lawyer/firm shall be deposited into a Trust Account except:

(i) funds reasonably sufficient to pay account charges not offset by interest;

(ii) an amount to meet a minimum balance requirement for the waiver of service charges; and/or

(iii) funds belonging in part to a client and in part presently or potentially to the lawyer/firm, but the portion belonging to the lawyer/firm shall be withdrawn when due unless the right of the lawyer/firm to such funds is disputed by the client, in which event the disputed portion shall remain in the account until the dispute is resolved.

(B) The lawyer/firm shall comply with all Rules relating to preserving the identity of clients' funds and property.

(C) Every Trust Account shall be established with a federally-insured and state or federally regulated financial institution authorized by federal or state law to do business in Montana. Funds in each Trust Account shall be subject to immediate withdrawal.

(D) The interest rate payable on a Trust Account shall not be less than the rate paid to non-lawyer depositors. Higher rates offered for deposits meeting certain criteria, such as certificates

of deposit, may be obtained on Trust Account funds if immediate withdrawal is available.

(E) Every Trust Account shall bear the name of the lawyer/firm and be clearly designated as either an IOLTA Trust Account or a Client Trust Account established under this Rule.

(2) IOLTA Trust Accounts. Every IOLTA Trust Account shall comply with the following provisions:

(A) The lawyer/firm shall maintain all client funds that are either nominal in amount or to be held for a short period of time in an IOLTA Trust Account.

(B) No client may elect whether his/her funds should be deposited in an IOLTA Trust Account, receive interest or dividends earned on funds in an IOLTA Trust Account, or compel a lawyer/firm to invest funds that are nominal in amount or to be held for a short period of time in a Client Trust Account.

(C) The determination of whether a client's funds are nominal in amount or to be held for a short period of time rests solely in the sound judgment of each lawyer/firm. No charge of professional misconduct or ethical impropriety shall result from a lawyer's exercise of good faith judgment in that regard.

(D) To determine if a client's funds should be deposited in an IOLTA Trust Account, a lawyer/firm may be guided by considering:

(i) the amount of interest the funds would earn during the period they are expected to be deposited;

(ii) the costs of establishing and administering the account, including the lawyer's/firm's fees, accounting fees and tax reporting requirements;

(iii) the amount of funds involved, the period of time they are expected to be held and the financial institution's minimum balance requirements and service charges;

(iv) the financial institution's ability to calculate and pay interest to individual clients; and

(v) the likelihood of delay in the relevant transaction or proceeding.

(E) The lawyer/firm shall require the financial institution in which the IOLTA Trust Account is established to:

(i) remit to the Montana Justice Foundation, at least quarterly, all interest or dividends on the average monthly balance in the IOLTA Trust Account, or as otherwise computed according to the institution's standard accounting practices, less reasonable service fees, if any;

(ii) with each remittance, provide the Montana Justice Foundation and the lawyer/firm with a statement showing for which lawyer/firm the remittance is sent, the period covered, the rate of interest applied, the total amount of interest earned, any service fees assessed against the account and the net amount of interest remitted;

(iii) charge no fees against an IOLTA Trust Account greater than fees charged to non-lawyer depositors for similar accounts, or which are otherwise unreasonable; and

(iv) collect no fees from the principal deposited in the IOLTA Trust Account.

(F) Annually the Montana Justice Foundation shall make available a list of all financial institutions offering IOLTA accounts and meeting this Rule's IOLTA depository qualifying requirements. Lawyers/firms shall be entitled to rely on the most recently published list for purposes of IOLTA Rule compliance. The Montana Justice Foundation shall pay all service charges incurred in operating an IOLTA Trust Account from IOLTA funds, to the extent the charges exceed those incurred in operating non-interest-bearing checking accounts at the same financial institution.

(G) Confidentiality. The Montana Justice Foundation shall protect the confidentiality of information regarding Trust Accounts pursuant to this Rule.

