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Civil Procedure and Evidence

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CIVIL PROCEDURE AND EVIDENCE

I. Civil Procedure ........................................ 344
   A. Jurisdiction: Rule 4B .............................. 344
   B. Service of Process: Rule 4D .................... 346
   C. Venue .................................................. 347
   D. Intervention: Rule 24(a) ......................... 348
   E. Dismissal of Actions: Rule 41(a) ............... 349
   F. Discovery: Rules 36 and 37 ..................... 350
   G. Judgment: Rule 54(b) ............................. 351
   H. Appellate Procedure: Rule 59 and Montana
      Rules of Appellate Civil Procedure Rule 5 .... 352
   I. Writs of Supervisory Control .................... 353

II. Evidence ............................................. 354
   A. Relevance: Rule 401 ............................... 354
   B. Other Crimes Evidence: Rule 404(b) ............ 356
   C. Impeachment: Rules 607, 608 and 613 .......... 358
   D. Opinion Testimony: Rules 701-705 .............. 360
   E. Hearsay: Rules 801 and 803 ..................... 363
   F. Miscellaneous ........................................ 367
      1. Authentication: Rule 901 ....................... 367
      2. Pretrial Order: Effect on Admissibility ...... 368
      3. The Completeness Rule: Rule 106 ............. 368

Introduction

The scope of the following survey is the Montana Supreme Court’s interpretation of the Montana Rules of Civil Procedure and Rules of Evidence in decisions issued from January 1, 1980 to December 31, 1980. The Montana court continues to bring the Rules of Civil Procedure into alignment with the corresponding federal rules, as construed by federal courts. In its application of the Rules of Evidence, the supreme court relies extensively upon prior Montana case law and the intent of the rules’ drafters, expressed in the Commission Comments to the Rules of Evidence.

I. CIVIL PROCEDURE

   A. Jurisdiction: Rule 4B

      The Montana Supreme Court issued two decisions in 1980 that constitute primary sources of authority on the application of
two provisions in Montana's long arm statute. In *May v. Figgins* and *North Dakota v. Newberger*, the court adopted a two-step approach for determining whether a court has in personam jurisdiction over a non-resident defendant. The court must: (1) determine whether the state statute provides for the exercise of jurisdiction under the particular facts of the case; and (2) determine whether it would offend due process to assert jurisdiction. The significance of the *Newberger* case is its interpretation, under the first step in this approach, of the provision that grants jurisdiction over "all persons found within the state of Montana." The *May* decision represents the first extended discussion of the due process issue by the Montana court.

In *May*, the plaintiff brought an action in Montana to enforce a Colorado default judgment entered against the defendant, a resident of Montana. The defendant was allegedly delinquent in making employer contributions to a union trust fund in breach of a collective bargaining agreement. The agreement had been executed in Montana and the situs of the trust was in the state of Washington, but the defendant had mailed 35 contribution checks to a Colorado bank where the fund's account was located. Colorado's jurisdiction over the defendant was based on the provision in its long arm statute that grants jurisdiction over non-residents if the claim arises from "the transaction of any business within this state." The supreme court dismissed the plaintiff's cause of action in Montana, holding that the defendant's activity did not establish sufficient "minimum contacts" with Colorado to permit that state's assertion of in personam jurisdiction in the original action. The court reached this result by comparing the facts in *May* to the

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1. Mont. R. Civ. P. 4B(1) provides in part:
   All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts: (a) the transaction of any business within this state.
5. See Mont. R. Civ. P. 4B(1).
6. Colo. Rev. Stat. § 13-1-124 (1973), the quoted provision of which is identical to Mont. R. Civ. P. 4B(1)(a). In *May*, the court pointed out that since Colorado had interpreted its long arm statute to mean that Colorado will have in personam jurisdiction over any non-resident who meets the "minimum contacts" (due process) test of International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Montana court was only required to decide the due process issue. May, - Mont. _, 607 P.2d at 1134.
facts of the three principal United States Supreme Court decisions which establish the minimum contacts doctrine. The opinion concludes that under those decisions, it would offend due process to require the Montana employer to defend in Colorado, based solely upon the mailing of the 35 contribution checks, where he had not purposely availed himself of the privilege of conducting business within that forum.

The Newberger case presented a situation where a non-resident plaintiff chose Montana as the forum to sue a non-resident defendant based on a transitory cause of action that arose outside of Montana. The defendant, a concert promoter and resident of California, allegedly had breached a contract with North Dakota State University. The state of North Dakota filed a complaint in Montana and attached proceeds from a concert being promoted by the defendant in Missoula. The defendant was never personally served with a summons but appeared through counsel on a motion to challenge the validity of the writ of attachment.

