STATE BAR OF MONTANA ANNUAL MEETING

Public Law Section CLE Breakout Track

Friday, September 23, 2022
Delta Colonial Hotel, Helena

MONTANA ADMINISTRATIVE PROCEDURE ACT CLE

September 23, 2022

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Contested Cases:

1. Legal Authority
    a. Montana Code Annotated Title 2, Chapter 4, Part 6
    b. Mont. Code Ann. § 2-4-202
        i. "...The attorney general shall prepare model rules of practice for agencies to use as a guide for contested case hearings and declaratory rulings."
    c. Model Rules
        i. Mont. Admin. R. 1.3.211 thru 1.3.224
        ii. Check your agency specific rules!!
2. Formal or Informal
    a. Formal by Default
    b. Informal (Mont. Code Ann. § 2-4-603 and 604)
        i. Mont. Code Ann. § 2-4-603(2):
            1. "Except as otherwise provided, parties to a contested case *may jointly waive in writing* a formal proceeding under this part. The parties may then use informal proceedings under 2-4-604. Parties to contested case proceedings held under Title 37 or under any other provision relating to licensure to pursue a profession or occupation may not waive formal proceedings."
        ii. Mont. Code Ann. § 2-4-604(4):
            1. In agency proceedings under this section, irrelevant, immaterial, or unduly repetitious evidence must be excluded but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not the evidence is admissible in a trial in the courts of Montana. Any part of the evidence may be received in written form, and all testimony of parties and witnesses must be made under oath. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient in itself to support a finding unless it is admissible over objection in civil actions.

3. What Procedural Rules Apply?
    a. Discovery
        i. Mont. Admin R. 1.3.217
            1. "In all contested cases, discovery is available to the parties in accordance with Rules 26 through 37 of the Montana Rules of Civil Procedure. However, Rule 27 and Rule 37(b)(1) and 37(b)(2)(D) shall not apply."
            2. Warning: Rule 37(b)(2)(D) does not exist.
    b. Other rules of Civil Procedure?
        i. "Pursuant to Mont. R. Civ. P. 1, the Montana Rules of Civil Procedure do not apply to administrative hearings, although an agency may adopt them pursuant to statutory authority and the legislature may mandate their application by statute. Nevertheless, where the Montana Rules of Civil Procedure do not govern an administrative proceeding, they may still serve as guidance for the administrative agency and the parties." *Citizens Awareness Network v. Mont. Bd. of Envtl. Review*, 2010 MT 10, ¶ 20, 355 Mont. 60, 61, 227 P.3d 583, 585.
        ii. Check your agency specific rules!!
    c. Evidence?
        i. Mont. Code Ann. § 2-4-202
            1. "Except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence. Objections to evidentiary offers may be made and shall be noted in the record." (*see* Mont. Admin. R. 1.3.221).
    d. Summary Judgment?
        i. *In re Peila*, 249 Mont. 272, 281, 815 P.2d 139, 145 (1991).
4. Hearing Examiners
    a. Mont. Code Ann. § 6-4-611
        i. Disqualification/Bias
        ii. *Bostwick Props., Inc. v. Mont. Dep't of Natural Res. & Conservation*, 2013 MT 48.
        iii. *Madison River R. V. Ltd. v. Town of Ennis*, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098.
    b. Mont. Admin R. 1.3.218
    c. Hearing Officer Unavailable?
        i. Mont. Code Ann. § 2-4-622.
5. Hearing
    a. Burden of Proof
        i. Mont. Admin. R. 1.3.219 has a proposed order of presentation, but allows adjustment "in the interests of justice."
6. FOF/COLs

a. Mont. Code Ann. § 2-4-622.
b. Mont. Admin. R. 1.3.223

7. Practice Tips/Perpetual Topics
    a. This is your opportunity to build a record.
        i. § 2-6-614 (Record – Transcription)
        ii. § 2-4-703:

> "If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that *the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court.* The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court."

    b. Constitutional Claims
        i. It can't be decided, but raise it? *Francetich v. State Comp. Mut. Ins. Fund*, 252 Mont. 215, 217, 827 P.2d 1279, 1281 (1992).
        ii. Exceptions for privacy determinations?
    c. Interlocutory appeals.
        i. Mont. Code Ann. § 2-4-701
            1. "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."
            2. Something bordering on a denial of due process or irreparable loss during proceeding. *Wilson v. Dep't of Pub. Serv. Regulation*, 260 Mont. 167, 172, 858 P.2d 368, 371 (1993).