(3) Non-IOLTA client Trust Accounts. All client funds shall be deposited in an IOLTA Trust Account, unless they are deposited

in a separate interest-bearing account for a particular client's matter with the net interest paid to the client. Such interest must be held in trust as the property of the client as provided in this Rule for the principal funds of the client.

(d) A lawyer/firm is exempt from this Rule's requirements if:

(1) the nature of their practice is such that no client funds are ever received requiring a Trust Account;

(2) the lawyer practices law in another jurisdiction and not in Montana;

(3) the lawyer is a full-time judge, or government, military or inactive lawyer; or

(4) the Montana Justice Foundation's Board of Directors, on its own motion, exempts the lawyer/firm from participation in the program for a period of no more than two years when:

(A) service charges on the lawyer's/firm's Trust Account equal or exceed any interest generated; or

(B) no financial institution in the county where the lawyer/firm does business will accept IOLTA accounts.

(e) Lawyer filings and records.

(1) Filings. Each lawyer/firm shall file an annual certificate of compliance with or exemption from this Rule with the Montana Justice Foundation. The certification must include the name of the lawyer/firm listed on the account, the account number, and the financial institution name and address. The certification may be made in conjunction with the annual dues billing process. Failure to provide the certification may result in suspension from the practice of law in this state until the lawyer complies with the requirements of this Rule.

(2) Records. Lawyer trust accounts shall be maintained as prescribed by the Montana Supreme Court in the "Trust Account Maintenance and Audit Requirements" (adopted February 27, 1989).

(f) Implementation. Implementation will be effected through this Rule and the Rules of the State Bar of Montana, all as amended and approved by the Montana Supreme Court.

## **RULE 1.19 - SALE OF LAW PRACTICE**

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in the geographic area in which the practice has been conducted.

(b) The entire practice is sold to one or more lawyers or law firms.

(c) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

## **RULE 1.20 - DUTIES TO PROSPECTIVE CLIENTS**

(a) A person who consults with or has had consultations with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had consultations with a prospective client shall not use or reveal information learned in the consultation(s), except

as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the prospective client.

## COUNSELOR

### **RULE 2.1 - ADVISOR**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

### **RULE 2.2 - EVALUATION FOR USE BY THIRD PERSONS**

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

### **RULE 2.3 - LAWYER SERVING AS THIRD-PARTY NEUTRAL**

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, settlement master, mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform all parties that the lawyer is not representing them. The lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

## ADVOCATE

### **RULE 3.1 - MERITORIOUS CLAIMS AND CONTENTIONS**

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein:

- (1) without having first determined through diligent investigation that there is a bona fide basis in law and fact for the position to be advocated;
  - (2) for the purpose of harassment, delay, advancement of a nonmeritorious claim or solely to gain leverage; or
  - (3) to extend, modify or reverse existing law unless a bona fide basis in law and fact exists for advocating doing so.
- (b) A lawyer for the defendant in a criminal proceeding, or the

respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

### **RULE 3.2 - EXPEDITING LITIGATION**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

### **RULE 3.3 - CANDOR TOWARD THE TRIBUNAL**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

### **RULE 3.4 - FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

### **RULE 3.5 - IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person except as permitted by law; or
- (c) engage in conduct intended to disrupt a tribunal.

### **RULE 3.6 - TRIAL PUBLICITY**

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):

- (i) the identity, residence, occupation and family status of the accused;
- (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
- (iii) the fact, time and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

### **RULE 3.7 - LAWYER AS WITNESS**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

### **RULE 3.8 - SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain

counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule consistent with the Confidential Criminal Justice Information Act.

### **RULE 3.9 - ADVOCATE IN NONADJUDICATIVE PROCEEDINGS**

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

## **OTHER THAN CLIENTS**

### **RULE 4.1 - TRUTHFULNESS IN STATEMENT TO OTHERS**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

### **RULE 4.2 - COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

**RULE 4.3 - DEALING WITH UNREPRESENTED PERSON**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

**RULE 4.4 - RESPECT FOR RIGHTS OF THIRD PERSONS**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

**LAW FIRMS AND ASSOCIATIONS**

**RULE 5.1 - RESPONSIBILITIES OF PARTNERS, MANAGERS AND SUPERVISORY LAWYERS**

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer within a firm shall be responsible for another lawyer in the firm's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies or ignores the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**RULE 5.2 - RESPONSIBILITIES OF A SUBORDINATE LAWYER**

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if the lawyer acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty.

