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# Montana v. Federal Evidence Rules 2013: A Short Comparison

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# Montana v. Federal Evidence Rules 2013<sup>1</sup>

## A short comparison

By Cynthia Ford

I began this series with “A Short History of the Montana Rules of Evidence.” In that article, I reviewed the rule-making process which led to the 1976 adoption of the M.R.E. and the fact that the M.R.E. are largely based on the Federal Rules of Evidence (F.R.E.), which became effective two years earlier. However, in several important respects, the Montana Evidence Commission felt that the existing Montana jurisprudence on a particular issue made more sense than the federal counterpart, and chose to depart from the federal model. The Montana Commission Comments to each rule state whether that rule was drafted to mirror, or deviate from, the corresponding federal rule.

Only one of the M.R.E. (Rule 407) has been modified in any significant way since they were adopted. By contrast, the F.R.E. have been amended multiple times, and just recently (2011) were systematically “restylized.” Thus, even if the particular M.R.E. originally reflected the federal version, subsequent federal amendments may have caused a diversion if those amendments were substantive. I recently prepared a short comparison of the current F.R.E. and the M.R.E. for my upcoming Evidence class at UMLS, and thought it might be helpful to practicing lawyers as well. This comparison is meant to cover major differences, and does not include those which I think are minor or inconsequential.

### MAJOR DIFFERENCES<sup>2</sup> FROM F.R.E.

#### Judicial Notice, Article II: Montana more detailed

M.R.E. 201 explicitly covers judicial notice of “all facts,” whereas F.R.E. 201 is much messier, governing judicial notice “of an adjudicative fact only, not a legislative fact” without providing any definition of either term.

The F.R.E. Article II on Judicial Notice has only one rule,

Rule 201. By contrast, Montana adds M.R.E. 202, “Judicial notice of law.” It requires a trial court to take judicial notice of the laws (common law, constitutions and statutes) of the United States, of Montana, and of every other state, territory and jurisdiction of the United States. Additionally, Rule 202 lists many other types of law which a court may judicially notice of its own accord or on request of a party.

#### Presumptions, Article III: Montana more detailed

F.R.E. 301 is very short and vague, and does not even define “presumption.” Montana’s version is quite a bit longer, defining presumptions in general and then differentiating between conclusive (M.R.E. 301(b)(1) and disputable presumptions (M.R.E. 301(b)(2)). The Montana version also details the effect of presumptions, the burden of evidence necessary to overcome a disputable presumption, and how a judge should cope with inconsistent presumptions.

### RELEVANCY, ARTICLE IV

#### Rule 404(a) Character Evidence

Under F.R.E. 404(a)(2), a federal criminal defendant may choose to offer evidence of a pertinent trait of character of the victim. However, the federal price for doing so is that the prosecutor is now free to do two things: rebut that evidence about the victim AND adduce evidence of the same trait of character of the defendant. Under M.R.E. 404(a)(2), the state criminal defendant may offer evidence of a pertinent trait of character of the accused, but the prosecutor may only rebut that evidence. The Montana prosecutor is not thereby freed to put on evidence about the defendant’s character.

In both state and federal court, in certain types of cases even if the defendant does not attempt to prove anything about the victim’s character but does put on evidence to show that the victim was the first aggressor in the incident, the prosecutor can offer evidence about the victim’s character trait of peacefulness. The difference is that in federal court, this can occur only in homicide cases. In Montana state court, the prosecutor may use

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<sup>2</sup> Of course, this outline is for initial research only, and I specifically disclaim any warranties as to its accuracy and thoroughness. Furthermore, it does not include any amendments made to either set of rules—Montana and federal—after June 2013.

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this tool in both homicide and assault cases “where the victim is incapable of testifying.”

#### **Rule 406 Habit Evidence: Montana more specific**

In both state and federal courts, the general rule is that character evidence is not admissible, but habit evidence is admissible as proof of conduct on a particular occasion. However, the F.R.E. do not contain any definition of either “character” or “habit” in the rules, although there is some guidance in the CAN. The Montana version of Rule 406 does define “habit” and furthermore specifies two methods of proving habit, opinion or specific instances of conduct “sufficient in number to warrant a finding that the habit existed...”

#### **Rule 408 Settlement Offers and Conduct: Federal more specific**

In both sets of rules, the general concept is the same, and is based on the public policy in favor of settlement of cases. Both prohibit evidence of settlement offers and of conduct and statements made during settlement negotiations. However, Montana’s ban applies only when the evidence is intended to prove liability for or the invalidity of the claim. An amendment to FRE 408 now additionally prohibits use of such evidence for impeachment purposes. Montana has not yet followed suit.