<u>Petitions for Judicial Review (Appeals of Contested Cases)</u>

1. Exhaustion

    a. §2-4-701, MCA. Immediate Review of Agency Action
        i. "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."
    b. 2-4-702, MCA. Initiating Judicial Review of Contested Cases
        ii. "…a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final written decision in a contested case is entitled to judicial review under this chapter."
    c. *Flowers v. Bd. of Personnel Appeals*, 2020 MT 150 (2020). "Flowers did not pursue to their conclusion all administrative remedies available before seeking judicial review. Hearing Office Holien's recommended order directed him to file exceptions

with BOPA if he was unsatisfied with her decision. That her recommendation became a final order of the Board twenty days later did not obviate the requirement to file exception in order to completely exhaust the 'available' administrative remedies."

d. The exhaustion doctrine does not apply to constitutional issues. Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers. Mont. Const. art. III, § 1.
    a. *Shoemaker v. Denke*, 2004 MT 11, ¶¶ 30-31 (the court did not abuse its discretion when it dismissed Shoemaker's petition for judicial review because he presented, in conjunction with his constitutional issue, a challenge to the underlying factual determinations upon which his constitutional defense rested).
e. Practice Points:
    - Watch for odd deadlines or procedures in the specific statutory/ARM schemes of any given area, sometimes they vary. Seek clarification from the final decision maker if you are unsure whether you need to do anything else to completely exhaust.
    - What the "Final written decision" is, and who makes it, can vary. Sometimes it comes from an agency head (e.g. a Director or designee), sometimes from a Hearing Examiner, sometimes from a Board/Commission. If you have a hearing examiner presiding over your hearing, do not automatically assume that the HE's decision is the final agency action.

2. Proper Parties to a PJR

    a. §2-4-702(2)(a), MCA
        i. "Copies of the petition shall be promptly served upon the agency and all parties of record."
    b. §2-3-102, MCA
        i. "Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except: (a) the legislature and any branch, committee, or officer thereof; (b) the judicial branches and any committee or officer thereof; (c) the governor, except that an agency is not exempt because the governor has been designated as a member thereof; or (d) the state military establishment and agencies concerned with civil defense and recovery from hostile attack.
    c. *Young v. Great Falls,* 194 Mont. 513 (1981)
        i. M.R.Civ.P., does not, by its terms, contemplate inclusion of an administrative board as an indispensable party for purposes of judicial review…when the legislature enacted 2-4-702, MCA, no provision was made for naming the "board" as a party for purposes of review."
    d. *MEIC v. DEQ et. al*, Cause No: DV 19-34, "Order Denying Respondent Montana Board of Environmental Review's Motion to Dismiss," March 12, 2020 (Montana Sixteenth Jud. Dist., J. Bidegaray), *writ supervisory control*

denied OP 20-0292, July 14, 2020, *currently appealed on merits* DA 22-0064, DA 22-0067, DA 22-0068.

i. "Thus, both the reasoning in *Forsythe* [*v. Great Falls Holding, LLC*, 2008 MT 384] and numerous prior decisions of the Montana Supreme Court make clear that the Board *may* be a party to a case seeking judicial review of the Board's action."

e. *In re Transfer Terr. from Poplar Elem. Sch. Dist. No. 9 to Froid Elem. Sch. Dist. No. 65,* 2015 MT 278.
   i. County superintendents are local, not state, government officials. Thus, proceedings before county superintendents are excluded from MAPA as a "unit of local government."

f. Practice point: unclear whether you need to include a Board/Commission as the party separately from the agency, but probably not – stay tuned. Boards/Commissions/Agencies can file a "notice of nonparticipation" if they do not wish to participate in the proceeding, or file a motion to dismiss (if wishing to push the issue).

