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MONTANA ADMINISTRATIVE REGISTER

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1999 ISSUE NO. 5
MARCH 11, 1999
PAGES 399-430



MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 5

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are found at the back of each register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Administrative Rules Bureau at (406) 444-2055.

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BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the proposed)	NOTICE OF PROPOSED
adoption of new rules)	ADOPTION
permitting the referral of)	
Department of Justice debts)	NO PUBLIC HEARING
to the Department of)	CONTEMPLATED
Administration or other)	
agency designated)	
by law.)	

TO: All Interested Persons

1. On April 12, 1999, the Department of Justice proposes to adopt rules permitting the referral of its debts to the Department of Administration, or other agency designated by law, for collection purposes.

2. The rules as proposed to be adopted provide as follows:

[RULE I] DEFINITIONS (1) "Debt" means a monetary sum owed to the state of Montana.

(2) "Department" means the department of justice.

(3) "Offset" means a deduction from monies due to a person or entity from the state for the purpose of recovering in total or in part a debt owed by the person or entity to the state. An offset is undertaken by the department of administration, or other agency designated by law, under the authority of 17-4-105, MCA. Offset may include but is not limited to an offset of a person or an entity's state tax refund.

(4) "Recovery" means any measure undertaken by the department of administration, or other agency designated by law, under the authority of 17-4-101, MCA et seq., in accordance with that agency's rules and policies as a means of recovering a debt owed by a person or entity to the state of Montana. Recovery may include but is not limited to assignment to a collection agency and litigation.

AUTH: 2-4-201, MCA
IMP: 17-4-110, MCA

[RULE II] REFERRAL FOR RECOVERY AND OFFSET (1) The department under the authority of 17-4-104, MCA, may refer to the department of administration, or other agency designated by law, for recovery and offset of any debt owed to the department.

(2) The department must determine that a debt is uncollectible by the department before the debt may be referred to the department of administration, or other agency designated by law.

AUTH: 2-4-201, MCA
IMP: 17-4-110, MCA

[RULE III] UNCOLLECTIBLE DEBT (1) A debt is uncollectible by the department, if the department has determined that:

(a) the debt is owing to the department;

(b) the debtor has either not pursued available administrative due process within the department or has failed to prevail in the available administrative due process within the department or in any appeal from that administrative due process to the state or federal courts;

(c) the debtor has failed to pay the debt after the department has made all reasonable efforts to collect the debt; and

(d) the department has no administrative means such as recoupment from current payments by which to recover the debt.

(2) The department has made all reasonable efforts to collect a debt when the debt remains owed in whole or in part after:

(a) the department has utilized appropriate notices directed at the debtor's last known address to inform the debtor of the debt owed and the debtor cannot be contacted; or

(b) the department has provided the debtor with an opportunity to enter into a repayment agreement based on a schedule for debt repayment that the department determines is appropriate and the debtor has failed to cooperate or the debtor is failing to repay the debt.

(3) A debtor is failing to repay a debt when the debtor has failed to make a monthly or other payment for which the department has mailed notice of delinquency, including a demand for cure of the delinquency within ten days from the date of mailing.

AUTH: 2-4-201, MCA

IMP: 17-4-110, MCA

[RULE IV] FORMS (1) The department shall refer a debt to the department of administration, or other agency designated by law, on the attached form.

**STATE OF MONTANA
DEPARTMENT OF ADMINISTRATION
BAD DEBT CERTIFICATION & TRANSFER FORM**

Agency Name:		(Department Use Only)		
		Document Locator No.	▶	
Instructions: Prepare five copies, keeping the last copy for agency file; send remaining four copies to the Department of Administration, Debt Collection Services, Mitchell Building, Helena, MT 59620. A complete file on bad debt must accompany form. See MOM Chapter 2-1100 for necessary instructions.		Agency Document No.	▶	
		No Warrant Trans. Doc. No.	▶	
DATA PROCESSING ENCODING SUMMARY				
	Agency No.	Accounting Entity	Principal Amount Due	Account Name
02				
	Interest	Penalties	Other Charges	Account Address
	Social Security No.		Employer I.D. No.	
HISTORY OF COLLECTION				
ORIGINAL TRANSACTION				
Date	Debt Description		Debt Code	Principal Amount Due
Annual Interest %	Interest	Penalties	Other Charges	Total Amount Due