**RULE 5.3 - RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies or ignores the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**RULE 5.4 - PROFESSIONAL INDEPENDENCE OF A LAWYER**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.19, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

**RULE 5.5 - UNAUTHORIZED PRACTICE OF LAW**

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

## **RULE 5.6 - RESTRICTIONS ON RIGHT TO PRACTICE**

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

### **PUBLIC SERVICE**

## **RULE 6.1 - PRO BONO PUBLICO SERVICE**

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should render at least fifty (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the fifty (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

## **RULE 6.2 - ACCEPTING APPOINTMENTS**

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

## **RULE 6.3 - MEMBERSHIP IN LEGAL SERVICES ORGANIZATION**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

## **RULE 6.4 - LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS**

A lawyer may serve as a director, officer or member of an

organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

## **RULE 6.5 - NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS**

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

### **INFORMATION ABOUT LEGAL SERVICES**

## **RULE 7.1 - COMMUNICATIONS CONCERNING A LAWYER'S SERVICES**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false if it contains a material misrepresentation of fact or law. A misleading communication includes, but is not limited to those that:

(a) omits a fact as a result of which the statement considered as a whole is materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve;

(c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;

(d) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(e) compares the quality of a lawyer's or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;

(f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;

(g) indicates an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such fact;

(h) contains any paid testimonial about, or endorsement of, the lawyer without conspicuous identification of the fact that payments have been made for the testimonial or endorsement;

(i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation;

(j) provides an office address for an office staffed only part time or by appointment only, without conspicuous identification of such fact;

(k) states that legal services are available on a contingent or no-recovery, no-fee basis without stating conspicuously that the client may be responsible for costs or expenses, if that is the case; or

(l) advertises for legal services without indentifying the jurisdictions in which the lawyer is licensed to practice.

**RULE 7.2 - ADVERTISING**

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:
  - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
  - (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and
  - (3) pay for a law practice in accordance with Rule 1.19.
- (c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

**RULE 7.3 - DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
  - (1) is a lawyer; or
  - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
  - (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;
  - (2) the solicitation involves coercion, duress or harassment;
  - (3) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person cannot exercise reasonable judgment in employing a lawyer; or
  - (4) the lawyer reasonably should know that the person is already represented by another lawyer.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan. Lawyers who participate in a legal services plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).

**RULE 7.4 - COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION**

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his/her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.
- (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
- (c) A lawyer engaged in Admiralty practice may use the

designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

- (d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
  - (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
  - (2) the name of the certifying organization is clearly identified in the communication.

**RULE 7.5 - FIRM NAMES AND LETTERHEADS**

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional (e.g., website) designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- (c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
- (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

**MAINTAINING THE INTEGRITY OF THE PROFESSION**

**RULE 8.1 - BAR ADMISSION AND DISCIPLINARY MATTERS**

- An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
  - (a) knowingly make a false statement of material fact; or
  - (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

**RULE 8.2 - JUDICIAL AND LEGAL OFFICIALS**

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
- (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct.

**RULE 8.3 - REPORTING PROFESSIONAL MISCONDUCT**

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- (b) A lawyer who knows that a judge has committed a violation of applicable code of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.



# **THE MORES OF MONTANA LAW CULTURE**

**Randy J. Cox**  
**Boone Karlberg P.C.**

## THE MORES OF MONTANA LAW CULTURE

Randy J. Cox  
Boone Karlberg P.C.

Mores are defined as “folkways of central importance accepted without question and embodying the fundamental moral views of a group.” Always remember, the practice of law is a privilege – not a right. It is a profession, not an occupation.