3. Timeliness of Appeal

   a. § 2-4-702, MCA (2)(a) Proceedings for review shall be instituted by filing a petition in district court *within 30 days after service* of the final written decision of the agency or, if a rehearing is requested, within 30 days after the written decision is rendered.
   b. *BNSF* Ry. Co. v. Cringle, 2010 MT 290 (a.k.a. Cringle I).
      i. "The 14-day filing deadline set out in § 49-2-505(3)(c), MCA, does not "circumscribe," "limit," or "affect" the District Court's subject matter jurisdiction." This statutory filing deadline ultimately may bar BNSF from a full appeal on the merits but it does not deprive the District Court of subject matter jurisdiction over BNSF's petitioner for review in District Court.
   c. *BNSF Ry. Co. v. Cringle,* 2012 MT 143 (a.k.a. Cringle II).
      i. "Because § 49-2-505(3)(c), MCA, is a statutory time prescription that provides an inflexible rule of finality, "good cause" for excusing noncompliance with the statute requires a showing of circumstances beyond the party's reasonable control that prevented the party from timely filing its notice of appeal. Applying this principle, we conclude that BNSF has failed to justify relief from the time bar."
   d. Practice Point: Appeal must be brought in 30 days unless you can show (really) good cause.

4. Service

   a. § 2-4-702(2)(a), MCA,
      i. "Copies of the petition must be promptly served upon the agency and all parties of record."
   b. § 2-4-106, MCA

i. "Except where a statute expressly provides to the contrary, service in all agency proceedings subject to the provisions of this chapter and in proceedings for judicial review thereof shall be as prescribed for civil actions in the district courts.

c. *MCI Telecommunications Corp. v. Department of Public Serv. Regulation,* 260 Mont. 175 (1993).
    i. 30-day appeal period for administrative decisions under § 2-4-106, MCA did not begin to run until the day following service by mail of the commission's order under Mont. R. Civ. P. 6(e).

d. Hilands Golf Club v. Ashmore, 277 Mont. 324 (1996).
    i. "…we hold that, for the purposes of service under MAPA, it is sufficient to mail copies of the Petition for Judicial Review upon the parties and the agency, whether the agency is itself a party of not. Accordingly, we hold that 5(b), M.R.Civ.P., service by mail is all that is necessary to satisfy the service requirement of § 2-4-702, MCA.

e. Where a statute provides different procedural requirements for judicial review of decisions from a specified agency, however, the requirements of the specific statute prevail over the provisions of the MAPA. *Trustees, Carbon Cty. Sch. v. Spivey*, 247 Mont. 33, 36 (1991) (citing *Department of Revenue v. Davidson Cattel Co.*, 190 Mont. 326, 329 (1980)).

f. But there are exceptions where specific statutes bar due process or put procedure over substance:
    i. *Pickens v. Shelton-Thompson*, 2000 MT 131
        1. "We conclude that, under these circumstances, the notice provision in the ALJ's decision and order did not provide notice to Pickens adequate to meet due process requirements and, consequently, application of the § 40-5-253, MCA, service requirements in this case would violate Pickens' right to due process of law. We further conclude that, under these circumstances, Pickens' petition for judicial review must be governed by the service requirement set forth in MAPA and Hilands, and of which Pickens received notice."
    ii. *Clouse v. Lewis & Clark County*, 2006 Mont. Dist. LEXIS 80 (quoting *In Re the Support of McGurran*, 1999 MT 192, ¶ 11).
        1. The Montana Supreme Court adheres to a policy of "liberal interpretation of procedural rules governing judicial review of administrative decisions, rather than taking an overly technical approach, so as to best serve justice and allow the parties to have their day in court." "This Court concludes that judicial economy and the interest of justice leans in favor of allowing the County to present its case, and its petition for judicial review will therefore be allowed to proceed."

g. Practice Point: service under MAPA is as prescribed by the Montana Rules of Civil Procedure unless a statute expressly provides otherwise – except where the statute would violate due process. So check your specific statutes and keep due

process in mind. Better: ask for, and waive, in person or mail service as a matter of courtesy so everyone can use electronic service for convenience.

