

## ETHICAL AND PROFESSIONAL RESPONSIBILITIES OF ATTORNEYS ASSIGNED BY THE OFFICE OF THE STATE PUBLIC DEFENDER

### Summary

Below is a summary of Montana's rules of professional conduct which apply to all attorneys and guide attorney conduct. The Montana Supreme Court has exclusive jurisdiction over matters involving the conduct and disciplining of attorneys.

### The Rules of Professional Conduct.

*Competent Representation.* An attorney must provide competent representation which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

*Obligations in Criminal Cases.* An attorney in a criminal case must consult with the client and abide by the client's decisions regarding what plea is to be entered and whether to have a jury trial, to testify, or to take an appeal. An attorney in a criminal case may not fail to represent a client who declines a plea agreement and goes to a jury trial.

*Client's Objectives.* An attorney must take all reasonable steps necessary to meet the client's objectives. However, the attorney cannot assist in the presentation of false evidence or violate the law.

*Reasonable Diligence and Promptness.* A lawyer must act with reasonable diligence and promptness, and an attorney's workload must be controlled so that each matter can be handled competently.

*Communication.* A lawyer must communicate and keep the client reasonably informed about the case and promptly comply with requests for information.

*Clients with Diminished Capacity.* An attorney must, as far as reasonably possible, maintain a normal attorney-client relationship with a client with diminished capacity, whether due to age, mental impairment, or other reason.

*Confidentiality.* An attorney must keep a client's information confidential, unless the client consents or the attorney's disclosure is necessary to carry out the client's representation.

*Conflicts of Interest.* An attorney must avoid "concurrent conflicts of interest." For example, an attorney cannot represent a husband and a wife where the wife "ratted out" the husband to police. A concurrent conflict of interest can occur due to a public defender's excessive workload. As one court noted, "public defenders are risking their own professional lives" when they have too many cases.

*Conflicts with Former Clients.* Absent informed written consent, an attorney must not represent client A when clients A's interests are materially adverse to a former client. For instance, an attorney cannot represent a client giving a statement to police if that statement is harmful to a former client.

*Conflicts and Public Employees.* The duty to avoid conflicts of interest applies to lawyers who are public employees.

*Duty to Advocate.* An attorney may only advance meritorious claims on behalf of a client. However, where a client faces incarceration the attorney may advocate that every element of the case be established.

*Expediting Cases.* An attorney shall make reasonable efforts to expedite cases consistent with the interests of the client.

*Duty of Candor and Fairness.* An attorney must not knowingly allow a court to be misled by false statements of law or fact. An attorney owes a duty of fairness to the opposing parties and counsel.

*Attorney Cannot Be A Witness.* An attorney cannot lawyer at a trial in which the attorney is likely to be a witness. As a result, OPD investigators, rather than attorneys, should interview witnesses in OPD cases.

*Obligations of Supervising Attorneys.* An attorney who has managerial authority must make reasonable efforts to ensure other attorneys conform to the Rules of Professional Conduct. An attorney under supervision does not violate the Rules of Professional Conduct when acting in conformance with a supervisory lawyer's "reasonable resolution of an arguable question of professional duty."

### **Mechanism for Enforcement of the Rules of Professional Conduct and Imposition of Discipline.**

All attorneys admitted to practice in Montana are subject to the disciplinary jurisdiction of the Supreme Court.

The Office of Disciplinary Counsel (ODC) processes, investigates, and prosecutes complaints against attorneys. Any member of the public may make a complaint. The ODC measures attorney conduct according to the previously discussed Montana Rules of Professional Conduct.

A Commission on Practice hears the complaints and makes recommendations to the Supreme Court regarding discipline.

Discipline may take several forms, including (1) disbarment; (2) suspension; (3) public censure; (4) admonition; and, (5) probation.

Discipline may be imposed, even if the client's rights were not prejudiced.

## ETHICAL AND PROFESSIONAL RESPONSIBILITIES OF ATTORNEYS ASSIGNED BY THE OFFICE OF THE STATE PUBLIC DEFENDER

All attorneys are bound by Montana's rules of professional conduct. Public defenders "are subject to the Rules of Professional Conduct governing the action of lawyers no less than other members of the State Bar."<sup>1</sup> These rules define and guide an attorney's ethical obligations.<sup>2</sup> The Montana Supreme Court has exclusive jurisdiction and responsibility in all matters involving the conduct and disciplining of attorneys. Rules which may relate to the work of public defenders will be discussed in the next section, and the disciplinary process will then be summarized.

### **The Rules of Professional Conduct.**

The first set of rules of professional conduct address the client-lawyer relationship.