The supreme court held that under Rule 12, the defendant waived any objection as to in personam jurisdiction by appearing initially without making such an objection. The court also concluded, however, that the defendant had such sufficient and substantial contacts with Montana to subject him to its jurisdiction as a person "found within the state of Montana." In reaching this

8. Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945). In International Shoe, the Supreme Court stated that [d]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe, 326 U.S. at 316.

9. May, — Mont., —, 607 P.2d at 1138. The court further held that the defendant did not clearly and deliberately waive his due process rights and thereby consent to in personam jurisdiction of Colorado courts by executing the collective bargaining agreement, which contained a provision that the county where contributions were payable would be a proper forum to institute legal proceedings to collect delinquent payments, where the agreement did not designate the specific county or state forum. Id. at —, 607 P.2d at 1138-39.

10. Mont. R. Civ. P. 12(g) requires all defenses or objections permitted to be made under Rule 12, including lack of jurisdiction over the person, to be consolidated in one motion. Mont. R. Civ. P. 12(h) provides that a defense of lack of jurisdiction over the person is waived if it is not included in a motion made under Rule 12.

11. Newberger, — Mont. —, 613 P.2d at 1005. Initially the defendant had filed a motion to discharge the writ of attachment, which is not a motion expressly permitted to be made under Mont. R. Civ. P. 12. Later, the defendant filed a Rule 12 motion to dismiss for lack of in personam jurisdiction. Therefore, the court’s holding goes beyond Rule 12 and indicates that an objection to in personam jurisdiction will be waived if not included in the first motion or appearance of any kind made by the defendant.

12. Newberger, — Mont. —, 613 P.2d at 1005. The court also stated that the facts of
conclusion, the court relied on a United States Supreme Court decision as authority for the principle that if a defendant's activities within the forum state are substantial or continuous and systematic, there is a sufficient relationship to support jurisdiction even though the cause of action does not arise out of those activities. The opinion in Newberger points out that the defendant transacted business in Montana by promoting the concert in question as well as previous concerts. In so doing, he entered into contracts for services to be performed in this state and had an interest in property, the concert proceeds, situated in Montana. Finally, the court determined that asserting jurisdiction over the defendant, based on the facts of this case, did not offend the traditional notions of fair play and substantial justice.

B. Service of Process: Rule 4D

In Joseph Russell Realty Co. v. Kenneally, the Montana court established that it will require absolute compliance with the substantive requirements of Rule 4D(2)(f). The appellant had served process upon the respondent corporation in a previous action through substituted service upon the secretary of state as permitted under that rule. An affidavit was filed reciting that none of the corporation's officers, directors, or agents could after due diligence be found within Montana. According to the rule, "[s]uch affidavit shall be sufficient evidence of the diligence of the inquiry made by affiant."

this case satisfied the requirements of subsections (a), (c) and (e) of Mont. R. Civ. P. 4B(1), but those provisions permit jurisdiction over the defendant only if the claim arises from activities in Montana. Therefore, the statutory basis for jurisdiction, under the court's two-step approach, must be derived from the clause permitting jurisdiction over "all persons found within the state of Montana."

13. Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952). In Perkins, however, the agent of the defendant corporation was personally served with summons in the forum state. Id. at 438. See also Harrington v. Holiday Rambler Corp., 165 Mont. 32, 525 P.2d 556 (1974) (foreign corporation held to be "found within the state of Montana").

14. Newberger, _ Mont. __, 613 P.2d at 1005. The court noted that denying jurisdiction in this case would "thwart the public interest this state has in providing a forum for companies doing business and for the carrying on and enforcing of proper business practices, such as the payment and collection of debts." Id., citing Prentice Lumber Co. v. Spahn, 156 Mont. 68, 76, 474 P.2d 141, 145 (1970).


16. Mont. R. Civ. P. 4D(2)(f) provides a mechanism for service of process upon a corporation, qualified to do business in Montana through service upon the secretary of state if none of the corporation's officers, directors or agents can, with the exercise of reasonable diligence, be found within Montana and if an affidavit to that effect is filed with the clerk of court.

Nevertheless, the court held that service of process in the former action was inadequate to confer personal jurisdiction over the respondent because no reasonably diligent search had occurred as commanded by Rule 4D(2)(f). As a result, the appellant's ten year old judgment was subject to collateral attack in the instant case. The decision was based on findings that both the appellant and his attorney had previously dealt with the corporation's registered agent and the agent's name was on file with the secretary of state. The high court further held that the appellant's receipt of misinformation from the secretary of state, to the effect that respondent had no registered agent in the state, did not excuse or fulfill the due diligence requirement.