5. Standards of Review

    a. §2-4-704, MCA.
        i. "The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs."
        ii. "The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudice because: The administrative findings, inferences, conclusions or decisions are: (i) In violation of constitutional or statutory provisions; (ii) In excess of the statutory authority of the agency; (iii) Made upon unlawful procedure; (iv) Affected by other error of law; (v) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; (vi) Arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (vii) Findings of fact, upon issues essential to the decision, were not made although requested.
    b. Clearly Erroneous
        i. "Under this standard of review, which applies to both the district court's review of the agency decision and this Court's review of the district court's decision, a reviewing court may not substitute its judgment for that of the administrative agency, but instead review the entire record to determine if the agency's findings of fact are clearly erroneous and its conclusions of law are correct." *KB Enters., LLC., v. Mont. Human Rights Comm'n*, 2019 MT 131, ¶ 6 (citing *Bollinger v. Billings Clinic*, 2019 MT 42 ¶ 26).
        ii. A finding is clearly erroneous if it is not supported by substantial evidence, if the agency misapprehended the effect of the evidence, or if our review of the record convinces us that a mistake has been made. Id. ¶ 6 (citing *Jones v. All Star Painting Inc.*, 2018 MT 70, ¶ 14).
        iii. "Administrative findings of fact may not be disturbed on judicial review if they are supported by substantial evidence in the record." *Peretti v. Dep't of Revenue*, 2016 MT 105, ¶ 18.
        iv. Substantial evidence is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. *KB Enters.*, ¶ 9 (citing *Peretti*, ¶ 18).
    c. Arbitrary & Capricious/Abuse of Discretion
        i. An agency abuses its discretion if it exercises discretion based on a clearly erroneous finding of material fact, without consideration of all

pertinent law or material facts, based on a clearly erroneous conclusion or application of law, or without conscientious judgment of in excess of the bounds of reason, resulting in substantial injustice. *See* § 2-4-704(2), MCA; *Mont. Fish, Wildlife & Parks v. Trap Free Mont. Pub. Lands,* 2018 MT 120, ¶ 11; *See Clark Fork Coal. v. Mont. Dep't of Envtl. Quality*, 2008 MT 407, ¶¶ 9-21; *North Fork Preservation Ass'n*, 238 Mont. at 465. *See also Larson v. State,* 2019 MT 28, ¶ 16.

ii. "[A]n agency decision is not arbitrary or capricious 'merely because the record contains inconsistent evidence or evidence which might support a different result.'" *All Star Painting, Inc. v. Jones*, 2021 MT 131, ¶ 7 (quoting *Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 25.

iii. "A decision is arbitrary and capricious only if apparently "random, unreasonable[,] or seemingly unmotivated, based on the existing record.'" Id., ¶ 7 (quoting *Mont. Wildlife Fed'n*, ¶ 25).

iv. The reviewing court must determine whether the agency considered the relevant information, or if the decision "was so at odds with that information that it could be characterized as arbitrary of the product of caprice."

d. Deference to Findings of Fact by the Agency:

i. "MAPA also confers ultimate authority on the District Court. As discussed, the Act explicitly provides that the agency "may not reject or modify the [Hearing Officer's] findings of fact unless the agency first determines . . . that the findings of fact were not based upon competent substantial evidence." *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 40; Section 2-4-621(3), MCA; accord *Schmidt*, ¶ 31; *State Pers. Div.*, ¶ 25; *Moran,* 270 Mont. at 51, 889 P.2d at 1187

6. Informal/Inherent/Interlocutory Judicial Review vs. Formal Judicial Review

a. For a discussion of both inherent and formal judicial review, and distinctions, see *Oelkers* litigation (discussed below)

b. Interlocutory/Immediate Review, §2-4-701, MCA.

i. Does not happen very often. Court will usually engraft the same standards for interlocutory appeal/supervisory control – i.e. high standard of imminent harm and no regular appeal process.

ii. *Copper Ridge v. DEQ*, DV 20-0445, "Petition for Judicial Review," filed March 20, 2020 (Mont. Thirteenth Jud. Dist., J. Harada, 2020).

c. Informal/Inherent Judicial Review:

i. *Johansen v. Department of Natural Resources & Conservation*, 1998 MT 51 (1998).

