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A Refresher: MT Evidence Law Sources and Research

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By Cynthia Ford

Evidence Law Sources[1]

Montana evidence law stems from three primary sources. The obvious source is the Montana Rules of Evidence ("MRE"), which were promulgated by the Montana Supreme Court for use in all trials beginning in July 1, 1977. (See December 2012/ January 2013 issue of The Montana Lawyer for a more complete history of the MRE). The statutorily-enacted (as opposed to promulgated rule) evidence law is more often forgotten: Title 26 of the Montana Code Annotated is entitled "Evidence" and contains 3 substantive chapters in addition to the Montana Rules of Evidence.[2] Chapter 1 of Title 26 is "Statutory Provisions on Evidence"; Chapter 2 is "Subpoenas and Witnesses"; Chapter 3 is "Effect of Former Judgments and Orders."[3]

These non-rule evidence statutes may significantly impact your case. For instance, nothing in the MRE discusses admission of altered writings, but there is a statute specifically on point which might be dispositive in a particular case. M.C.A. §26-1-106, "Explanation of alterations in a writing," provides:

> The party producing a writing as genuine that has been altered or appears to have been altered after its execution in a part material to the question in dispute shall account for the appearance or alteration. The party may show that the alteration was made by another without the party›s concurrence, was made with the consent of the parties affected by the alteration, or was otherwise properly or innocently made or that the alteration did not change the meaning or language of the instrument. If the party does that, the party may give the writing in evidence, but not otherwise.

Knowing that there is such a statute, and its effect, could be key in a case centering on the admission or preclusion of a contract, deed, will, business record or medical chart. Another very important provision found in the statutes rather than the rules is M.C.A. 26-2-601, "Medical malpractice expert witness qualifications." Enacted in 2005, it sets a very specific list of criteria for expert witnesses on the standard of care in medical malpractice cases. Again, this could make or break a medical malpractice case, but there is nothing in MRE 702 or 703 which would alert you to these requirements.

The M.C.A. also contains "stealth" evidence provisions scattered throughout the Code, in various sections dealing with particular subject matters, best found by perusing the Index to the MCA. A familiar example is the "parol evidence rule" which partakes both of substantive contract law and the law of evidence[4]. In Montana, it is enacted as M.C.A. 30-2-202:

> Final written expression -- parol or extrinsic evidence. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
>
> (a) by course of dealing or usage of trade (30-1-205) or by course of performance (30-2-208); and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The U.S. Supreme Court noted, in the criminal arena, another Montana statute which governs admissibility of evidence but which is located outside Title 26 in the M.C.A.: "Section 45-2-203 does not appear in the portion of Montana›s Code containing evidentiary rules (Title 26), the expected placement of a provision regulating solely the admissibility of evidence at trial…." Montana v. Egelhoff, 518 U.S. 37, 57 (1996) (Ginsburg, J., concurring). Bottom line: you don't want to be surprised at trial because your

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1 Copyright Cynthia Ford.

2 The MRE are printed as Chapter 10, even though they technically are rules rather than legislative enactments, for ease of reference.

3 Chapters 4-9 are reserved.

4 But "The parol evidence rule, as it appears in the law of contract and in the Uniform Commercial Code, is actually a principle of substantive law and not a procedural rule of evidence. …Thus, the admissibility of any evidence is ultimately subject to the provisions of the Montana Rules of Evidence. (Citations omitted). Norwest Bank Billings v. Murnion, 210 Mont. 417, 424, 684 P.2d 1067, 1071 (1984).

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opponent did, and you did not, consult the M.C.A. as well as the M.R.E.

A third source of evidence law applies mostly in criminal cases: the federal and Montana constitutions. For example, a current hotbed of activity by the U.S. Supreme Court concerns the application of the Sixth Amendment's Confrontation Clause to evidence against criminal defendants. Ignoring this constitutional requirement in a criminal case would amount to professional negligence. The danger is highest for those who only occasionally appear in criminal cases[5]; all prosecutors and specialized criminal defense lawyers are keenly aware of the most recent pronouncements from the U.S. and Montana Supreme Courts on the right of confrontation.