C. Venue

The issue of proper venue and the application of Montana's venue statutes is a perennial source of litigation. The recent case of State ex rel. Kesterson v. District Court raised the question of whether filing a suit as a class action, under Rule 23, affects the determination of proper venue. The plaintiffs contended, based upon convenience and judicial economy, that venue was proper for the entire class if venue could be properly established in relation to any one plaintiff in the class.

The supreme court rejected the plaintiffs' contention as inconsistent with traditional venue principles which seek to place trial of an action in a county favorable to the defendant. The court relied on federal authority and Rule 82 in holding that the defendants were entitled to have venue satisfied with respect to all named class representatives. Accordingly, the court applied venue statutes to the parties based upon the nature of the claims and the place where they arose, as if each of the plaintiffs had filed a distinct cause of action.

18. Kenneally, Mont. 605 P.2d at 1111.
19. Id.
21. See Mont. R. Civ. P. 23, which contains special provisions applicable to class actions but does not refer to venue for such actions.
23. Mont. R. Civ. P. 82 provides: "Except as provided in Rule 4 these rules shall not be construed to extend or limit the jurisdiction of the district courts of Montana or the venue of actions therein."
24. Kesterson, Mont. 614 P.2d at 1052.
In *Cabinet Resource Group v. Montana Department of State Lands*, the supreme court held that proper venue for an action seeking a writ of mandamus against an agency is the county where the public official refuses to act or neglects to act. One of the defendants, ASARCO, Inc., had argued that proper venue should lie in Lincoln County where the alleged harm was threatened through physical alteration of the land.

The court stated that determining the objective of the complaint is essential in order to establish where the cause of action arose, which, in turn, determines proper venue under the statute. Since the objective of this complaint was mandamus, the alleged wrongful acts of the state officials, which occurred in Lewis and Clark County, gave rise to the cause of action and made venue proper in that county. The opinion distinguished the objective in a mandamus action from the objective in an action to enjoin enforcement of an agency order, or an action to enjoin an agency from altering land in a designated county.

D. Intervention: Rule 24(a)

*State ex rel. Palmer v. District Court* is the first Montana decision to address the adequacy of a person's representation by existing parties in an action as that issue affects the right to intervene under Rule 24(a)(2). In this case, the court upheld the trial court's denial of an heir's petition to intervene in an action brought by the special administrator of an estate against another heir. The *Palmer* court established that the right to intervene will be strictly construed where an existing party in the action is

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27. *Id.* at _, 616 P.2d at 312-13, construing MCA § 25-2-105 (1979), which states in part: "Actions against a public officer or person specifically appointed to execute his duties . . . must be tried in the county where the cause or some part thereof arose, subject to the power of the court to change the place of trial."

28. See *Montana Dakota Util. Co. v. Public Serv. Comm'n*, 111 Mont. 78, 107 P.2d 533 (1940) (proper venue held to be in county where order is put into operation, not county where order made).

29. See *Guthrie v. Montana Dept. of H. & E. Sciences*, 172 Mont. 142, 561 P.2d 913 (1977) (proper venue held to be in county where irreparable harm to land was sought to be prevented).


31. *Mont. R. Civ. P. 24(a)(2)* provides in pertinent part: Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

charged by law with representing the absent party's interest.\textsuperscript{33}

In a dissenting opinion, Justice Sheehy argued that based on federal authority,\textsuperscript{34} Rule 24(a)(2) grants the right of intervention to a party whose representation “is or may be” inadequate.\textsuperscript{35} He concluded that the special administrator in this case had a conflicting fiduciary duty to both heirs and therefore petitioner's representation may have been inadequate.\textsuperscript{36}

E. Dismissal of Actions: Rule 41(a)

Rule 41(a)(2)\textsuperscript{37} permits the trial court to dismiss an action upon the request of the plaintiff without a stipulation of dismissal by all parties. \textit{Petritz v. Albertsons, Inc.}\textsuperscript{38} is the first Montana case to interpret this rule. In \textit{Petritz}, the trial court granted the plaintiff's motion, filed on the day before trial, to dismiss his cause of action without prejudice. The defendant had resisted the motion based on its extensive discovery costs and potentially greater liability in a subsequent action by the plaintiff.