1. Citing and quoting *North Fork Preservation Ass'n v. Department of State Lands*, 238 Mont. 451 (1989); *Langen v. Badlands Coop. State Grazing Dist.*, 125 Mont. 302, 308 (1951)).

2. "The review by the district court is only for the purpose of determining the legal rights of the parties involved. This is so because of

the division of governmental powers under the Constitution, neither the district court nor the Supreme Court may substitute their discretion for the discretion reposed in boards and commissions by the legislative acts… The appeal from the commission to the district court is for the purpose merely of determining whether upon the evidence and the law of the action of the commission is based upon any error of law, or is wholly unsupported by the evidence or clearly arbitrary or capricious. On such review courts will only inquire insofar as to ascertain if the board or commission has stayed within the statutory bounds and has not acted arbitrarily, capriciously or unlawfully."Id. at 16-17 (

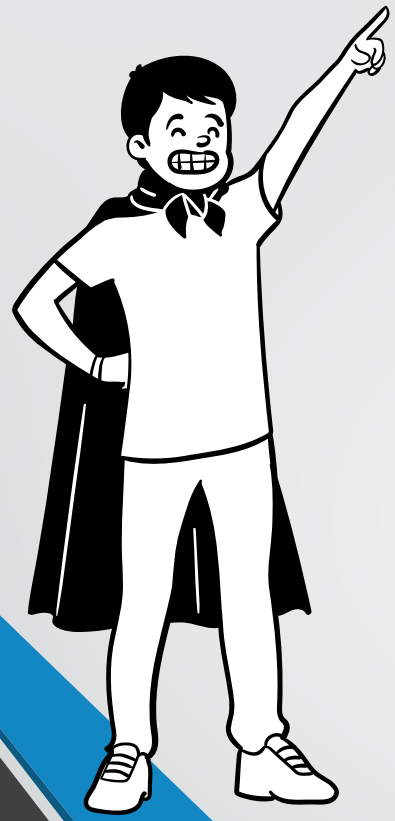
d. MAPA Formal Judicial Review:
    i. MAPA's judicial review provision only apply to "contested cases." *North Fork,* 238 Mont. at 457; *Nye v. Dep't of Livestock*, 196 Mont. 222 (1981).
    ii. MAPA defines a contested case as: a "proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to rate making, price fixing, and licensing."

Rulemaking:

1. Legal authority
    a. Rulemaking
        i. Statutes: Title 2, chapter 4, part 3, MCA
        ii. Rules: ARM Department 1, chapter 2 and model rules in ARM Department 1, chapter 3, subchapter 3
    b. Legislative review of rules: Title 2, chapter 4, part 4, MCA
    c. Negotiated rulemaking: Title 2, chapter 5, MCA
        i. Not MAPA, but should be
2. Definitions
    a. § 2-4-102(11), MCA – "'Rule' means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule."
        i. Exception (one of several): "statements concerning only the internal management of an agency or state government and not affecting private rights or procedures available to the public, including rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide accounting, budgeting, and human resource system."
    b. § 2-4-102(14), MCA – "Substantive rules" are either:
        i. "legislative rules … under expressly delegated authority … have the force of law."
        ii. "adjective or interpretive rules … under express or implied authority to codify an interpretation of a statute … lack[] the force of law."