This leads us to another well-known source of evidence law: court interpretation of the statutes and rules governing admission of evidence. The Montana Supreme Court has the final say on the application of the M.C.A. and the M.R.E.; these are matters of state law (except where a state evidence provision allegedly abridges a federal right). The Montana Supreme Court deals regularly[6] with appeals claiming that the trial court erred in admitting or refusing evidence. The constitutions, statutes and M.R.E. comprise the skeleton of the body of evidence law in Montana. The Supreme Court opinions interpreting and applying the bones in specific circumstances serve as the meat, and are essential to an accurate understanding of evidence law in Montana.

Beehler v. Eastern Radiological Associates, 2012 MT 260, is a recent example of a case filling out the bare bones of an evidence statute. As I mentioned above, the legislature enacted M.C.A. §26-2-601, setting required qualifications for experts in medical malpractice cases. The trial court in Beehler found that the plaintiff's only expert did not meet that statutory standard, excluded his testimony, and therefore granted summary judgment for the defendants. On appeal, the Supreme Court reversed and remanded, holding that the plaintiff's expert did in fact comply with the statute's requirements, and that the District Court had incorrectly applied the statute and in so doing, abused its discretion. The Supreme Court acknowledged that it had not previously decided a case construing this statute, ¶24, and provided a road map for trial judges in future cases to use in applying the statute:

> When the specifics of Dr. Joseph›s deposition and experience are applied to the requirements of § 26–2–601, MCA, and the subject of Plaintiffs' claim, it is clear that Dr. Joseph qualifies as an expert. Specifically, Dr. Joseph is licensed to practice in California, treats bacterial meningitis, and provides the type of treatment at issue, infection prevention during a myelogram, satisfying Subsection 1(a). Moreover, Dr. Joseph is board certified in infection prevention, investigates and treats nosocomial infections, has investigated post-myelogram meningitis infections, and has developed infection control procedures that require radiologists to wear masks during myelograms. Recognizing that the wearing of a mask during the myelogram is the "act or omission that is the subject matter of the malpractice claim," it is clear that Dr. Joseph satisfied Subsection 1(b). Similarly, as Dr. Joseph is a physician testifying about a physician, he satisfied Subsection 2.

¶25. Thus, to have a complete taste of Montana law on the qualification of medical experts in malpractice cases, you have to integrate the M.C.A., the M.R.E., and the Montana Supreme Court cases applying the relevant provisions.

Researching Evidence Law: Step-by-Step[7]

1. Montana Statutes. The official Montana state website is easy and free: http://data.opi.mt.gov/bills/mca_toc/index.htm

a. Title 26 "Evidence" contains both specific statutes and reprints as Chapter 10 the Montana Rules of Evidence (see below)

b. index or subject search of the rest of the MCA, to locate special evidence provisions for your specific type of case

c. Montana Constitution, available as part of the MCA website above.

2. Montana Rules of Evidence (M.R.E.)

a. The Rules themselves, available in numerous sources on- and off- line, including the free Montana state website, where they are printed as Chapter 10 of Title 26: http://data.opi.mt.gov/bills/mca_toc/26

b. The Montana Commission Comments

These were written at the time the original M.R.E. were drafted, and are very helpful in explaining the intent of each rule. The November 3, 1976 letter from the Evidence Commission to the Montana Supreme Court conveying the proposed M.R.E. stated:

> The official comments cover a comparison of the Montana Rules with their Federal counterparts, the reasons for the adoption of each Rule, the Rules' effect upon the existing Montana law of evidence, and citation of leading Montana case law authorities. The Commission believes that the comments provide significant guidelines for interpretation and application of the Rules in practice.

Where the proposed (and adopted; they all were) M.R.E. differs from the then-current corresponding Federal Rule of Evi-

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5 I myself am on very thin ice here. I have never practiced criminal law, so that all my information on this subject comes from what I have had to learn in teaching Evidence, both from written sources and from colleagues who dedicate their practices to prosecution or criminal defense and have generously shared their insights.

6 In the twelve months between December 1, 2011 and December 1, 2012, WestlawNext found 17 cases involving "admission of evidence."

7 The Jameson Law Library at the University of Montana School of Law, in particular Cynthia Condit and Stacey Gordon, have been very helpful in all parts of my research, but particularly in making sure this chapter is complete and correct. Because they are lawyers as well as librarians, they asked me to add "to the best of their knowledge." In my experience, the best of their knowledge is the best around.