AGENCY COLLECTION PROCEDURES		
Date of First Notice	Check appropriate box:	
	<input type="checkbox"/> Demand for payment was sent to debtor's last known address, but debtor cannot be contacted there;	
Date of Final Notice	<input type="checkbox"/> Debtor has been offered an appropriate installment payment schedule, but Debtor has declined to agree to the schedule; or	
	<input type="checkbox"/> Although Debtor agreed to an installment schedule, Debtor has not made an installment payment within ten days of the Department's demand letter providing notice of delinquency.	
CERTIFICATION AND TRANSFER		
I hereby certify this to be a valid debt of the State of Montana and that every means of collection of the Account Receivable identified herein has been utilized according to agency criteria for uncollectibility. This notice will evidence our intent to transfer this debt to the Department of Administration, Debt Collection Services.		
Signature of Agency Official	Title	Date
ACCEPTANCE AND WRITE OFF AUTHORITY		
<input type="checkbox"/> Approved We hereby accept this debt.		
<input type="checkbox"/> Not Approved See attached material.		
Signature of Agency Official	Title	Date

AUTH: 2-4-201, MCA
 IMP: 17-4-110, MCA

3. The Department of Administration offers to state agencies a debt offset program. The program matches debts owed to state agencies against payments about to be made to the debtors. Such payments represent, among other things, tax refunds and consideration for goods sold to the state. When the offset program finds a match, it offsets the payment intended for the debtor with the state debt owed by the same debtor. The money is then transferred to the state agency. The offset program is an efficient and effective means of debt collection for state agencies.

The Department of Justice desires to use the offset program to

collect debts owed to it. These debts will, for the most part, involve video gambling machine taxes collected by the Gambling Control Division. Other debts, however, may also be referred for offset.

In order to participate in the offset program, the Department of Justice must adopt rules and forms. Such adoption is required by 17-4-110, MCA.

4. Interested parties may submit their data, views or arguments concerning the proposed rules in writing to Ed Nolde, Department of Justice, 215 North Sanders, P.O. Box 201401, Helena, MT 59620, no later than April 8, 1999.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Ed Nolde, Department of Justice, 215 North Sanders, P.O. Box 201401, Helena, MT 59620. The request must be received no later than April 8, 1999.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption, from the Administrative Rule Review Committee of the legislature, from a governmental subdivision or agency, or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 170 persons based on the 1700 video gambling operators licensed in Montana.

7. The Department of Justice maintains an interested person list so that all interested parties are informed of prospective rule changes. Persons interested in being on this list should contact Melanie Symons, 215 North Sanders, P.O. Box 201401, Helena, MT 59620.

DEPARTMENT OF JUSTICE

By:

Chris D. Justice, Chief Counsel
JOSEPH P. MAZUREK
Attorney General

By:

Melanie Symons
Melanie Symons
Assistant Attorney General
Rule Reviewer

Certified to the Secretary of State February 26, 1999.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment)
of rules 4.10.1001, 4.10.1003,) NOTICE OF AMENDMENT
4.10.1005 through 4.10.1007 and) AND ADOPTION
4.10.1501 and the adoption of new)
rules I through IV (4.10.1009)
through 4.10.1012) pertaining to)
pesticide enforcement)

TO: All Interested Persons

1. On January 14, 1999, the Montana department of agriculture published a notice of proposed amendment of rules 4.10.1001, 4.10.1003, 4.10.1005 through 4.10.1007 and 4.10.1501 and the adoption of new rules I through IV (4.10.1009 through 4.10.1012) pertaining to pesticide enforcement at page 1 of the 1999 Montana Administrative Register, Issue No. 1.

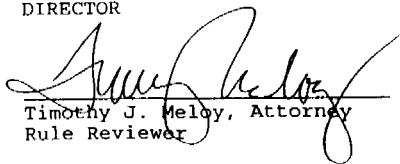
2. The department has amended and adopted the rules exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF AGRICULTURE



Ralph Peck
DIRECTOR



Timothy J. Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State February 26, 1999.