“It takes a lifetime to build a reputation – and ten seconds to destroy it.” Words of sound advice spoken to a young lawyer many years ago.

If you are involved in litigation, much of the conduct from which you will be known by other lawyers is your communications (letters, emails, briefs) and how you handle discovery.

One thing you do not want to find out about first-hand is this: The Montana Supreme Court has original and exclusive jurisdiction in all matters involving the conduct of attorneys practicing law in Montana.

- You do not want to be in front of the Supreme Court defending unethical or sanctionable conduct. The Court takes a dim and unfriendly view of uncooperative, bickering, unprofessional litigation and discovery conduct.
  - o The Rules of Professional Conduct are “not to be ignored for economic gain nor are they to be used - - or rather abused - - by opposing parties as procedural weapons to gain a tactical or strategic advantage in litigation. *Schuff v. A.T. Klemens & Son*, [cite]
  - o The Court has made it clear that “abuse of discovery must no longer be dealt with leniently and that the transgressors of discovery abuses should be punished rather than encouraged repeatedly to cooperate.” *Id.*
  - o Imposition of sanctions for failure to comply with discovery procedures is regarded with favor. “It is, after all, a maxim of our rules of discovery that the price for dishonesty must be made unbearable to thwart the inevitable temptation that zealous advocacy inspires.” *Id.*

Regarding litigation and discovery conduct, the words of the Supreme Court should guide you:

- o “Modern instruments of discovery, together with pre-trial procedures, make a trial less a game of blindman’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *Richardson v. State*, 2006 MT 43, ¶ 22.
- o The “repeated claim that the information sought was ‘irrelevant and not reasonably calculated to lead to the discovery of admissible evidence’ was a plain abuse of the discovery process. *Id.* ¶36

- “Achieving a speedy and inexpensive determination is contingent upon timely disclosure, which is thwarted by protracted legal wrangling over semantic nuances and technicalities.” Id., ¶163.
- “The first sentence in the Preamble of the Montana Rules of Professional Conduct states that a ‘lawyer shall always pursue the truth.’” Id., ¶164.

Where to learn how to conduct ourselves as lawyers?

- Obvious places:
  - Rules of Professional Conduct
  - The Preamble to the Rules of Professional Conduct
    -
- Other Sources:
  - American Board of Trial Advocates
    - Principles of Civility, Integrity, and Professionalism
    - Code of Professionalism
  - American College of Trial Lawyers
    - Code of Conduct for Trial Lawyers and Judges Involved in Civil Cases with Self-Represented Parties
    - Code of Pretrial and Trial Conduct
  - From The Lawyer’s Deskbook and Directory published by the State Bar:
    - Standards of Professional Courtesy to Clients
    - Standards of Professional Courtesy Among Attorneys
    - Standards of Professional Courtesy and Ethics Between the Judiciary and Attorneys
    - Ten Commandments for Trial Lawyers
    - Montana Values – Past Presidents Committee of the State Bar of Montana
  - Well-established, well-known lawyers



AMERICAN BOARD OF TRIAL ADVOCATES

## Code of Professionalism

*As a member of the American Board of Trial Advocates, I shall*



*Always remember that the practice of law is first and foremost a profession.*



*Encourage respect for the law, the courts, and the right to trial by jury.*



*Always remember that my word is my bond and honor my responsibilities to serve  
as an officer of the court and protector of individual rights.*



*Contribute time and resources to public service, public education, charitable and  
pro bono activities in my community.*



*Work with the other members of the bar, including judges, opposing counsel, and  
those whose practices are different from mine, to make our system of justice  
more accessible and responsive.*



*Resolve matters and disputes expeditiously, without unnecessary expense, and  
through negotiation whenever possible.*