The court concluded that the general rule favoring such motions for dismissal\textsuperscript{39} should be followed where conditions may be attached by the trial court to cure any substantial prejudice resulting to the defendant.\textsuperscript{40} Therefore, the court affirmed the trial court's judgment but directed that, as a condition of the dismissal, an award of costs and reasonable attorney fees be made to the defendant.\textsuperscript{41} The court also discussed the issue of whether a party's liability may be tolled as a condition attached to granting a voluntary dismissal. Finding the state of the law to be unsettled, however, the supreme court left this matter for the trial court's consideration if a subsequent action was filed.\textsuperscript{42}

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\textsuperscript{35} \textit{Palmer, \textit{- Mont. \textit{-}}, 619 P.2d at 1206.}
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Mont. R. Civ. P. 41(a)(2) states in part: “Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper . . . .”}
\textsuperscript{38} \textit{Id., citing In re Estate of Scott}, 40 Colo. App. 343, 577 P.2d 311 (1978).
\textsuperscript{39} \textit{Id. at \textit{-}, 608 P.2d at 1089.}
\textsuperscript{40} \textit{Id. at \textit{-}, \textit{608 P.2d at 1092, citing 5 Moore's Federal Practice \textit{\& 41.05 at 41-72 (2d ed. 1976).}}}
\textsuperscript{41} \textit{Id. at \textit{-}, \textit{608 P.2d at 1093.}}
\end{flushright}
The recent case of Audit Services v. Kraus Construction, Inc.\(^43\) indicates that the supreme court will uphold severe district court sanctions imposed on a party who fails to comply with discovery orders. The court affirmed a default judgment entered against the defendant under Rule 37\(^44\) when he failed to comply with an order compelling him to answer interrogatories.\(^45\) The opinion distinguished "first appearance" default judgments from those based on non-compliance with the rules of discovery; the former are generally not favored by courts.\(^46\) The defendant’s contention that the default proceedings were void because he had not consented to the withdrawal of his attorney, which occurred during the period of non-compliance, was rejected by the court.\(^47\)

In North Dakota v. Newberger,\(^48\) the high court affirmed the trial court’s discretion to deny leave to file late answers to a request for admissions. The defendant had not responded to the request within the time provided by Rule 36\(^49\) and the matters requested were therefore deemed admitted. The supreme court upheld a summary judgment for the plaintiff that was based on those admissions.\(^50\)

44. MONT. R. Civ. P. 37(b) and (d) authorize a district court to render judgment by default against a party who fails to serve answers or objections to interrogatories or fails to obey an order to provide or permit discovery.
45. Audit Services, _ Mont. _, 615 P.2d at 190.
47. Audit Services, _ Mont. _, 615 P.2d at 189, citing McPartlin v. Fransen, _ Mont. _, 582 P.2d 1255 (1978). In McPartlin, the court held that when an attorney withdraws without the consent of his client, the opposing party must notify the unrepresented party to have counsel appear before the represented party may proceed with the action. _ Id. at _, 582 P.2d at 1259. The court in Audit Services concluded that the court order requiring the defendant to answer interrogatories, which was served on him personally, satisfied the notice requirement. Audit Services, _ Mont. _, 615 P.2d at 189.
49. MONT. R. Civ. P. 36(a) provides that:

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney.

50. Newberger, _ Mont. _, 613 P.2d at 1006.
Rule 54(b) provides a mechanism through which orders not otherwise final may be certified by the district court to be final judgments and, as such, appealable under Rule 1, Montana Rules of Appellate Civil Procedure. The Montana Supreme Court dismissed appeals in three cases during the survey period because the requirements of Rule 54(b) had not been satisfied.

In Roy v. Neibauer, the plaintiff appealed from an order granting summary judgment to one defendant while the plaintiff's claim was pending as to another defendant in the same action. The appeal was premature, absent a Rule 54(b) certification, because the order appealed from did not adjudicate all claims or the rights and liabilities of all parties in the action.

The court, set forth the legal principles and procedural steps applicable to Rule 54(b). An essential requirement under the rule is an express determination by the district court "that there is no just reason for delay." The opinion summarizes the rules governing such a determination and enumerates the factors consid-

51. Mont. R. Civ. P. 54(b) states:
When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action. . . .
52. Mont. R. App. Civ. P. 1 provides in pertinent part:
A party aggrieved may appeal from a judgment or order, except when expressly made final by law, in the following cases:
(a) From a final judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court or administrative body.
56. See Mont. R. Civ. P. 54(b).
57. (1) [T]he burden is on the party seeking final certification to convince the district court that the case is the "infrequent harsh case" meriting a favorable exercise of discretion; (2) the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final; (3) the district court must marshal and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated.

ered by an appellate court in reviewing the propriety of a Rule 54(b) certification. 68