BEFORE THE BOARD OF REALTY REGULATION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment)
of rules pertaining to defini-)
tions, applications, fees,)
inactive licenses, trust account)
requirements, continuing educa-)
tion, grounds for license)
discipline, general license)
administration requirements,)
pre-licensing education,)
definitions, license renewal,)
inactive licenses - reactivation,)
continuing property management)
education, trust account require-)
ments for property management,)
grounds for license discipline for)
property management licensees;)
and the repeal of a rule)
pertaining to foreign land sales)
practices act)

NOTICE OF AMENDMENT AND
REPEAL OF RULES PERTAINING
TO THE PRACTICE OF REAL
ESTATE

TO: All Interested Persons:

1. On January 14, 1999, the Board of Realty Regulation published a notice of public hearing on the proposed amendment and repeal of rules pertaining to the practice of real estate at page 24, 1999 Montana Administrative Register, issue number 1. The public hearing was held on February 16, 1999, in Helena, Montana.

2. The Board has amended ARM 8.58.301, 8.58.406A, 8.58.406C, 8.58.411, 8.58.412, 8.58.414, 8.58.415A, 8.58.415B, 8.58.415C, 8.58.423, 8.58.425, 8.58.701, 8.58.702, 8.58.707, 8.58.708, 8.58.709, 8.58.710, 8.58.712 and 8.58.714 and repealed ARM 8.58.410 exactly as proposed. The Board has amended ARM 8.58.419 as proposed, but with the following changes:

"8.58.419 GROUNDS FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT (1) through (3)(j) will remain the same as proposed.

(k) When acting as a listing broker, licensees shall continue to submit to the seller all offers and counter offers received by the licensee until such time as a pending transaction has been closed or the listing agreement terminated, unless the seller has waived this obligation in writing. Licensees are not obligated to continue to actively market the property after an offer has been accepted by the seller. Licensees acting as agents of buyers shall submit to the buyer all offers and counter offers until an offer has been accepted but have no obligation to continue to show properties to their clients after an offer has been accepted unless otherwise agreed in writing;

(l) will remain the same as proposed.
(m) The licensee shall inform his/her principal at the time an offer is prepared or presented of the estimated costs and fees associated with that offer. A dual agent shall inform both ~~parties principals~~ to the transaction. ~~A statutory broker and a dual agent will inform both parties to the transaction.~~ A statutory broker will inform all ~~parties~~ buyers/sellers not otherwise represented;

(n) through (x) will remain the same as proposed.
(y) Licensees may not negotiate a sale, exchange or lease of real property directly with a seller or buyer if the licensee knows that the seller/buyer has a written, ~~exclusive~~ agency contract with another broker;

(ad) will remain the same as proposed.
~~(ae) Licensees advertising or marketing on a site on the Internet that is either owned by, or controlled by, the licensee must include on each page of the site on which the licensee's advertisement or information appears, the following:~~

~~(i) the licensee's name or the name of the firm with which the licensee is affiliated;~~

~~(ii) the city, state/province and country in which the licensee's office is located; and~~

~~(iii) the regulatory jurisdiction(s) in which the licensee holds a real estate broker or salesperson license;~~

~~(af) Licensees using any Internet electronic communication for advertising or marketing, including, but not limited to, e-mail, e-mail discussion groups and bulletin boards must include, on the first or last page of all communications, the following:~~

~~(i) licensee's name or the name of the firm with which the licensee is affiliated;~~

~~(ii) the city, state/province and country in which the licensee's office is located; and~~

~~(iii) the regulatory jurisdiction(s) in which the licensee holds a real estate broker or salesperson license;~~

(ag) will remain the same, but will be renumbered (ae).

(4) will remain the same as proposed."