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dence, the Comment explains why Montana chose a different path on that issue.

Sadly, it is not as easy to locate the Commission Comments as the M.R.E. themselves. Offline, the hard copy of the Montana Code Annotated published by West does have the Commission Comments at the start of the annotation section for each rule, which is probably the best way to access them if you have access to a physical law library which includes this set.

Online, the Comments are available for a fee on both WestlawNext and LexisAdvance[8], but I have not found any free online source. The Comments are not included as part of the M.C.A. on the state website. As a public service, to facilitate access to and use of the original Commission Comments[9], I have attached them to my faculty webpage in pdf [10] format, in the bottom section of the webpage, entitled "Helpful Research Links": http://umt.edu/law/about/faculty/people/ford.php

3. Montana Supreme Court cases interpreting the MCA or Montana constitutional provision(s) you found. These are available widely, including through the online subscription services of WestlawNext and LexisAdvance. For free, there are:

a. The Montana Supreme Court website: does allow searching by phrase, in addition to party name. Go to Opinions/Brief tab > select Advanced Search. The format of how the rules are written in the opinion may vary, but probably should be something like "703 M.R. Evid." Thus, a search for "M.R.E. 703" may not return anything. The key is to come up with a search that will catch at least part of what you are looking for. http://searchcourts.mt.gov/

b. Google Scholar: http://scholar.google.com/schhp?hl=en&as_sdt=4,27

c. Findlaw.com (the professional site – which is accessible to all) has access to Montana Supreme Court opinions with an option to do a free text search (current Montana coverage is 1980-current): http://www.findlaw.com/casecode/montana.html

d. Justia.com has access to Montana Supreme Court opinions, text searchable (current Montana coverage is 1972-current): http://law.justia.com/montana/

4. Federal evidence law: this is not binding, but can be highly persuasive if the M.R.E. in question follows the corresponding F.R.E.

a. Read the corresponding FRE, and compare it to the M.R.E. in question yourself.

b. Reread the M.R.E. Commission Comment (see above) for its insight into the comparability of the M.R.E. to the 1977 version of the F.R.E.

If you conclude that the Montana approach is similar to the federal approach, continue; federal evidence law will be useful. If Montana chose a different path, stop now, because the federal materials will not be helpful.

c. If the M.R.E. was meant to mirror the F.R.E., read the original Federal Advisory Committee Note ("ACN"). These are easier to find online than the Montana Commission Comments, including in both WestlawNext and LexisAdvance. There are two good free sources:

The Cornell Legal Information Institute includes the original ACNs (and the ACN for each amendment), right after the appropriate rule: http://www.law.cornell.edu/rules/fre

The federal government printing office website also has the original and amendment ACNs, listed after each rule: http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/html/USCODE-2009-title28-app-federalru-dup2.htm

CAVEAT: the Advisory Committee Notes were submitted by the Committee to the U.S. Supreme Court with the Committee's

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8 WestlawNext has the Commission Comments. LexisAdvance has even more information about the rules adoption process and also includes the original Commission Comments to each rule. However, neither WestlawNext nor LexisAdvance has a comment to the 2007 amendment to Rule 407, which is the only amendment of the MRE since their original adoption, because there was no Comment to the amended version.

9 Note that this document is entitled "Complete Proposed Comments" and dates from November 8, 1976, but my research shows that the Court adopted these in toto as part of its adoption of the Commission's proposed MRE, so this version became the official Comments. (See "History of MRE").

10 Note also, that there is no guarantee of format, so you should proofread carefully if you elect to block and copy any part of a Comment from my webpage to a legal document.