*Keep my clients well-informed and involved in making decisions affecting them.*



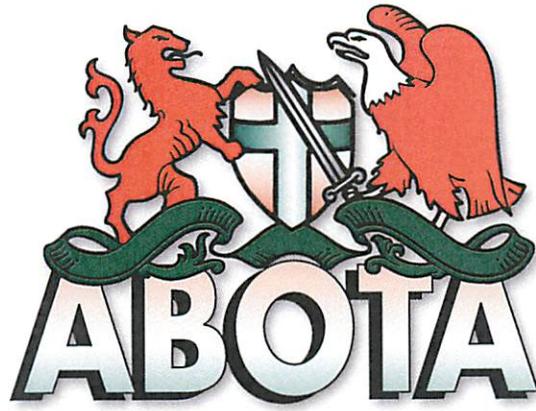
*Achieve and maintain proficiency in my practice and continue to expand  
my knowledge of the law.*



*Be respectful in my conduct toward my adversaries.*



*Honor the spirit and intent, as well as the requirements of applicable rules or  
codes of professional conduct, and shall encourage others to do so.*



American Board of Trial Advocates

**PRINCIPLES OF CIVILITY,  
INTEGRITY,  
AND PROFESSIONALISM**

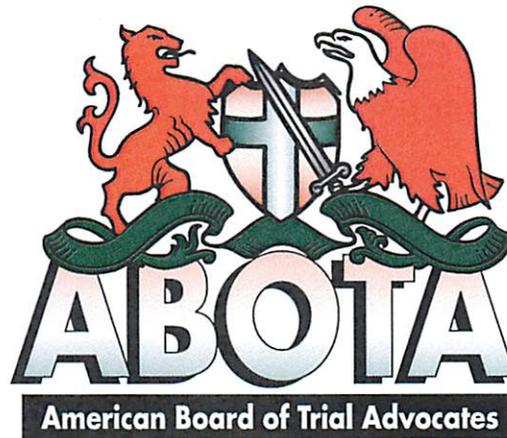
## Preamble

These Principles supplement the precepts set forth in ABOTA's Code of Professionalism and are a guide to the proper conduct of litigation. Civility, integrity, and professionalism are the hallmarks of our learned calling, dedicated to the administration of justice for all. Counsel adhering to these principles will further the truth-seeking process so that disputes will be resolved in a just, dignified, courteous, and efficient manner.

These principles are not intended to inhibit vigorous advocacy or detract from an attorney's duty to represent a client's cause with faithful dedication to the best of counsel's ability. Rather, they are intended to discourage conduct that demeans, hampers, or obstructs our system of justice.

These Principles apply to attorneys and judges, who have mutual obligations to one another to enhance and preserve the dignity and integrity of our system of justice. As lawyers must practice these Principles when appearing in court, it is not presumptuous of them to expect judges to observe them in kind. The Principles as to the conduct of judges set forth herein are derived from judiciary codes and standards.

These Principles are not intended to be a basis for imposing sanctions, penalties, or liability, nor can they supersede or detract from the professional, ethical, or disciplinary codes of conduct adopted by regulatory boards.



*As a member of the American Board of Trial Advocates, I will adhere to the following Principles:*

1. Advance the legitimate interests of my clients, without reflecting any ill will they may have for their adversaries, even if called on to do so, and treat all other counsel, parties, and witnesses in a courteous manner.
2. Never encourage or knowingly authorize a person under my direction or supervision to engage in conduct proscribed by these principles.
3. Never, without good cause, attribute to other counsel bad motives or improprieties.
4. Never seek court sanctions unless they are fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to informally resolve the issue with counsel.
5. Adhere to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom.
6. When called on to do so, commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.
7. Timely confer with other counsel to explore settlement possibilities and never falsely hold out the potential of settlement for the purpose of foreclosing discovery or delaying trial.
8. Always stipulate to undisputed relevant matters when it is obvious that they can be proved and where there is no good faith basis for not doing so.
9. Never initiate communication with a judge without the knowledge or presence of opposing counsel concerning a matter at issue before the court.
10. Never use any form of discovery scheduling as a means of harassment.
11. Make good faith efforts to resolve disputes concerning pleadings and discovery.
12. Never file or serve motions or pleadings at a time calculated to unfairly limit opposing counsel's opportunity to respond.