Auth: Sec. 37-1-131, 37-1-136, 37-1-306, 37-51-102, 37-51-203, 37-51-321, MCA; IME, Sec. 37-51-102, 37-51-201, 37-51-202, 37-51-321, 37-51-512, MCA

3. The Board has thoroughly considered all comments and testimony received. Those comments, and the Board's responses thereto, are as follows:

ARM 8.58.419 GROUND FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT

COMMENT NO. 1: The Board noted during discussion that there was a typo in the last sentence of (3) (k). The word "as" should be "has."

RESPONSE: The typo has been corrected as shown above.

COMMENT NO. 2: The Board also noted during discussion that (3)(m) contained repetitive language.

RESPONSE: The Board amended (m) as shown above to eliminate the redundancy.

COMMENT NO. 3: One comment was received asking the Board to clarify the language in ARM 8.58.419(3)(y).

RESPONSE: The Board responded to the comment by amending the rule as shown above.

COMMENT NO. 4: One comment was received from staff of the Administrative Code Committee stating that the statement of reasonable necessity appeared inadequate.

RESPONSE: The statement of reasonable necessity serves to set forth the principle reasons for, and the rationale supporting, the agency's rulemaking process. The Board, in considering comments made to the rulemaking proposal, considered again the statement of reasonable necessity in conjunction with the other participants of the rule review committee of the board which developed this rulemaking notice.

Based on that review, it is the opinion of the Board that the reasonable necessity statement accurately depicts the purpose and rationale behind the amendments. The amendments were truly designed to be for clarification and not substantive. With one exception, Internet advertizing which has been removed, the amendments are clearly for clarification. The Board also determined that based upon 2-4-314, MCA, it was entirely appropriate to proceed with this rulemaking notice and without further citation, would justify the Board's action.

BOARD OF REALTY REGULATION
JOHN BEAGLE, CHAIRMAN

BY: Annie M. Bartos
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, February 26, 1999.

BEFORE THE BOARD OF SPEECH-LANGUAGE
PATHOLOGISTS AND AUDIOLOGISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT OF ARM
of rules pertaining to defini-) 8.62.402 DEFINITIONS,
tions, supervisor responsibility,) 8.62.501 SUPERVISOR RESPON-
schedule of supervision, non-) SIBILITY, 8.62.502 SCHEDULE
allowable functions of speech) OF SUPERVISION - CONTENTS,
aides and functions of audiology) 8.62.504 FUNCTIONS OF AIDES
aides) AND 8.62.703 CONTINUING
) EDUCATION REQUIRED - WHEN

TO: All Interested Persons:

1. On December 17, 1998, the Board of Speech-Language Pathologists and Audiologists published a notice of public hearing at page 3239, 1998 Montana Administrative Register, issue number 24. The hearing was held on January 15, 1999, in Helena, Montana.

2. The Board has amended ARM 8.62.402 and 8.62.502 exactly as proposed, and has amended ARM 8.62.501 and 8.62.703 as proposed, but with the following changes. ARM 8.62.504 is being amended as shown below as the Board noted that the language being deleted was inadvertently published in the original notice and should not have been included.

"8.62.501 SUPERVISOR RESPONSIBILITY (1) All persons working in the capacity of a speech-language or audiology aide must be under the direct supervision of a fully licensed speech-language pathologist or audiologist. This supervisor assumes full legal and ethical responsibility for the ~~tasks~~ tasks performed by the aide and for any services or related interactions with a client.

(2) will remain the same as proposed.

(3) The speech-language pathology or audiology supervisor and/or appropriate administrative agency is responsible for insuring that the speech-language pathology or audiology aide is initially adequately trained for the tasks he/she will perform. ~~The speech-language pathology or audiology supervisor shall perform a task analysis of the duties of the speech-language pathology or audiology aide and provide a minimum of 40 hours of practical training in the duties the speech-language pathology or audiology aide is expected to perform: The amount and type of training required should be based on the skills and experience of the speech-language pathology or audiology aide, the needs of the patients/clients served, the service setting, the tasks assigned and other factors as determined by the supervising speech-language pathologist and audiologist.~~"

Auth: Sec. 37-15-202, MCA; IMP, Sec. 37-15-102, MCA

"8.62.504 FUNCTIONS OF AIDES (1) through (2)(a)(v) will remain the same as proposed.