The supreme court continues to emphasize that time limits for post-trial motions and notice of appeal are mandatory and jurisdictional. In Price v. Zunchich, 69 the court held that untimely post-judgment motions do not suspend the time limits for filing notice of appeal under Rule 5. 60 Furthermore, where such motions are untimely, a district court has no power to vacate its judgment pending a hearing on the motions in order to protect a party’s right to appeal. 61

Marvel Brute Steel Building, Inc. v. Bass 62 demonstrates that regardless of the language in Rule 5, 63 a party may forfeit his right to appeal in spite of serving a timely post-trial motion and filing notice of appeal within 30 days of the issuance of an order denying the motion. In Bass, the parties stipulated that defendant’s motion for a new trial would be determined on briefs, without a hearing, in the interest of judicial convenience. An order denying the motion

58. 1. The relationship between the adjudicated and unadjudicated claims;
2. The possibility that the need for review might or might not be mooted by future developments in the district court;
3. The possibility that the reviewing court might be obliged to consider the same issue a second time;
4. The presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final;
5. Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense and the like.


60. Mont. R. App. Civ. P. 5 provides in part:
The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the district court by any party pursuant to the Montana Rules of Civil Procedure hereafter enumerated in this sentence[:] . . . Rule 50(b) . . . Rule 52(b) . . . Rule 59.

61. Price, — Mont. _, 612 P.2d at 1299. The court notes that a district court may suspend the time for filing notice of appeal up to an additional 30 days upon a showing of excusable neglect, under Rule 5, Mont. R. App. Civ. P., but here no such showing was made.


63. Mont. R. App. Civ. P. 5 provides that the running of the 30 day time period for appeals is suspended by a timely post-judgment motion and that if suspended, the full time for appeal fixed by this rule commences to run and is to be computed from mailing by the clerk of notice of the entry of any of the following orders made upon a timely motion under such rules: . . . (4) denying a motion for a new trial under rule 59.
was issued by the trial court 22 days later.

The supreme court held that under Rule 59(d), the defendant's motion was deemed denied 10 days after it was served, and therefore, the time for appeal began to run on that date rather than the subsequent date of the trial court's order. Relying on Rule 5, without reference to Rule 59(d), the defendant did not file notice of appeal within 30 days of the earlier date. As a result, his appeal was dismissed.

I. Writs of Supervisory Control

The rules governing writs of supervisory control in Montana remained somewhat ambiguous in 1980. The supreme court granted the writ in Great Western Sugar Co. v. District Court, and dismissed the plaintiff's amended complaint after the district court had refused to do so. The opinion concluded that the defendant would be subjected to complex litigation under a claim for which relief could not be granted. Further, he had no plain, speedy or adequate remedy at law because the district court's order was interlocutory and not appealable.

In contrast, the court refused to grant a writ of supervisory control in Kinion v. Design Systems, Inc., where the district court's order vacating a default judgment was challenged. Here, the court reasoned that it could not review such an interlocutory order by granting the writ, and thereby accomplish indirectly what could not be done directly on appeal.

The court's choice of the rules or rationale to be applied in a given case may be explained by a statement in State ex rel. Ward

64. Mont. R. Civ. P. 59(d) provides in pertinent part:
Hearing on the motion shall be had within 10 days after it has been served, or within 10 days after the party opposing the motion for new trial has served his affidavits as set forth in subparagraph (c) hereinafore . . .

. . . .

If the motion is not noticed up for hearing and no hearing is held thereon, it shall be deemed denied as of the expiration of the period of time within which hearing is required to be held under this Rule 59.

66. _ Id. at _, 616 P.2d at 383.
67. _ Id. at _, 610 P.2d 717, 721 (1980).
68. _ Id. at _, 610 P.2d at 719. The court held that plaintiffs' allegations did not make out an intentional tort against the defendant, his employer, and therefore did not state a claim upon which relief could be granted due to the employer's protection under the exclusivity clause of the Workers' Compensation Act. _Id._
69. _ Id. at _, 610 P.2d at 721.
70. _ Id. _, 620 P.2d 852, 854 (1980).
v. Schmall,\textsuperscript{72} where the court denied a request for a supervisory writ. Pointing out that a writ of supervisory control is not to be used to circumvent the appeal process, the court added, "Only in the most extenuating circumstances will such a writ be granted."\textsuperscript{73} Apparently, the decision as to whether the exception for "extenuating circumstances" is applicable will be made on a case-by-case basis.