13. Never request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.
14. Consult other counsel on scheduling matters in a good faith effort to avoid conflicts.
15. When calendar conflicts occur, accommodate counsel by rescheduling dates for hearings, depositions, meetings, and other events.
16. When hearings, depositions, meetings, or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously-reserved time for other matters.
17. Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect my client's legitimate rights.
18. Never cause the entry of a default or dismissal without first notifying opposing counsel, unless material prejudice has been suffered by my client.
19. Never take depositions for the purpose of harassment or to burden an opponent with increased litigation expenses.
20. During a deposition, never engage in conduct which would not be appropriate in the presence of a judge.
21. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.
22. During depositions, ask only those questions reasonably necessary for the prosecution or defense of an action.
23. Draft document production requests and interrogatories limited to those reasonably necessary for the prosecution or defense of an action, and never design them to place an undue burden or expense on a party.
24. Make reasonable responses to document requests and interrogatories and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and nonprivileged documents.
25. Never produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.
26. Base discovery objections on a good faith belief in their merit, and not for the purpose of withholding or delaying the disclosure of relevant and nonprivileged information.
27. When called on, draft orders that accurately and completely reflect a court's ruling, submit them to other counsel for review, and attempt to reconcile any differences before presenting them to the court.
28. During argument, never attribute to other counsel a position or claim not taken, or seek to create such an unjustified inference.
29. Unless specifically permitted or invited, never send to the court copies of correspondence between counsel.

## When In Court I Will:

1. Always uphold the dignity of the court and never be disrespectful.
2. Never publicly criticize a judge for his or her rulings or a jury for its verdict. Criticism should be reserved for appellate court briefs.
3. Be punctual and prepared for all court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.
4. Never engage in conduct that brings disorder or disruption to the courtroom.
5. Advise clients and witnesses of the proper courtroom conduct expected and required.
6. Never misrepresent or misquote facts or authorities.
7. Verify the availability of clients and witnesses, if possible, before dates for hearings or trials are scheduled, or immediately thereafter, and promptly notify the court and counsel if their attendance cannot be assured.
8. Be respectful and courteous to court marshals or bailiffs, clerks, reporters, secretaries, and law clerks.

## Conduct Expected of Judges

*A lawyer is entitled to expect judges to observe the following Principles:*

1. Be courteous and respectful to lawyers, parties, witnesses, and court personnel.
2. Control courtroom decorum and proceedings so as to ensure that all litigation is conducted in a civil and efficient manner.
3. Abstain from hostile, demeaning, or humiliating language in written opinions or oral communications with lawyers, parties, or witnesses.
4. Be punctual in convening all hearings and conferences, and, if unavoidably delayed, notify counsel, if possible.
5. Be considerate of time schedules of lawyers, parties, and witnesses in setting dates for hearings, meetings, and conferences. When possible, avoid scheduling matters for a time that conflicts with counsel's required appearance before another judge.
6. Make all reasonable efforts to promptly decide matters under submission.
7. Give issues in controversy deliberate, impartial, and studied analysis before rendering a decision.
8. Be considerate of the time constraints and pressures imposed on lawyers by the demands of litigation practice, while endeavoring to resolve disputes efficiently.
9. Be mindful that a lawyer has a right and duty to present a case fully, make a complete record, and argue the facts and law vigorously.
10. Never impugn the integrity or professionalism of a lawyer based solely on the clients or causes he represents.
11. Require court personnel to be respectful and courteous toward lawyers, parties, and witnesses.
12. Abstain from adopting procedures that needlessly increase litigation time and expense.
13. Promptly bring to counsel's attention uncivil conduct on the part of clients, witnesses, or counsel.

Ever wonder what happened to the ideals of civility, integrity, and professionalism to which you aspired in law school? They are alive and well in the American Board of Trial Advocates. Admittedly, these principles are difficult to define. Nevertheless, the legal profession as a whole and each individual lawyer and judge must adopt and practice these concepts so that the members of our profession will again be looked upon as the greatest protectors of our life, liberty, and property.