~~(vi) determine the selection of cases with input from the supervisor,~~

(vii) and (viii) will remain the same as proposed, but will be renumbered (vi) and (vii).

(b) through (b) (iv) will remain the same as proposed.

~~(v) determine the selection of cases with direct input from the supervisor,~~

(vi) and (vii) will remain the same as proposed, but will be renumbered (v) and (vi).

(c) through (5) will remain the same as proposed."

Auth: Sec. 37-15-202, MCA; IMP, Sec. 37-15-102, MCA

"8.62.703 CONTINUING EDUCATION REQUIRED - WHEN

(1) through (5) will remain the same.

(6) Speech-language pathology aides I, II and III shall complete 20 units of continuing education annually, six of which must be sponsored as defined in ARM 8.62.702, and submit verification of the continuing education to the board at the time of registration. Fourteen unsponsored continuing education units may include on-the-job training as part of the supervision plan, and college coursework obtained through an accredited college or university.

(7) Audiology aides and audiology industrial aides shall complete six units of continuing education annually, two of which must be sponsored and four unsponsored as defined in ARM 8.62.702, and submit verification of the continuing education to the board at the time of registration."

Auth: Sec. 37-15-202, MCA; IMP, Sec. 37-15-102, 37-15-309, MCA

3. The board has thoroughly considered all comments and testimony received. Those comments, and the Board's responses thereto, are as follows:

8.52.501 SUPERVISOR RESPONSIBILITY

COMMENT NO. 1: Several comments were received in opposition to the additional 40-hour initial training requirement for all speech-language pathology and audiology aide levels.

RESPONSE: The Board has determined that the 40-hour initial training requirement as proposed does place an undue burden on the aide, the speech-language pathologist or audiologist, the school district and/or the employing cooperative and has amended the rule as shown above. The Board understands that this requirement would also place an undue burden on an aide who is only employed part time and would take away actual client services. During the aide's employment, unless the aide has prior competent training by a supervisor and has previously performed direct child services, the board has placed the responsibility for any training requirement at the discretion of the fully licensed supervisor of the aide, who is ultimately responsible for the aide's services.

8.62.502 SCHEDULE OF SUPERVISION - CONTENTS

COMMENT NO. 2: Multiple comments were received addressing variations of direct and indirect supervision requirements and recommendations for percentages.

RESPONSE: The Board has determined that the percentages that were proposed for direct and indirect supervision requirements are reasonable to protect the consumer who is receiving services of speech-language pathology or audiology aides.

COMMENT NO. 3: One comment was received in support of the proposed amendment to require a minimum of 40 hours of initial training.

RESPONSE: The Board acknowledged the comment.

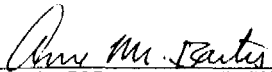
8.52.703 CONTINUING EDUCATION REQUIRED - WHEN

COMMENT NO. 4: Fifteen comments were received in opposition to the proposed amendments pertaining to the 20 units of continuing education annually the board proposed for aide levels II and III.

RESPONSE: The Board responded that the continuing education units proposed in (6) are currently being obtained through the training and education that the supervisor currently provides to the supervisee. Therefore, the Board wants to clarify that no additional continuing education units are required. The Board deleted the additional continuing education requirement proposed for aide levels II and III. The aide level I continuing education units are not being deleted as this level of aide is currently enrolled in an accredited graduate program and those credits can be used for the continuing education requirement. The Board amended the rule as shown above to reflect the ratio of sponsored and unsponsored continuing education units it is requiring.

BOARD OF SPEECH-LANGUAGE
PATHOLOGISTS AND AUDIOLOGISTS
LYNN HARRIS, CHAIRMAN

BY:


ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE


ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, February 26, 1999.

BEFORE THE BOARD OF VETERINARY MEDICINE
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT OF ARM
of rules pertaining to defini-) 8.64.401 DEFINITIONS,
tions, continuing education and) 8.64.505 CONTINUING EDUCATION
unprofessional conduct) AND 8.64.508 UNPROFESSIONAL
) CONDUCT

TO: All Interested Persons:

1. On December 3, 1998, the Board of Veterinary Medicine published a notice of proposed amendment of the above-stated rules at page 3185, 1998 Montana Administrative Register, issue number 23.