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proposed rules, and passed on by the Court to Congress. Before the FRE were finalized, Congress made several substantive changes, which meant that the ACNs for those rules became inaccurate, and remain so. Also, some of the original ACNs contained "typos" and/or incorrect references to other rules. In 1998, the Federal Judicial Center published "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," which outlines those FREs where the published ACNs are misleading. This is a public document, and can be located online free at: http://www.fjc.gov/public/pdf.nsf/lookup/capra.pdf/$file/capra.pdf

d. DO NOT PROCEED DIRECTLY TO FEDERAL CASES. Starting with secondary sources can save you, and your client, a lot of time and money. Because the federal system is so big, there are several great treatises which go through the rules one-by-one, explaining the purpose and use of each rule, and digesting the important cases decided about that rule. They have done the pre-work which will make your federal case research much more efficient. Of course, you can't rely solely on the author's interpretation of the case: it is your professional responsibility to both read the case for yourself and to check on its current status. Here is a list of my favorite treatises:

- Federal Rules of Evidence Manual, 10th ed., by Steven Saltzburg & Michael Martin, Lexis product http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=42095#
- McCormick on Evidence, 6th ed., Westlaw product http://store.westlaw.com/mccormick-on-evidence-6th-practitioner-treatise-series/136369/15693906/productdetail
- Weissenburger's Federal Evidence, 7th ed., by Glen Weissenburger & James Duane, Lexis product http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=45089#
- Handbook of Federal Evidence, 7th ed., by Michael Graham, Westlaw product http://store.westlaw.com/handbook-of-federal-evidence-7th/182860/11406856/productdetail
- Moore's Federal Practice [, 3rd ed., loose-leaf, Lexis product http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=10106
- Wright & Miller's Federal Practice & Procedure, 3rd ed., Westlaw product http://store.westlaw.com/federal-practice-procedure-wright-miller/3731/22060402/productdetail

e. Research federal case law, using the treatise as a guide. Remember, these cases are only persuasive, not binding, on the Montana courts (unless the decision is based on a constitutional provision).
   i. U.S. Supreme Court
   ii. 9th Circuit decisions
   iii. Other circuits
   iv. U.S.D.C. for the District of Montana

5. U.S. Constitution (I have this on my phone and ipad via free apps, so should you. Or, like Justice Scalia, you could still carry around a hard copy…)

a. U.S. Supreme Court cases
b. If none, 9th Circuit cases
c. Other circuits

6. REMEMBER TO UPDATE your research if any time at all has passed between when you did it, and the time you are making your (oral or written; see below) argument to the Court.

USING YOUR RESEARCH

You can use your research orally, to support an objection or to respond to an objection, in the middle of trial. "Your Honor, I object. Rule ___ applies, and there is a case directly on point: Smith v. Jones, 123 Mont. 42, 78 P.3d 297 (2012). Also, the Commission Comment to Rule ___ specifically says: "XXXXXXXX." Impressive, and if you think your opponent hasn't even thought about the issue, maybe the best route because the oral objection at trial won't give her a chance to prepare a counter to your argument.

BUT you and your opponent are not the only interested parties. Consider the judge who has to make the ruling on the fly, has not been alerted to the objection beforehand, and probably hasn't read, at least recently, either the Commission Comment or the case on which you rely. Judges are only human[11] and if you put yourself in their places, wouldn't you rather have something in writing, preferably beforehand, to help you make the necessary decision? My favorite quote of all time comes from a very good Montana trial judge, which the Supreme Court saw fit to reprint verbatim:

> Plaintiffs' counsel attempted to introduce a notarized statement through the defendant Josephson:
>
> Q. I'm handing you a notarized statement of Mr. Hand. May I approach, Your Honor?
>
> THE COURT: You may, but what good is a notarized statement?
>
> Q. Mr. Hand is deceased, Your Honor. This falls outside of the definition of hearsay, it's notarized, it's a statement about Mr. Josephson and the Monroes. I'm going to ask him if he knows about it and if he's heard of it before.
>
> THE COURT: Okay. I don't know how far you're

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11 E.g., M.C.A. 3-5-202 "A person is not eligible for the office of judge of a district court unless the person...," Oldfather, "Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design," 36 Hofstra L.R. 125 (2007), http://lawarchive.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v36n01_cc4_oldfather_36_1.pdf; Boston Legal 2004 Season, "Death Be Not Proud" at 19:07.

Court releases results of Bench and Bar Survey

The recently concluded Supreme Court Bench and Bar survey shows appellate attorneys, judges and law school faculty continue to hold the Court in high regard. The survey, which asks a series of 10 questions about the Court's work pace, decision quality and overall management, showed 86.4% of the respondents reporting a positive perception of the Court. The survey is sent every two years to all District Court judges, attorneys with cases before the court, and University of Montana School of Law faculty.