The central issue in Schmall was whether a state district court has jurisdiction to grant writs of supervisory control over justice of the peace courts.\textsuperscript{74} Construing the 1972 Montana Constitution, the court inferred that absent statutory or constitutional authority, the district courts have no such jurisdiction.\textsuperscript{75} The opinion expressly overruled two prior decisions that approved of the district court's exercise of supervisory power.\textsuperscript{76}

\section*{II. EVIDENCE}

\subsection*{A. Relevance: Rule 401}

Four recent decisions of the Montana Supreme Court illustrate the distinct purposes that Rule 401\textsuperscript{77} was intended to serve. In State v. Fitzpatrick,\textsuperscript{78} a rule of wide admissibility was applied to circumstantial evidence based on the standard of acceptable probative value contained in Rule 401.\textsuperscript{79} The court held that two items of physical evidence discovered three months after the crime

\textsuperscript{72} - Mont. _, 617 P.2d 140, 141 (1980).
\textsuperscript{73} Id.
\textsuperscript{74} Schmall, - Mont. _, 617 P.2d at 140-41. In Schmall, the petitioner challenged the constitutionality of MCA § 61-8-404(2) (1979), which automatically approves the admission of evidence that the defendant refused to take a chemical test in a prosecution for driving while intoxicated. He sought a writ of supervisory control from the district court on the grounds that a non-lawyer justice of the peace was ill-equipped to deal with the constitutional aspects of the case. Id.
\textsuperscript{75} Id. at _, 617 P.2d at 141. MONT. CONST., art. VII, § 2 provides in part:
(1) The supreme court has appellate jurisdiction and may issue, hear, and determine writs appropriate thereto. It has original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as may be provided by law.
(2) It has general supervisory control over all other courts.
\textsuperscript{77} MONT. R. EVID. 401 provides:
Definition of relevant evidence. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.
\textsuperscript{78} - Mont. _, 606 P.2d 1343 (1980).
\textsuperscript{79} See MONT. R. EVID. 401, Commission Comment.
and not conclusively linked to the defendant were properly admitted by the trial court.\textsuperscript{80} Citing Rule 401 and the Commission Comment, the high court concluded that the two items "had a tendency to make the existence of those facts [defendant's commission of the crime] more probable, and, by definition, were relevant."\textsuperscript{81}

\textit{State v. Beachman}\textsuperscript{82} demonstrates the applicability of the clause: "fact that is of consequence to the determination of the action."\textsuperscript{83} This clause was included in Rule 401 to incorporate the former concept of materiality within the definition of relevance.\textsuperscript{84} In \textit{Beachman}, the supreme court upheld the exclusion of probative evidence because the fact, for which the evidence had been offered, was not of "consequence" to a determination of the defendant's guilt.\textsuperscript{85}

Rule 401, unlike its federal counterpart, expressly provides that relevant evidence may include impeachment evidence. The court's opinion in \textit{Cissel v. Western Plumbing & Heating}\textsuperscript{86} did not cite Rule 401, but is consistent with this provision. The court held that testimony bearing on the credibility of a witness, by showing a motive to testify falsely, is relevant evidence.\textsuperscript{87}

Finally, the drafters of Rule 401 intended real and demonstrative evidence to come within the definition of relevant evidence if admitted as an aid to understanding for the trier of fact.\textsuperscript{88} In \textit{Workman v. McIntyre},\textsuperscript{89} the Montana court applied rules which produce the result intended by Rule 401, and held that the trial court improperly excluded demonstrative exhibits. Prior case law emphasized the discretion of the trial court in determining whether to permit the use of demonstrative evidence in order to

\begin{footnotes}
\textsuperscript{80} Fitzpatrick, \textit{Mont.} \textit{-}, 606 P.2d at 1355. The court found that the discovery of the evidence was not too remote and stated that the issue of remoteness is generally governed by the discretion of the trial court.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.} 616 P.2d 337 (1980).

\textsuperscript{83} \textit{Mont. R. Evid.} 401.

\textsuperscript{84} \textit{See Mont. R. Evid. 401, Commission Comment.}

\textsuperscript{85} \textit{Beachman}, \textit{Mont.} \textit{-}, 616 P.2d at 340. The defendant, charged with obstruction of justice for his assistance in the burial of a homicide victim, offered evidence to prove his reasons for leaving the county shortly thereafter, but the court concluded that the gravamen of the offense was the defendant's state of mind at the time of the burial.

\textsuperscript{86} \textit{Mont.} \textit{-}, 612 P.2d 206 (1980).