2. The Board has amended the rules exactly as proposed.

3. The Board has thoroughly considered all comments and testimony received. Those comments, and the Board's responses thereto, are as follows:

ARM 8.64.401 DEFINITIONS

COMMENT NO. 1: One comment was received wherein commentor expressed concern about the limitation he felt the proposed language regarding the "veterinarian/client/patient relationship" would place upon his ability to practice.

RESPONSE: The Board, after consideration of the comment, determined that the purpose of the rule is to provide accountability for the consumer, and to address the situation of a veterinarian determining treatment and dispensing medication for animals not physically seen or examined by the veterinarian. The Board declined to make changes and has amended the rule as proposed.

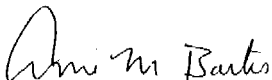
COMMENT NO. 2: One comment was received stating concern about the Board's ability to enforce the proposed amendment. This commentor also requested the board hold a public hearing on this issue.

RESPONSE: The Board considered the comment and feels the enforcement process currently used is adequate and is working. The Board noted that 10% or 25% of the interested persons must request a hearing if a hearing is to be required. Only this one commentor requested a hearing so no hearing will be held on this issue.

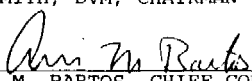
COMMENT NO. 3: One comment was received expressing concern about the absence of language specifying that telephone conferences may be included as an option for obtaining continuing education.

RESPONSE: The Board would like to clarify that the rule is meant to be somewhat flexible and does include the option for obtaining continuing education through means such as telephone conferencing on a case-by-case basis.

BOARD OF VETERINARY MEDICINE
DON SMITH, DVM, CHAIRMAN



ANNIE M. BARTOS
RULE REVIEWER

BY: 

ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, February 26, 1999.

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION AND DEPARTMENT
OF FISH, WILDLIFE AND PARKS OF THE STATE OF MONTANA

In the matter of the proposed) NOTICE OF AMENDMENTS
amendment of ARM 12.3.123 and)
ARM 12.3.402 regarding license))
refunds.)

TO: All Interested Persons.

1. On January 14, 1999, the Fish, Wildlife and Parks Commission (commission) and the Department of Fish, Wildlife and Parks (department) published notice of the proposed amendments of the above-captioned rules at page 43 in the 1999 Montana Administrative register, issue number 1.

2. The commission and department have amended ARM 12.3.123 and ARM 12.3.402 as proposed.

3. No comments were received regarding these rule amendments.

RULE REVIEWER

Robert N. Lane
Robert N. Lane

FISH, WILDLIFE AND PARKS
COMMISSION

Patrick J. Graham
Patrick J. Graham, Secretary

DEPARTMENT OF FISH, WILDLIFE
AND PARKS

Patrick J. Graham
Patrick J. Graham, Director

Certified to the Secretary of State February 26, 1999.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the) NOTICE OF AMENDMENT
amendment of 37.70.406,)
37.70.407, 37.70.601 and)
37.70.901 pertaining to low)
income energy assistance)
program)

TO: All Interested Persons

1. On September 24, 1998, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rules at page 2551 of the 1998 Montana Administrative Register, issue number 18.

2. The Department has amended rules 37.70.406, 37.70.407, 37.70.601 and 37.70.901 as proposed.

3. No comments or testimony were received.

Juan Silva
Rule Reviewer

Laurie Elvinger
Director, Public Health and
Human Services

Certified to the Secretary of State February 26, 1999.

VOLUME NO. 48

OPINION NO. 1

CLERKS - Authority to collect \$20 fee to be applied to payment of salary of court reporter;
COUNTY OFFICERS AND EMPLOYEES - Authority of clerk of district court to collect \$20 fee to be applied to payment of salary of court reporter;
FEES - Authority of clerk of district court to collect \$20 fee to be applied to payment of salary of court reporter;
MONTANA CODE ANNOTATED - Title 25, chapter 1; sections 7-4-2511, 25-1-202;
MONTANA CONSTITUTION - Article VII, section 4(2);
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 72 (1990), 42 Op. Att'y Gen. No. 56 (1988), 40 Op. Att'y Gen. No. 62 (1984), 37 Op. Att'y Gen. No. 128 (1978).