3. Initiating rulemaking
    a. Required by legislation.
    b. Agency need within delegation authority.
    c. Required by court order.
    d. Agency determination upon review.
        i. Biennial review required by § 2-4-314, MCA.
        ii. Governor Gianforte's Red Tape Relief task force to remove excessive, outdated, and unnecessary regulations
    e. Required after consideration of a petition for rulemaking. § 2-4-315, MCA.
4. Requirements
    a. Scope: "To be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." § 2-4-305(5), MCA.
    b. Hearing:
        i. Must be held "[i]f the proposed rulemaking involves matters of significant interest to the public" or if 10% or 25 of the directly affected persons requests. § 2-4-302(4), MCA.
        ii. Presiding officer reads "Notice of Function of Administrative Rule Review Committee." § 2-4-302(7), MCA.
    c. Procedure: "A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section, unless notice of adoption of the rule is published within 6 months of the publishing of notice of the proposed rule, and unless the adoption is in compliance with the prohibitions of subsection (11)." 2-4-305(7), MCA.
    d. Notice and opportunity for public comment is essential.
5. Timeline for adoption
    a. Notice of proposed rulemaking published with the Secretary of State
        i. Publication occurs 10 days after filing deadline
    b. Hearing – if required, at least 20 days after proposal notice
    c. Public comment period – at least 28 days after proposal notice
    d. Notice of adoption published with the Secretary of State
        i. Not less than 30 days nor more than 6 months from the proposal notice or an amended proposal notice
        ii. Not during the final three months of the year preceding a legislative session
6. Practice tips
    a. The Secretary of State's rulemaking staff is extremely helpful
    b. Information available through the Secretary of State's website rules.mt.gov
        i. Current and past Administrative Rules of Montana (searchable)
        ii. Current and past Montana Administrative Register (searchable)
        iii. Rulemaking templates
        iv. Rulemaking filing deadlines
        v. Replacement page information
    c. WARM (Writing Administrative Rules of Montana) course available through the Professional Development Center – pdc.mt.gov
    d. Agency counsel and paralegals with experience
    e. Plain English, KISS.

f. Generally follows the Legislature's style guide, the Bill Drafting Manual
    i. Numbering is different than statutes. ARM 1.2.212
    ii. Opinion: "Shall" should be abolished
7. 2021 Legislation
    a. HB 47 (2021) – Amended § 2-4-303, MCA, to require additional notice to legislative committee members and staff, including "a good faith effort" to provide that notice "prior to adoption of an emergency rule."
    b. HB 447 (2021)
        i. Amended § 2-4-302, MCA, to require sending, current with filing, a rulemaking proposal notice to the "appropriate administrative rule review committee."
        ii. Amended § 2-4-305, MCA, by adding "In the year preceding the year in which the legislature meets in regular session, an agency may not adopt a rule between October 1 through the end of the year."
            1. Exceptions for emergency rules and "unavailability of information."
    c. SB 227 (2021) – Amended § 2-4-412, MCA, to allow "a repeal or amendment to a rule" by joint resolution of the legislature.
        i. "If an agency adopts a new rule to replace the repealed rule, the agency shall adopt the new rule in accordance with the objections stated by the legislature in the joint resolution."
        ii. Separation of powers questions raised.
        iii. Governor Gianforte's veto overridden.
8. 2021–2022 Montana Supreme Court cases
    a. No significant developments.



The 2022 Annual OPD Case Summary

Michael Marchesini

James Reavis

Appellate Defender Division

Search and Seizure a.k.a. ~~Total Victory~~ Not quite!

- Flicking your beams at a police car to get them to turn down their high beams is not grounds for the officer to stop you. Gardner, 2022 MT 3
- Pots or pot? Odor of marijuana + denial of marijuana in car – DUI impairment ≠ PS to canine sniff ceramic-loaded truck for pot. Harning, 2022 MT 61
- Officer can't extend welfare check on sleeping driver in parking lot once it's clear driver is fine and not drunk. Zeimer, 2022 MT 96
- Having PS to investigate Grant doesn't create PS to investigate Jason, even if they switched seats in the car. Carrywater, 2022 MT 131
- Police invade house w/ weapons drawn and handcuff 60-year old black man, leaving him naked for 30 min. A valid probation search. Peoples, 2022 MT 4