\textsuperscript{87} \textit{Cissel, Mont.} \textit{-}, 612 P.2d at 211, \textit{citing State v. Ponthier}, 136 Mont. 198, 208, 346 P.2d 974, 979-80 (1959) and \textit{Clarke, Montana Rules of Evidence}, 39 Mont. L. Rev. 79, 119 (1978). The court held further that the prejudicial effect of the evidence, testimony of an assault and threats against the witness made by the plaintiff, did not substantially outweigh its probative value and was therefore properly admitted under \textit{Mont. R. Evid.}

\textsuperscript{88} \textit{See Mont. R. Evid. 401, Commission Comment.}

\textsuperscript{89} \textit{Mont.} \textit{-}, 617 P.2d 1281, 1291 (1980).
\end{footnotes}
clarify or supplement testimony.\textsuperscript{90} Under the rules adopted in Workman, however, such evidence may only be excluded if it is not relevant or if its probative value is outweighed by its prejudicial effect.\textsuperscript{91}

B. Other Crimes Evidence: Rule 404(b)

The supreme court's most conspicuous deviation from the express provisions of the rules of evidence is its severe limitation on the use of other crimes evidence in criminal prosecutions.\textsuperscript{92} In 1980, the court confirmed that with one exception, it will adhere to three procedural requirements and a stringent test of admissibility for the introduction of such evidence that are not imposed by Rule 404(b).\textsuperscript{93} Evidence of other crimes may be introduced, under the court's four element test of admissibility, only if: (1) the other crimes are similar to the one charged; (2) they are near in time to the crime charged; (3) they have a tendency to establish a common scheme, plan or system; and (4) the probative value of the evidence is not substantially outweighed by prejudice to the defendant.\textsuperscript{94}

The procedural requirements are aimed at providing the defendant with notice that other crimes evidence will be introduced and instructing the jury on the limited purposes for which the evidence is received.\textsuperscript{95}

The high court applied both the substantive test of admissibil-


\textsuperscript{92} Mont. R. Evid. 404(b) states:

\textsuperscript{93} Other crimes, wrongs, acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

\textsuperscript{94} State v. Just, 1 Mont. 602 P.2d 957, 961 (1979). The first three elements were derived from State v. Jensen, 153 Mont. 233, 239, 455 P.2d 631, 634 (1969), while the fourth element was taken from Mont. R. Evid. 403.

\textsuperscript{95} The specific procedural requirements, which were imposed for the first time in State v. Just, 1 Mont. 602 P.2d 957, 962-64 (1979), are as follows: (1) the state must provide the defendant with written notice, before the trial, that other crimes evidence will be produced and the purposes for which it is to be admitted; (2) the trial court must, at the time the evidence is introduced, explain the purpose of the evidence to the jury and admonish them to weigh the evidence only for those purposes; and (3) in its final charge, the court must instruct the jury in unequivocal terms that the evidence was received only for the limited purpose earlier stated and the defendant is not being tried and may not be convicted for any offense except that charged, and warn them that to convict for other offenses may result in unjust double punishment.
ity and the procedural requirements to other crimes evidence in State v. Case. The defendant's conviction was reversed because the evidence introduced failed to meet three of the four criteria in the test of admissibility. Additionally, the court held that failure to comply fully with its "procedural mandates" constituted reversible error.

State v. Hansen suggests that evidence of other crimes may not satisfy the "similarity" element of the test of admissibility, unless the other crime is virtually identical to the one charged. Applying the "nearness in time" element of the test, the court concluded that in this case, where there was no continuing course of conduct by the defendant, a crime committed two and one-half years before the crime charged was too remote to be admissible.

In State v. Trombley, the supreme court created an exception to its general prohibition of other crimes evidence. During the trial of the defendant, who was charged with the theft of a vehicle, the district court admitted evidence of the defendant's possession of credit cards allegedly stolen from the same vehicle. The court distinguished evidence of such an act, which is inseparably related to the crime charged, from "wholly independent" or "unrelated" other crimes evidence. Therefore, the test of admissibility and procedural requirements for other crimes evidence were held to be