HELD: A district court clerk must charge and collect the court reporter filing fee provided under Mont. Code Ann. § 25-1-202 when a civil appeal has been filed from a city or justice court.

February 18, 1999

Mr. Thomas R. Scott
Beaverhead County Attorney
2 South Pacific, CL #2
Dillon, MT 59725-2713

Dear Mr. Scott:

You have asked my opinion on the following question:

Must a district court clerk charge and collect the court reporter filing fee provided for under Mont. Code Ann. § 25-1-202 (1997) when an appeal has been filed from a city or justice court?

In answering your question, I look first to the plain language of the statute. Stratemeyer v. Lincoln County, 276 Mont. 67, 915 P.2d 175 (1996) (a statute is to be construed according to its plain meaning). The statute reads in whole:

Fee for court reporter. In addition to other filing fees, a fee of \$20 must be paid to the clerk of the district court at the time of filing a civil action in the district court. The fee must be paid by the clerk into the treasury of the county where the action is filed, to be applied to the payment of the salary of the reporter. The prevailing party may have the amount paid by the prevailing party taxed in the bill of costs as proper disbursements.

Mont. Code Ann. § 25-1-202 (1997). In my prior opinions on fee collection provisions, I applied a narrow construction. See 43 Op. Att'y Gen. No. 72 at 276 (1990); 42 Op. Att'y Gen. No. 56 at 215 (1988); 40 Op. Att'y Gen. No. 62 at 248 (1984); 37 Op. Att'y Gen. No. 128 at 546 (1978). Statutes authorizing a clerk to collect fees for services are strictly construed and will not be extended beyond their letter. 43 Op. Att'y Gen. No. 72 at 278 (quoting 14 C.J.S. Clerk of Court § 10).

Your question centers on whether the filing of a civil action in district court includes the filing of an appeal from a justice's or city court. A "civil action" is an action one party prosecutes against another to enforce or protect a right, or to redress or prevent a wrong. Mont. Code Ann. § 27-1-103(2) (1997); see also Black's Law Dictionary 245 (6th ed. 1990) (a "civil action" is any action brought to enforce, redress, or protect private rights). The actions that city and justices' courts have limited jurisdiction to hear include civil actions. Mont. Code Ann. § 3-10-111 (1997) (incorporating the definition of civil action at Mont. Code Ann. § 27-1-103(2) (1997) by stating that provisions of title 27 of the code are applicable to justices' courts and their proceedings); see also Mont. Code Ann. § 3-10-301 (1997) (enumerating the types of civil actions falling under the jurisdiction of justices' courts); Mont. Code Ann. § 3-11-102 (1997) (stating that city court jurisdiction is concurrent with that of justices' courts). The statute governing appeals from city and justices' courts expressly identifies "civil actions" as the types of cases that an aggrieved party may appeal to seek redress from a judgment rendered by a city or justice's court. Mont. Code Ann. § 25-33-102 (1997) ("Any party dissatisfied with the judgment rendered in a civil action in a city or justice's court may appeal therefrom to the district court of the county at any time within 30 days after the rendition of the judgment."). Generally, an appeal is a resort to an upper court or tribunal. State ex rel. School Dist. No. 8 v. Lensman, 108 Mont. 118, 124, 88 P.2d 63, 65 (1939). It follows that parties aggrieved by the judgment of a justice's or city court continue to seek to enforce, redress, or protect their rights by obtaining a more favorable ruling by the district court. See, e.g., State v. Morales, 284 Mont. 237, 244, 943 P.2d 1286, 1291 (1997) (Nelson, J., specially concurring, stating that in criminal proceedings, limited jurisdiction court and district court trials are simply different phases of one systematic process). In sum, the plain meaning of "civil action" includes appeals from a justice's or city court filed in district court.