Montana Rule of Professional Conduct (MRPC) 1.1 imposes the obligation to provide competent representation, which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment 8 to the Model Rule 1.1 notes that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

MRPC 1.2 requires that the lawyer consult with the client, and in criminal cases, the lawyer "shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." That is, the client has "ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Model Rule, Comment 1. The Montana Supreme Court has ruled that a lawyer may not seek to withdraw from a case based on his client's decision to decline a plea agreement and exercise his right to a jury trial. The Supreme Court held that the obligations imposed by MRPC 1.2 "are paramount, and unqualified."<sup>3</sup>

The United States Supreme Court has recognized that while a lawyer must take all reasonable lawful means to attain the objectives of the client, he or she is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.<sup>4</sup>

A lawyer must act with reasonable diligence and promptness. MRPC 1.3. Comment 2 to Model Rule 1.3 recommends that “[a] lawyer’s work load must be controlled so that each matter can be handled competently.”

A lawyer has an affirmative obligation to communicate with his or her client. Duties regarding communication include the obligations to keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information. MRPC 1.4.

A lawyer’s obligations to the client extend to those clients who are under some form of diminished capacity, including age. Under MRPC 1.14(a), “[w]hen a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Comment 1 to the Model Rule notes that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”

MRPC 1.6 requires that a lawyer maintain the confidentiality of information provided by a client. “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted [by other subsections].” Respecting the confidentiality of information “contributes to the trust that is the hallmark of the client-lawyer relationship.” Model Rule, Comment [2]. This “principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics.” Model Rule, Comment 3.

Several rules proscribe impermissible conflicts of interests. MRPC 1.7(a) imposes on lawyers the duty to avoid a “concurrent conflict of interest.” Generally, a lawyer shall not represent a client if “the representation of one client will be directly adverse to another client [.]” For example, a lawyer would have a conflict of interest if he concurrently represented two people, one of whom provided harmful information about the other client. This was the conclusion of the Montana Supreme Court, in In the Matter of Neuhardt, 2014 Mont. 88, 374 Mont. 379, 321 P.3d 833. There, Neuhardt, the lawyer, had an impermissible conflict when he concurrently represented both a husband and a wife who “ratted out” her husband during an interview in a drug investigation.

A lawyer also has an impermissible “concurrent conflict of interest” under MRPC 1.7(a) (2) if “there is a significant risk that the representation of one or more clients will be materially

limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Public defenders who labor under excessive workloads are not entitled to any exception to this ethical mandate. As noted in State ex rel. Mo. Pub. Defender Comm'n v. Waters, 370 S.W.3d 592, 608 (Mo. 2012),

No exception exists to the ethics rules for lawyers who represent indigent persons. To the contrary, as the American Bar Association has aptly noted, there is an "implicit premise that governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules." Am. Bar Ass'n, *Eight Guidelines of Public Defense Related to Excessive Workloads*, August 2009, at 11. For this reason, "public defenders are risking their own professional lives" when appointed to an excessive number of cases.

A lawyer also owes a duty to avoid conflicts of interest involving former clients. MRPC 1.9(a) provides that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person "in the same or a substantially related matter" if that person's interests are "materially adverse to the interests of the former client" unless the former client gives informed written consent.<sup>5</sup> In the *Neuhardt* case, the lawyer also had a conflict of interest under Rule 1.9, when he represented a person during an interview with law enforcement when that person made statements that were harmful to the lawyer's former client.

These prohibitions about conflicts of interest specifically apply to lawyers who are public employees. MRPC 1.11(d)(1) states generally that a lawyer currently serving as a public officer or employee "is subject to Rules 1.7 [prohibition against concurrent conflicts of interest] and 1.9 [prohibition against conflict of interest with former client]."

MRPC Rule 1.16(a)(1) requires that a lawyer shall not represent a client if "the representation will result in violation of the rules of professional conduct or other law[.]"

MRPC 2.1 sets out the attorney's obligations as an advisor to his or her client. A lawyer must "exercise independent professional judgment and render candid advice" to a client.

A third set of rules relates to the lawyer's role as advocate for the client. MRPC rule 3.1 provides generally that a lawyer should pursue or advance meritorious claims and contentions only. However, a lawyer's constitutional obligation to provide effective representation for a client in a criminal case may trump the general rule. MRPC 3.1(b) provides that "[a] lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in

incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established." Comment 3 to the Model Rule explains, "[t]he lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule."

MRPC 3.2 provides that "a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

MRPC 3.3 imposes a duty of candor to the tribunal. Comment 2 to the Model Rule explains that "although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."

All lawyers own duties of fairness to opposing parties and counsel. MRPC 3.4.