Fitness to Proceed

- If State wants to reactivate charges that were dismissed due to lack of fitness, it must file a new information, but you can move to dismiss under 46-18-222 if further prosecution would be unjust. Mosby, 2022 MT 5
- Missing the 90-day statutory deadline to review fitness not jurisdictional violation, Tison and Meeks cases overruled. Rich, 2022 MT 66
- District court can't hold DPHHS in contempt for not complying with fitness eval due to lack of bed space. Fouts, 2022 MT 9
  - McGrath concurs, says State should have pursued civil commitment. "Persisting with criminal charges against a long-term severely mentally ill individual seems to have been a fool's errand lacking benefit to anyone."

MSH and MSP are Dangerous Right Now

- Montana State Hospital (Warm Springs) loses federal funds after four people die: Montana State Hospital loses Medicare, Medicaid funds due to safety issues | Montana Public Radio (mtpr.org)
- Montana State Prison suffers severe staffing shortage, inmate mental health care and morale has plummeted: 'It's a dumpster fire': Employees speak out about poor conditions at the Montana State Prison – Daily Montanan

We ♥ Legal Procedure!

- Opening the door is not a confrontation clause exception. Hemphill, 142 S.Ct. 681
- Public defenders and prosecutors have the right to take "responsibly scheduled vacations" (unless you represent Rossbach). Rossbach, 2022 MT 2
- Jerk move: Probationer took UA and told the truth as condition required; State filed new charge. State on appeal dismissed for "classic penalty situation." Moody, DA 20-0304
- MT Sup. Ct. denies double jeopardy dismissal after mistrial due to defense taking longer than expected to present case. Hartman, OP 22-0037
  - Surprise! Federal court disagrees with MSC and grants habeas writ, dismissing case. District court interfered with double jeopardy right by granting mistrial even after defense counsel took measures to "tighten up" defendant's testimony. Hartman, CV 22-057-M-DLC

We 💔 Legal Procedure ☹️

- Federal government applying tribal law is a "separate sovereign" from federal government applying federal law; no double jeopardy violation. Denezpi, 142 S.Ct. 1838
- States now have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians on tribal land. Castro-Huerta, 142 S.Ct. 2486
- Open plea to itty-bitty state charge adds 18 months to federal sentence, but collateral consequence, no judge advisement required. Goodman, 2022 MT 17N
- 4-3 ruling: Courts not required to allow inmate witnesses to wear civilian clothes when testifying. Hearing required on need for jail clothes/shackles. Rossbach, 2022 MT 2
- If you win in city court, but government appeals and wins reversal in district court, case goes back to city court; you can't appeal to MT Supreme Court. Trainer, DA 21-0461

Rules of Evidence

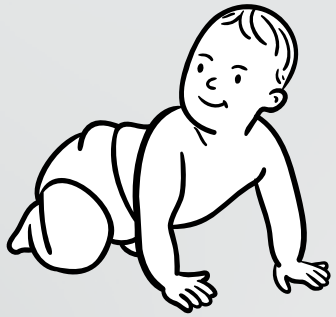
- References to "skull f---ing" and jokes/dreams about child sex abuse allowed under 404(b) to prove motive in homicide case, but State goes too far and violates Rule 403. Lake, 2022 MT 28
- Hearsay is still hearsay even if declarant testifies. Oliver, 2022 MT 104
- Rebuttal witnesses not excluded under Rule 615. Wilson, 2022 MT 11
- Text messages between co-conspirators in furtherance of a conspiracy admissible as non-hearsay evidence. Wienke, 2022 MT 116

Sufficient Evidence

- Sketchy perjury conviction re: taser use affirmed. Burnett, 2022 MT 10
- Accomplice testimony requires sufficient non-accomplice collaborating evidence. Tollie, 2022 MT 59
- North Dakota DUI sufficiently similar to MT DUI law for stacking purposes. Pankurst, 2022 MT 89
- Obstruction conviction reversed after walking away and calling the police officer dumb. Bennett, 2022 MT 73
  - "It would be a frightening departure if we were to begin imposing criminal liability on defendant because we found their responses to an officer's questions lacking in etiquette."