### **RULE 409 MEDICAL EXPENSES**

The exact titles of this rule differ, and that difference indicates the substantive difference in the Montana and federal rules. FRE 409 is “Offers to Pay Medical and Similar Expenses,” and prohibits evidence of either offers to pay or actual payment of medical, hospital or similar expenses as evidence of liability. MRE 409 is “Payment of Expenses.” By its terms, evidence that payment of “expenses occasioned by an injury or occurrence” (so not necessarily limited to medical-type expenses) was actually made is banned, but there is no prohibition about evidence that an offer to do so was made.

### **SEX OFFENSE CASES: FRE CONTAIN SEVERAL SPECIFIC RULES WHICH ARE NOT IN THE MRE**

#### **Federal Rule 412: “Rape Shield”—no MRE 412**

FRE 412 applies to all federal civil and criminal cases involving alleged sexual misconduct, and as a general rule prohibits evidence of the victim’s sexual behavior or sexual predisposition. There are several exceptions outlined in Rule 412. Montana has a similar provision (for criminal cases only), but it is statutory rather than a rule of evidence:

M.C.A. § 45-5-511: Provisions generally applicable to sexual crimes

(2) Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions under this part except evidence of the victim’s past sexual conduct with the offender or evidence of specific instances of the victim’s sexual activity to show the

origin of semen, pregnancy, or disease that is at issue in the prosecution.

#### **Federal Rules 413-415: Similar Crimes Admissible in Civil and Criminal Sexual Assault and Child Molestation Cases—no Montana counterpart**

The FRE have three specific rules by which Congress meant to ensure that the jury would hear evidence that the person accused (civilly or criminally) of sexual assault or child molestation had performed other similar acts, whether or not those earlier acts had resulted in charging or conviction. There has been much academic criticism of those rules. Montana, like many other states, has never adopted any of them. Thus, in sexual assault and child molestation cases in Montana state courts, MRE 403 and 404 will govern the admissibility of prior acts by the defendant.

### **PRIVILEGES, ARTICLE V: HUGE DIFFERENCES**

In Montana, privileges are statutory only. M.R.E. 501 states that there is no privilege of a witness about any matter unless the constitution, statute or court rule provides such a privilege. Numerous Montana Supreme Court cases discuss the public policy in favor of full disclosure of information helpful to a jury, and the resulting narrow construction of even those privileges which are provided by statute. (The Montana privilege statutes are located in M.C.A. Title 26, Chapter 1, Part 8).

By contrast, FRE 501 rejects a statutory list of privileged communications approach. Instead, it provides that federal evidentiary privileges are to be decided by the federal courts on a case-by-case basis: “The common law—as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.”

*N.B.: F.R.E. 501 specifically provides that in federal diversity of citizenship cases, state privilege law governs for those claims on which state law provides the rule of decision.*

In addition to this striking difference in approach, Montana and the federal system do not recognize the same privileges as a substantive matter. Montana statutes provide privileges for communications between: spouses (criminal only); attorney-client; parishioner-clergy; speech pathologist/audiologist-patient; psychologist-patient; student-educational employee; domestic violence/sexual assault advocate-victim. There also are privileges for confidential communications made to a public employee, and for communications made in the course of mediation. For civil medical malpractice actions only, any apology or expression of sympathy is privileged. Montana has a specific “Media Confidentiality Act” which statutorily provides a privilege to protect media sources. M.C.A. 26-1-901 to 903. Montana also privileges law enforcement officials from disclosing the identity of informants.

Without doing an in-depth review of the federal case law, as a general proposition, federal courts recognize: both testimonial

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and communications privileges for spouses in criminal actions; attorney-client privilege; parishioner-clergy privilege; and a psychotherapist-patient privilege (which covers licensed clinical social workers as well as psychologists). There is no doctor-patient privilege. The Supreme Court has not decided any cases about speech pathologist/audiologist privilege, student-teacher privilege, advocate-victim privilege, public employee privilege, mediation privilege or apology privilege. Federal protection of the reporter-source communication has been declined.

The M.R.E. has specific rules, 503 and 504, dealing with the waiver of privilege, if the holder voluntarily discloses any significant part of the privileged matter, unless that disclosure was erroneously compelled. M.R.E. 505 prohibits court and counsel from commenting on any claim of privilege.

The F.R.E. contains only one other privilege rule after 501. F.R.E. 502, relatively recently adopted, deals with the effect of disclosures of information which is protected by either the attorney-client privilege or the “work product” doctrine. This rule is specific and complex. Ironically, Montana does not have a counterpart, so that disclosures of this sort are dealt with by Montana case law rather than rule or statute.