The plain intent of Mont. Code Ann. § 25-1-202 supports the treatment of civil appeals as other civil actions filed in the district court. The statute requires persons wishing to file a civil action in district court to pay \$20 to the clerk to be applied to the court reporter's salary. With few exceptions, litigants who appeal from justices' or city courts try their cases anew in the district court. Mont. Code Ann.

§ 25-33-301(1) (1997). Because a justice's or city court appeal results in a new trial and because the district court is a court of record, the necessity of a court reporter is obvious. Thus, the treatment of an appeal from city or justice's court as any other civil action filed in a district court serves the legislature's plain intent under § 25-1-202 that the \$20 charge at the time of a filing go toward paying a court reporter's salary.

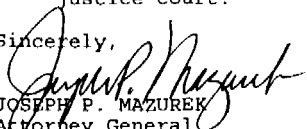
Additional support for treating appeals as other civil actions comes from the former version of the statute. The former version of Mont. Code Ann. § 25-1-202 required payment of a fee that applied to the reporter's salary "in every issue of fact in civil actions tried before the court or jury." Rev. Codes Mont. (1947) § 93-1905. Historically, it appears that the statute's intent was to require a fee for any civil proceeding tried in district court, whether the case started in district court or began as an appeal from a justice's or city court.

The remaining question is whether Mont. Code Ann. § 25-1-202 mandates that clerks charge and collect the court reporter filing fee. Because of the use of the term "must," Mont. Code Ann. § 25-1-202 establishes that the fee a litigant pays to a district court clerk is mandatory. See Montco v. Simonich, 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997) (stating the statutory term "must" is mandatory rather than permissive). While Mont. Code Ann. § 25-1-202 does not expressly authorize that clerks charge and collect the \$20 court reporter fee, the statutory duty of clerks clearly requires them to do so. See Mont. Code Ann. § 7-4-2511(1) (requiring each salaried county officer to charge and collect all fees allowed by law, paid or chargeable in all cases, except as provided in § 25-10-403 which governs prepayment of fees). Reading the first two sentences of Mont. Code Ann. § 25-1-202 leads to the same conclusion. The \$20 fee that a clerk must pay into the county treasury is the same \$20 fee paid by persons wishing to file a civil action in district court. Both sentences employ the mandatory term "must." It follows that the statute not only authorizes, but mandates, a clerk to charge and collect the \$20 fee toward a court reporter's salary.

THEREFORE, IT IS MY OPINION:

A district court clerk must charge and collect the court reporter filing fee provided under Mont. Code Ann. § 25-1-202 when a civil appeal has been filed from a city or justice court.

Sincerely,


JOSEPH P. MAZUREK
Attorney General
jpm/cmf/dm

**NOTICE OF FUNCTIONS OF ADMINISTRATIVE RULE REVIEW COMMITTEE
Interim Committees and the Environmental Quality Council**

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Business and Labor Interim Committee:

- ▶ Department of Agriculture;
- ▶ Department of Commerce;
- ▶ Department of Labor and Industry;
- ▶ Department of Livestock;
- ▶ Department of Public Service Regulation; and
- ▶ Office of the State Auditor and Insurance Commissioner.

Education Interim Committee:

- ▶ State Board of Education;
- ▶ Board of Public Education;
- ▶ Board of Regents of Higher Education; and
- ▶ Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- ▶ Department of Public Health and Human Services.

Law, Justice, and Indian Affairs Interim Committee:

- ▶ Department of Corrections; and
- ▶ Department of Justice.

Revenue and Taxation Interim Committee:

- ▶ Department of Revenue; and
- ▶ Department of Transportation.

State Administration, Public Retirement Systems, and Veterans' Affairs Interim Committee:

- ▶ Department of Administration;
- ▶ Department of Military Affairs; and
- ▶ Office of the Secretary of State.

Environmental Quality Council:

- ▶ Department of Environmental Quality;
- ▶ Department of Fish, Wildlife, and Parks; and
- ▶ Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE
MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

- | | |
|-------------------------------------|---|
| Known
Subject
Matter | 1. Consult ARM topical index.
Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute
Number and
Department | 2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers. |

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To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 1998, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1998 and 1999 Montana Administrative Registers.

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