Sex Offenses

- Pre-2017 sex crimes use Pre-2017 laws – Different crimes, different elements, different consent definition. Use the law in effect at the time. Plain error will not save us. LaFournaise, 2022 MT 36, Deveraux, 2022 MT 130
- Prior false allegations of 8-year old not admissible under rape shield exception because "sleeping with" did not mean having sex. Hansen, 2022 MT 163
- New trial granted for IAC for not objecting to statistical evidence of false reports of sexual assault. Quiroz, 2022 MT 18
- Can't be required to register as a sex offender for the crime of failing to register b/c it's not a sexual or violent offense under 46-23-502(9). Knapp, 2022 MT 35N
- Constitutionality of 46-15-320 (no kid interviews) dodged because kids supposedly voluntarily declined interviews. Mathis, 2022 MT 156



Don't Take the Kids: DNs

- Mother's lack of engagement trumped Department's improper shoehorning of requirements into treatment plan without first moving to amend the treatment plan. C.K., 2022 MT 27
- A district court has authority to place a non-YINC child with non-offending, out-of-state parent and dismiss case. D.H., 2022 MT 37
- Department can pursue contested guardianship, not termination, under lighter reunification "likely unproductive" standard. S.S., 2022 MT 75
- Mother who abruptly moved out of state and stopped visits & communication justified termination; R.J.F. distinguished. A.M.G. & S.M.H., 2022 MT 175

Don’t Jail the Kids: DJs

- **We are right, they are wrong**: Admitting guilt for consent decree not a formal “valid admission” to allegations; trial rights are preserved. D.A.T., 2022 MT 174
- No commitment to Pine Hills without finding that youth is a serious juvenile offender + commitment necessary to protect the public. V.K.B., 2022 MT 94
- Court adequately considered mitigating characteristics of youth in omitting parole restriction but otherwise imposing life sentences. Keefe, 2022 MT 121

Sentencing

- Custodial sentence on a revoke restarts the PFO clock. Rossbach, 2022 MT 2
- Time spent at START is "time served at a detention center" and counts as credit for time served. Tippets, 2022 MT 81
- Denial of street time credit reversed because State failed to demonstrate any violation during 10-month period. Gudmundsen, 2022 MT 178
- Reversal for 335 days of street time after district court was silent and there was no record of a violation during the time in question. Pennington, 2022 MT 180
- Court strikes requirement to pay incarceration and medical costs; future attempts to use 7-32-2245 should be challenged. Strong, 2022 MT 147N

Revocations

- Compliance violation revoke that did not follow MIIG upheld on appeal because of lack of objection below. Tippets, 2022 MT 81
  - Petition for Rehearing: Court clarifies the procedures in 46-18-203(8) must still be followed.
- Compliance violation revoke no longer requires MIIG exhaustion, only that probationer will not be responsive to further efforts under MIIG. Pennington, 2022 MT 180
- Parolee can be revoked on dismissed charges and charges that are never filed. Pryor, OP 22-0293
  - Keep challenging non-compliance revokes if offenses are dismissed or not charged.

Juror Challenges & Batson
Keep Fighting the Good Fight

- To obtain reversal on appeal for wrongly denied for-cause challenge, you must use a peremptory to strike that juror. Deveraux, 2022 MT 130
- Batson challenge denied on appeal after counsel withdrew challenge to State striking only non-white juror, who said she could not be fair due to personal experiences with racial discrimination. Miller, 2022 MT 92
- Batson challenge denied after prosecutor strikes only Native American on the panel and calls him hostile. But Court shows openness to future Batson challenges. Wellknown, 2022 MT 95
  - Base Batson objection on both the U.S. and Montana Constitutions.
  - Identify for the record which juror is what race (we can't see them on appeal).
  - Always respond to State's race-neutral reason for excluding the juror.
  - If implicit bias may be behind the State's reason to exclude, make that record.

Thank you!

We like to help, so please feel free to reach out

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