Generally, MRPC 3.7 provides that a lawyer "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." This prohibition makes it inadvisable for a public defender to interview a person who is likely to testify at a trial. If that person's trial testimony differs materially from the statement given before trial to the public defender, the lawyer cannot, under Rule 3.7, take the stand herself and dispute the contradictory testimony. Thus, potential witnesses for the state often are interviewed by an investigator, so that the lawyer may use that investigator at trial to develop conflicts in testimony.

The Montana Rules of Professional Conduct apply with equal vigor to supervisory lawyers and staff lawyers in OPD. MRPC 5.1(a) states that a lawyer who has "managerial authority" comparable to that of a law firm partner "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." A manager having "direct supervisory authority over another lawyer shall make reasonable efforts to ensure" that the other lawyer conforms to the ethics rules. MRPC 5.1(b).

Staff lawyers are bound to comply with the ethics rules even if acting "at the direction of another person." MRPC 5.2(a). Rule 5.2(b) provides that a staff attorney does not violate the Rules of Professional Conduct if the lawyer acts in accordance with the supervisory lawyer's "reasonable resolution of an arguable question of professional duty."

## **Mechanism for Enforcement of the Rules of Professional Conduct and Imposition of Discipline.**

Matters regarding possible violations of the Montana Rules of Professional Conduct are governed by the Supreme Court's Rules for Lawyer Disciplinary Enforcement (MRLDE). See, In the Matter of Neuhardt, 2014 Mont. 88, ¶16, 374 Mont. 379, 321 P.3d 833. "Any lawyer admitted to practice law in the state of Montana . . . is subject to the disciplinary jurisdiction of the Supreme Court." MRLDE 7.

The Office of Disciplinary Counsel (ODC) performs central intake functions and processes and investigates those complaints against lawyers which are within the disciplinary jurisdiction of the Supreme Court. MRLDE 1, 10. Any member of the public may make a complaint against a lawyer. In 2014, 50% of complaints docketed by the Office of Disciplinary Counsel were made by clients or former clients of the lawyer; 17% of the docketed complaints were made by "third parties/other"; and 11% were made by attorneys. Twenty percent of all docketed claims filed in 2014 were against public defenders. See, ODC's 2014 Annual Report, at 12-13.

ODC also prosecutes complaints against lawyers, and bears the responsibilities of a prosecutor under Montana Rule of Professional Conduct 3.8.<sup>6</sup>

A Commission on Practice hears and decides complaints, and in appropriate cases makes recommendations to the Supreme Court for discipline. MRLDE 2.

MRLDE 8 provides that discipline may be imposed on a lawyer for any of the following reasons:

- (1) Acts or omissions by a lawyer, individually or in concert with any other person or persons, which violate the Rules of Professional Conduct or the disciplinary rules adopted from time to time by the Supreme Court.
- (2) Any act committed by an attorney contrary to the highest standards of honesty, justice, or morality, including but not limited to those outlined in Title 37, chapter 61, parts 3 and 4, MCA, whether committed in such attorney's capacity as an attorney or otherwise.

Discipline may take any of several forms, including (1) disbarment - the unconditional termination of any privilege to practice law in Montana; (2) suspension - the temporary or indefinite termination of the privilege to practice law in Montana; (3) public censure; (4) admonition; and, (5) probation.

An ethical violation may exist independent of the constitutional obligation for a lawyer to provide effective representation in a criminal case.<sup>7</sup> Thus, discipline may be imposed, even if the client's rights were not prejudiced. In the Neuhardt case, in which the lawyer represented both the husband and the wife who "ratted out" her husband, the Court held that Neuhardt violated the "conflict of interest" provisions of Rule 1.7, "whether or not 'actual prejudice' to [husband's] defense occurred as a result of Neuhardt's joint representation." 2014 MT 88, at ¶27.

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<sup>1</sup> Chaleff v. Superior Court, 69 Cal. App. 3d 721, 724 (Cal. App. 2d Dist. 1977).

<sup>2</sup> The American Bar Association adopted Model Rules of Professional Conduct in 1983. The Montana Supreme Court adopted the ABA Model Rules, Rule 1.1 to Rule 8.5 inclusive, on June 6, 1985. In the Matter of the Adoption of the American Bar Association Model Rules of Professional Conduct, Cause No. 84-303. The Court has revised various rules several times since the Model Rules were adopted.

<sup>3</sup> State v. Jones, 278 Mont. 121, 132, 923 P.2d 560, 566 (1996).

<sup>4</sup> Nix v. Whiteside, 475 U.S. 157, 166 (1986).

<sup>5</sup> Matters are substantially related "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Model Rule 1.9, Comment 3.

<sup>6</sup> See, In the Matter of Neuhardt, 2014 Mont. 88, ¶21, 374 Mont. 379, 321 P.3d 833.

<sup>7</sup> See, Nix v. Whiteside, 475 U.S. 157, 165 (1986) (breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.)