Please join ABOTA in making these principles a reality once again.



**American Board of Trial Advocates**

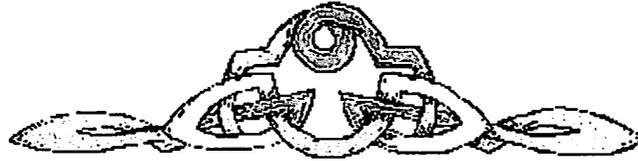
2001 Bryan Street

Suite 3000

Dallas, TX 75201

Phone: 800-93-ABOTA

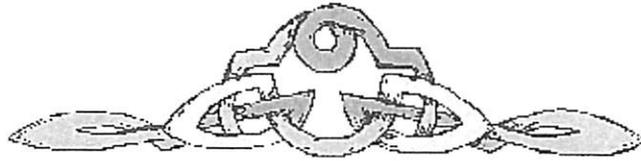
[www.abota.org](http://www.abota.org)



## TEN COMMANDMENTS FOR TRIAL LAWYERS

1. Never lie to or mislead another lawyer.
2. Don't make a practice of practicing by default, or of taking advantage of opposing counsel on technicalities. There are cases in which a client's interest may be the overriding consideration, but all too often the phrase, "I have to protect my client's rights", is used to justify unprofessional action. This guideline is particularly applicable where whatever advantage you are seeking can be corrected by opposing counsel with a motion and hearing before a judge.
3. Never force the opposing counsel to do something the hard way, such as requiring the filing of a superfluous Court order.
4. Promptly return all telephone calls of other lawyers.
5. Try to accommodate an opposing lawyer's schedule as far as reasonably possible.
6. On discovery matters, call opposing counsel and try to work out problems rather than precipitously resorting to motion practice and applications for sanctions. Remember, motions to compel discovery are sometimes absolutely necessary, but are unsatisfactory a great percentage of time -- and judges don't like them.
7. Practice law so that you need few favors from opposing counsel, but also practice law so that when you need a favor, opposing counsel will not refuse you.
8. Avoid brash and militant stances. Being militant tends to give opposing counsel extra incentive to come after you, and reduces the likelihood of compromise. A corollary of this guideline is to avoid unnecessarily abrasive letters. Too many lawyers believe a nasty letter will gain an advantage when, in fact, all it does is squelch civilized communication. When you write a letter, consider for a moment what effect it will have.
9. Don't bad-mouth other lawyers.
10. Always be willing to give advice to other lawyers upon request.

-- George C. Dalthorp, Esq., Montana (1986)



## MONTANA VALUES

These are core values of Montana lawyers that inspire us to practice with integrity and seek justice:

1. Seek truth and be honest;
2. Strive for excellence in our practice;
3. Treat all with respect, civility and courtesy;
4. Respect the law, and appreciate and understand its development and institutions;
5. Foster fairness in the justice system;
6. Serve the community;
7. Provide access to justice;
8. Engage in pro bono representation; and
9. Develop the profession of law.

-- Past Presidents Committee, State Bar of Montana (2009)



## STANDARDS OF PROFESSIONAL COURTESY TO CLIENTS

I will try to achieve a desirable and just result for my clients as quickly and inexpensively as possible considering all available methods of dispute resolution.

I will communicate regularly with my clients and inform them of all developments. I will respond promptly and courteously to their telephone calls and letters.

I will discuss with my clients a timetable for handling the case, estimate fees and costs, and provide them with a realistic evaluation of the potential outcome.

I will be loyal to my clients' confidences and secrets.

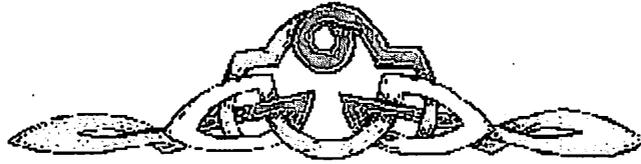
I will diligently represent my clients and I will give them objective and independent advice.