## WITNESSES, ARTICLE VI

### **Rule 606—Competency of Juror as Witness—one difference**

The general rule in both the federal and state versions of Rule 606 is that it is very hard to introduce a juror’s testimony about what happened in the jury in order to attack the validity of the verdict. The federal and Montana versions of Rule 606 both except (and thus allow) juror testimony about extraneous information improperly brought to the attention of the jury, and about outside influences brought to bear on any juror. FRE 606(b)(3) also allows juror testimony that a mistake was made in entering the verdict on the form (for instance, that they agreed on \$100,000.00 but the foreperson wrote \$10,000.00). MRE 606(b)(3) instead allows juror testimony about whether there was any resort to the determination of chance (such as rolling a dice or a coin toss).

### **Rule 609—Impeachment by Conviction of Crime—huge difference**

F.R.E. 609 allows the opponent of a witness to present evidence that the witness has previously been convicted of a crime. The overall concept is that criminality impacts credibility. The federal rule is specific and complex about what type of crime, and how long ago the conviction, in deciding whether the evidence is admissible.

The Montana approach is exactly the opposite, plain and sweet: “For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.”

## OPINIONS AND EXPERT TESTIMONY, ARTICLE VII

### **Rule 702 Testimony by experts—very different**

FRE 702 was amended to codify the reliability requirements

for expert testimony imposed by the U.S. Supreme Court in the *Daubert* and *Kumho Tire* cases, which rejected the pre-Rules “*Frye* general acceptance test.” MRE 702 has not followed suit, and does not contain in the language of the rule anything about reliability of the expert’s method or application of that method in the case at hand.

Furthermore, the Montana Supreme Court cases do not mirror those of the federal court system. Like the U.S. Supreme Court, the Montana Supreme Court has rejected the pre-Rules “general acceptance” test in favor of a more liberal admissibility. However, Montana does not apply *Daubert* and its progeny to all forms of expert testimony. Montana does use a *Daubert*-like analyses when the expert testimony involves “novel scientific evidence:”

Expert testimony regarding novel scientific evidence must be reliable. *Hulse*, ¶ 52 (citing *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993)). We have adopted non-exclusive factors to consider when determining whether novel scientific evidence is reliable, including testing, peer review, technique rate of error, standards of operation and general acceptance.

*Wheaton v. Bradford*, 2013 MT 121, 370 Mont. 93, 300 P.3d 1162, 1166, footnote 3.

However, when the testimony does not involve a “novel” scientific method, Montana does not require a *Daubert* analysis. “[A]ll scientific expert testimony is not subject to the *Daubert* standard and the *Daubert* test should only be used to determine the admissibility of novel scientific evidence.” *Hulse v. State, Dep’t of Justice, Motor Vehicle Div.*, 1998 MT 108, 289 Mont. 1, 28, 961 P.2d 75, 91.

Certainly, if a court is presented with an issue concerning the admissibility of novel scientific evidence, ... the court must apply the guidelines set forth in *Daubert*, while adhering to the principle set forth in *Barmeyer*. However, if a court is presented with an issue concerning the admissibility of scientific evidence in general, the court must employ a conventional analysis under Rule 702, M.R.Evid.

*Hulse v. State, Dep’t of Justice, Motor Vehicle Div.*, 1998 MT 108, 289 Mont. 1, 31, 961 P.2d 75, 93.

[T]he district court’s gatekeeper role in applying the *Daubert* factors, which guide trial courts in their assessment of the reliability of proffered scientific expert testimony, applies only to the admission of novel scientific evidence in Montana. *Damon*, ¶ 18. Novelty in Montana is assessed from a very narrow perspective.

*Harris v. Hanson*, 2009 MT 13, 349 Mont. 29, 37, 201 P.3d 151, 158.

### **Rule 703—Basis of Expert Opinion—looks but is not different in effect**

Both the state and federal rules 703 allow an expert to base her opinion upon inadmissible evidence, so long as that evidence is

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of a type reasonably relied upon by experts in her field. The federal version has been amended to add that the otherwise-inadmissible information is usually not allowed into evidence on direct examination of the expert. The Montana version does not contain this stricture, but the Montana Supreme Court has held similarly: “Rule 703, M.R.Evid., anticipates that experts form opinions and inferences based upon first-hand observations, facts presented at trial and information obtained outside of the courtroom prior to trial. The rule recognizes that an expert witness may rely upon inadmissible evidence when forming an opinion. . . . However, **Rule 703, M.R.Evid., does not give a witness permission to repeat inadmissible out-of-court statements to bolster his or her expert opinions before the jury.** (Citations omitted; emphasis added). *Perdue v. Gagnon Farms, Inc.*, 314 Mont. 303, 313, 65 P.3d 570, 576 (2003).