Survey respondents were very pleased with the timeliness of the Court's decisions, with 94.9% strongly agreeing or agreeing that the Court issues opinions in a timely manner. An even higher number, 96.4%, indicated that the Court completes its overall workload in a timely manner. This represents a 60% increase from numbers recorded in the first survey conducted in 2008.

"As a Court we understand that Montanans should not wait for years for a decision. We have put considerable effort toward finishing cases and getting decisions out the door so litigants can get a decision and move on with life. I am very proud of the Court and happy that attorneys and judges see the difference," said Chief Justice Mike McGrath.

The survey, sent to 707 individuals, had a response rate of 46.1%, which was up from the 39.6% response rate in 2010. It was conducted in September 2012 using an anonymous on-line survey tool. The survey is part of a series of Supreme Court performance measures adopted in 2008.

The Court recently modified its case processing standards by reducing the goal for case completion from 365 days to 180 days. Under the revised standard, the Court aims to get decisions issued within 180 days of the case being submitted to the Court for classification (with all briefing completed). The average length for case turnaround is currently less than 100 days.

Survey users also expressed overall satisfaction with the Court's decisions. A large majority of respondents (80%) strongly agreed or agreed that the Court's decisions clearly state the rule of law, standards of review and instructions on remand. Respondents also agreed that decisions are based on facts and applicable laws, and deviations from the principle of stare decisis are well explained.

For all questions involving decisions, judges and law school faculty reported higher satisfaction than attorneys; however, a majority of attorneys still responded positively. The level of positive affirmation from the appellate lawyers is impressive. Each case has a winner and loser, and attorneys on both sides report confidence in the Court's work.

In 2012, a total of 778 actions (direct appeals, original proceedings and disciplinary cases) were filed before the Court. Specific details about cases filed before the Court are available at: http://courts.mt.gov/clerk/stats/default.mcpx.

The report and information about case flow measures is available at: http://courts.mt.gov/supreme/measures/default.mcpx.

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> going to get but you may approach. **This is kind of like an evidence exam for me. If somebody would tell about these things a little before then I wouldn't have to, you know, make these rulings off the cuff,** but go ahead. I mean we've got 89,000[12] exceptions to the hearsay rule and, you know, **if somebody would give me a heads up and say we've got a dead guy who has a statement here that I'm going to try to get into evidence that I could do a little research**, but I don't know if you are trying to let all these people think I'm an idiot or something, but proceed and I'll try to catch up as we go along.

Lopez v. Josephson, 2001 MT 133, ¶ 39, 30 P.3d 326, 333. Judge Prezeau articulated what most, if not all, judges must feel when called upon to rule on an evidence issue at trial, without any warning.

The best way to help the judge, and thus advance your client's case, is to reduce your research to writing and present it to the court at the time you make your argument. You can do this in several forms: a brief in support of a pretrial motion in limine to exclude or admit an item of evidence (oral or tangible); as part of a trial brief; or, at the very least, as a short "point brief" which you hand to the judge and opposing counsel in the courtroom, in support of your oral objection or response. If you are going the point brief route, I recommend that you append to your point brief copies of the pertinent MRE, the Commission Comment, and the text of the case(s) you have cited, all highlighted so the judge can quickly find the applicable provisions in that source. Even if the judge rules against you, she should be impressed with your diligence, and predisposed to listen to you carefully next time. If it is true that when a judge rules on a point of evidence, he is choosing which lawyer he wants to "represent" him if an appeal occurs, it seems obvious that he would pick the one who is better prepared. Of course, although the jury is not ruling on the evidence issue, they may at least share the judge's impression that you know what you are doing. Lastly, the opposing lawyer may retreat from marginal objections or responses to avoid a repetition of the "I have a point brief here, your Honor" scenario if her briefcase does not contain any counter. One of my favorite trial moments of all time occurred when I was appearing as a special prosecutor, and midway through the trial, the criminal defense lawyer uttered in frustration: "Enough with the Rules already, Your Honor!"

There is some danger, however: you have to be careful not to appear smug or in any other way cause the jury (or judge) to feel sorry for your opponent, and subconsciously begin to root for her. That does not mean you should not do or use your research, just that the tone with which you do it has to be consciously calibrated to convey respect for the process, the court, and your opponent.

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12 Well, ok, maybe this is a slight exaggeration…