I will avoid using tactics that intentionally delay a case, harass or abuse another party, or drain a party's financial resources.

I will act in a civil and courteous manner at all times.

While I recognize that disagreements between parties may cause harsh feelings, I will act with compassion and not make personal attacks on other parties, their lawyers, or the court.

I will consider my clients' time to be as valuable as my own and will not keep them waiting for appointments.



## **STANDARDS OF PROFESSIONAL COURTESY AMONG ATTORNEYS**

We will serve our community and our profession and will rededicate ourselves to the highest ideals of the profession not only for the benefit of the public but also for the enrichment of the system of justice.

We will remember a dispute is between the parties and not between the attorneys. Effective representation does not require antagonistic behavior.

We will never intentionally mislead another attorney.

We will practice law so that we need few favors from opposing counsel, but we will practice law so that when we need a favor, opposing counsel will not refuse us.

We will be civil and prompt in all communications and will return telephone calls and respond to letters in a timely manner.

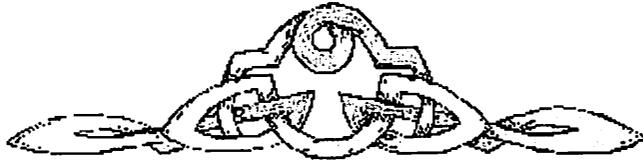
We will not quarrel over matters of form or style, but will concentrate on matters of substance.

We will refrain from making and will not tolerate derogatory comments or personal attacks upon other attorneys, their clients, or the judiciary.

We will contact opposing counsel before scheduling hearings or noticing depositions. We will cooperate with opposing counsel in responding to all reasonable requests for scheduling accommodations, for extensions of time, and waiver of procedural formalities.

We will prepare documents accurately, reflecting the agreement of the parties and will observe all understandings and adhere to all agreements with other attorneys.

We will not practice by default or by taking advantage of opposing counsel on technicalities. Unless it is necessary for protection of our client's case and is fully justified by the circumstances, we will not seek sanctions or disqualification of opposing counsel.



## **STANDARDS OF PROFESSIONAL COURTESY AND ETHICS BETWEEN THE JUDICIARY AND ATTORNEYS**

The protection and preservation of the dignity, independence, credibility, fairness and efficiency of the administration of justice is the indivisible and primary responsibility of the bench and the bar. There are, however, discrete functions that attach to this responsibility which are defined by the following specific standards.

Courts not only implement but symbolize the administration of justice and their effectiveness depends upon public trust and belief.

The judiciary must therefore refrain from conduct or unjust or unnecessary criticism that will bring disrespect to the judiciary.

Courts have a fundamental duty to insure full and complete justice to all parties regardless of the case or the identity of the party.

Judges should generally rule in accordance with applicable statutes, precedents and facts regardless of personal bias or conviction, without regard to the effect on the parties and with a full and balanced exposition of the reasons for all rulings.

Attorneys are bound, as officers of the court, to inform the court of all applicable laws and not to misrepresent to the court any pertinent fact, regardless of the effect such law or fact may have on the court's ruling or the judgement of a jury.

The proper administration of justice requires disposition of all cases in as expeditious and economical manner as is consistent with full presentation, consideration and deliberation.

Attorneys are therefore required to minimize undue delay, to cooperate fully with clients and opposing counsel in advancing cases in an orderly and timely fashion, and to bring to the attention of the court for appropriate action any impermissible delay.

The judiciary is likewise required to minimize delays, inadvertent or intended; to promulgate rules and procedures for the rapid and complete disposition of all cases, enforce diligently and impartially such rules and procedures, and to decide promptly all matters submitted to it.

Strong public support of the judicial system is vital to the ability of the bench and bar to discharge their duties.

The bench and bar shall accord common courtesy, respect, and civility on all occasions to all persons involved in the judicial process.

The bench and bar shall always be conscious of the broader duty to the administration of justice and their duty to the legal system.

In sum, the bench and bar shall act to ensure that all judicial proceedings are conducted in a manner which will preserve and foster the integrity of the judicial system.