#### **FRE 706—Court-Appointed Experts: Montana does not have any such rule**

In the federal system, Rule 706 allows a court to appoint its own expert, and sets out the procedure for doing so. Montana does not have any such rule.

## **HEARSAY, ARTICLE VIII**

#### **Rule 801(d)(1)(A): Nonhearsay by definition: Prior Inconsistent Statement of Witness**

Montana’s version of this rule treats all prior statements which are inconsistent with the witness’ testimony at trial as nonhearsay, regardless of when, how, or to whom the statements were made. Thus, a bartender could recount what the witness said to him late on a Friday night. The federal version is much more conservative. In order for a prior inconsistent statement to qualify as nonhearsay, it must have been made in a specific way (under penalty of perjury) and in a specific setting (at a trial, deposition, hearing or “other proceeding”).

#### **Rule 803(3): Exception for Then-Existing Condition**

Montana does not extend this exception to statements of memory or belief which are offered to prove the fact remembered or believed. Thus, such statements of memory or belief are subject to the hearsay rule. FRE 803(3) does extend the exception to statements of memory or belief, but only if the statement relates to the terms or validity of the declarant’s will.

#### **Rule 803(6): “Business Records” Exception**

There are two differences here. First, the FRE version allows a proponent of a business record to satisfy this exception’s foundation either by calling a foundation witness (the custodian of the record or “other qualified witness”) or by submitting a certification which conforms to the self-authentication provisions in FRE 902(11) or (12). Montana requires a foundation witness; the MRE do not have any corollary to 902(11) or (12).

The second difference is that Montana’s version of 803(6) adds language not present in the federal rule. That language purports to allow admission of Montana state crime lab reports without calling the person(s) who compiled the report, if the

requisite pretrial notice is provided to the opponent. (Note that the same language used to be found in M.R.E. 803(8), the public records exception, but was removed after the Montana Supreme Court found that it unconstitutionally violated defendants’ Confrontation rights under the 6<sup>th</sup> Amendment. So far, there has not been a similar holding re: 803(6), but recent U.S. Supreme Court Confrontation Clause cases put this language in jeopardy.)

#### **Rule 803(8): Public Records Exception**

The two versions of this rule are very different in their length and complexity. The federal rule was greatly simplified and shortened in the recent stylistic amendments to the FRE. The Montana version still suffers from the stylistic difficulties of the first draft, after which it was modeled. In addition, it seems to exempt from the exception (thus prohibiting as hearsay) a greater list than the revised federal rule, but more case law is necessary to show whether this is really true.

#### **MRE 803(24) and MRE 804(b)(5): Other exceptions to the hearsay rule (the “residual exception”).**

The FRE no longer contain these subsections to the rules providing exceptions to the hearsay prohibition. Instead, the “residual exception” has been consolidated, and expanded, into FRE 807. Montana does not have a rule 807.

FRE 807 imposes several requirements for an out-of-court statement to be excepted from Rule 802 which do not appear in either of the separate MRE residual exception clauses. Montana’s only requirement is that the proffered hearsay bears “equivalent circumstantial guarantees of trustworthiness” as the enumerated exceptions. The federal rule has additional procedural (pretrial notice) and substantive requirements (that the evidence is more probative than other admissible evidence, and that the interests of justice will be served by its admission) which make the residual exception more difficult to meet.

#### **Rule 804(a):**

**Difference 1: Montana is more liberal about when a witness is “unavailable,” thus potentially allowing more use of the Rule 804 exceptions.**

The Montana version of Rule 804 (a)(1) says that “unavailability,” the prerequisite to use of the 804(b) exceptions, “includes” the 5 listed specific situations, thus potentially allowing a proponent to expand on that list. The federal version appears to be limited to the five listed situations.

**Difference 2: FRE 804(a)(5) requires the proponent to have tried to obtain testimony OR attendance by the declarant if the statement is offered as a statement under belief of imminent death, a statement against interest, or a statement of personal/family history.** Montana simply requires the attempt to have been to obtain the declarant’s attendance at trial.

#### **Rule 804(b)(2) Statements under Belief of Imminent Death: FRE version is more restrictive**

Montana allows the use of this exception in all types of cases. The FRE version restricts it to homicide and civil cases, excluding other types of criminal cases.

### **Rule 804(b)(3): Statements against Interest: Montana is more liberal**

The FRE version recognizes statements which are against only certain types of interests: proprietary, pecuniary or civil or criminal consequences. The MRE version also includes statements which would “make the declarant an object of hatred, ridicule or disgrace.”

### **Rule 804(b)(6): No such Montana exception**

The FRE allow an exception to the hearsay prohibition for statements which are offered against a party that wrongfully obtained the declarant’s unavailability. This is an added penalty for wrongfully causing a potential witness to be unavailable: the wrongdoer both loses his/her/its own ability to profit from the absence by invoking a hearsay exception, and may be harmed by admission against that party of what would otherwise be barred as hearsay.

## **AUTHENTICATION, ARTICLE IX**

The federal version contains two rules which Montana does not have, which make a substantial difference in how a proponent obtains admission of certain documents. The federal method dispenses with the need for live testimony from the custodian, if the record in question has been certified by its custodian.

### **FRE 902(11): Certified domestic business records: no Montana counterpart.**

### **FRE 902(12): Certified foreign business records: no Montana counterpart.**

Together, these two rules allow a proponent of a business record in federal court to meet the authentication requirement by submitting a document certified by its custodian, instead of having to present live testimony from that custodian that the document is indeed a business record. If it is a document from a U.S. organization, the certification must meet federal standards. If the document is from another country, the certification should match the standards of that country. For both rules, the proponent must provide advance notice so that the opponent has time

to investigate and object.

## **BEST EVIDENCE, ARTICLE X**

The two articles are basically the same. Montana’s version is slightly more liberal, in allowing admission of not just a duplicate but also “a copy of an entry in the regular course of business” in lieu of an original in most circumstances.

### **Rule 1003: Admissibility of Duplicates: Montana adds “[and] copies of certain entries.”**

This is where Montana says that if you can admit either duplicates or copies of entries in the regular course of business” in lieu of an original, unless there is some question about the authenticity of the original or other circumstances make this unfair. The federal rule sticks to “duplicates,” which are defined as “accurately reproducing the original.”

### **Rule 1008: Functions of court and jury: FRE gives the jury a role in some circumstances; MRE makes the judge the sole decision-maker.**

The FRE recognizes, as does the MRE, that the judge ordinarily decides whether the proponent has fulfilled the factual conditions for admission of “other evidence” (not the original) of the contents of a writing, recording, or photograph. However, the FRE specifically assigns to the jury factual decisions about: whether the asserted item ever existed; whether another one produced is the original; and whether the “other evidence” accurately reflects the content. MRE 1008 says the court is to decide all these issues.

## **ADDITIONAL RESOURCE**

With the help of my fabulous research assistant, Michelle Vanisko (3L, would be a terrific hire for next year, just saying), I put together a side-by-side table of the M.R.E. v. F.R.E. It is too long to print here, but I have posted it on my faculty page under “Helpful Research Links”: <http://www.umt.edu/law/faculty/people/ford.php>. Again, this is current only through June 2013 but you are welcome to download, print and use it with that caveat.

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held on a regular basis at schools or community agencies.

- Lead a Youth Homelessness Task Force in your community. NAEHCY can help you launch this inter-agency collaborative to support homeless youth.
- Engage in state policy advocacy to support homeless youth. NAEHCY’s State Advocacy Toolkit provides ready-to-use advocacy tools and sample laws.

### **How can you find out about opportunities to help?**

To find out where your services are needed in your community, contact the following:

- [Montana Legal Services Association](http://www.mtlsa.org), www.mtlsa.org. Anyone who is being unlawfully denied access to education may apply with MLSA by calling the HelpLine at 1-800-666-6899. Any attorney who accepts a pro bono client in this area of law may contact MLSA attorney Amy Hall at [ahall@mtlsa.org](mailto:ahall@mtlsa.org) if additional support would be helpful.
- [Heather Denny, Montana’s State Coordinator](http://www.mtlsa.org) for the Education of Homeless Children and Youth, at 406-444-2036 or at [hdenny@mt.gov](mailto:hdenny@mt.gov). Ms. Denny can also provide contact information for local school district McKinney-Vento liaisons.
- [Montana Coalition for the Homeless](http://www.mtcoh.org), [www.mtcoh.org](http://www.mtcoh.org)
- [Tumbleweed](http://www.tumbleweedprogram.org) in Billings, [www.tumbleweedprogram.org](http://www.tumbleweedprogram.org)
- Patricia Julianelle, Legal Director of the National Association for the Education of Homeless Children and Youth, at [pjulianelle@naehcy.org](mailto:pjulianelle@naehcy.org)