96. _ Mont. _, 621 P.2d 1066 (1980).
97. _ Id. at _, 621 P.2d at 1070-71. The other crimes evidence was found to be too dissimilar, lacking a tendency to establish a common scheme, plan or system, and of such character that its prejudicial effect outweighed its probative value.
98. _ Id. at _, 621 P.2d at 1071-72. The "procedural mandates" were not complied with here in that the defendant received no written notice before trial that the evidence would be introduced, and the final jury instruction omitted the "unequivocal warning of the possibility for unjust double punishment."
100. _ Id. at _, 608 P.2d at 1085-86. In both the crime charged, sexual intercourse without consent, and the prior offense introduced as evidence, the incidents began in a bar, the victims left the bar with the defendant, the defendant drove both victims to a secluded mountain location, both victims resisted, the defendant twisted the thumbs of both victims against their wrists to force intercourse, and the defendant drove both victims back to town, warning them not to report the incident. The differences between the crimes were that the defendant knew one victim prior to the rape but not the other, the defendant threatened only one victim with multiple rape, and the defendant was accompanied by a friend when leaving the bar with one of the victims, whereas he and the other victim left the bar alone.
101. _ Id. at _, 608 P.2d at 1086-87. The court described the factors that affect the determination of whether the prior act is too remote as: (1) the number of incidents that have occurred; (2) the nature of the incidents; and (3) the proximity of the last act to the date of the conduct at issue. _Id., citing_ State v. Minns, 80 N.M. 269, 272, 454 P.2d 355, 358 (1969).
The court's decision regarding evidence of other acts or wrongs in *State v. Bashor* illustrates the more literal application of Rule 404(b) that was intended to govern other crimes evidence as well. In this case, the court held that evidence of threats by the defendant against a friend of the homicide victim was relevant to prove motive or intent and therefore admissible under Rule 404(b). The opinion quotes Rule 404(b) and contains no reference to the test of admissibility or procedural requirements applied to other crimes evidence. The Montana court will apparently maintain two separate standards under Rule 404(b): (1) a literal application of Rule 404(b) for evidence of other acts or wrongs which are related to the crime charged; and (2) a standard incorporating the court's substantive and procedural requirements for the admission of "wholly independent" other crimes evidence.

**C. Impeachment: Rules 607, 608 and 613**

During the survey period, the Montana Supreme Court issued several decisions that construe rules of evidence relating to impeachment of witnesses. The court's opinion in *State v. Fitzpatrick* quotes extensively from the Commission Comment to Rule 607 in explaining the effect of that rule on prior Montana case law. The traditional rule required a showing of surprise and prejudice before a party could impeach his own witness. It was abolished by Rule 607 as was its corollary that a party is bound by the testimony of his own witness. Accordingly, the *Fitzpatrick* court upheld the state's impeachment of its own witness, through the use of a prior inconsistent statement under Rule 801(d), without a showing of surprise or prejudice.

104. Trombley, _ Mont. _, 620 P.2d at 368.
107. _ Mont. _, 606 P.2d at 1349.
108. MONT. R. EVID. 607 states: "(a) The credibility of a witness may be attacked by any party, including the party calling him. (b) No party is bound by the testimony of any witness."
109. Fitzpatrick, _ Mont. _, 606 P.2d at 1349, quoting MONT. R. EVID. 607, Commission Comment. Rule 607 is also consistent with MONT. R. CIV. P. 43(b) on the scope of examination and cross-examination.
110. MONT. R. EVID. 801(d) permits a prior inconsistent statement to be received as both substantive evidence and impeachment evidence. See text accompanying notes 157-64 infra.
111. Fitzpatrick, _ Mont. _, 606 P.2d at 1349.
In *Kopischke v. First Continental Corp.*, the court applied Rule 613 in holding that the trial court properly refused to admit a deposition of the plaintiff offered by the defendant for impeachment purposes. When the deposition was offered the plaintiff was no longer present at the trial, having been extensively examined and cross-examined earlier.

Noting a departure from former practice, the court pointed out that Rule 613(a) permits cross-examination concerning a prior inconsistent statement without first showing the statement, or disclosing its contents, to the witness. In order to introduce "extrinsic" evidence of the prior statement, however, Rule 613(b) requires that the witness be afforded an opportunity to explain or deny the statement. A party may demand that a witness be returned to the stand for this purpose, but in *Kopischke*, the court concluded that such a demand by the defendant was properly denied on grounds that the proposed evidence would be repetitious.

The Montana Supreme Court upheld the constitutionality of Rule 608(b) and the "rape shield" provision of MCA § 45-5-503(5) (1979) in *State v. Higley*. They were challenged as unnecessarily restricting the defendant's constitutional right to confront witnesses. Both laws withstood constitutional scrutiny be-

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112. *Id.*, citing Advisory Committee's Note to Rule 613, Fed. R. Evid., for the proposition that impeachment evidence of prior inconsistent statements may be offered at any time during the trial.
113. *Id.*, at 689. 
114. *Id.*, at 621 P.2d at 1050. The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant the right to testimony of witnesses in his
cause they serve the state's legitimate interest in preserving the integrity of trials and preventing a criminal prosecution from becoming a trial of the victim.\textsuperscript{122}

Concentrating on the application of Rule 608(b), the court held that the trial court correctly refused to allow cross-examination into specific instances of the victim's conduct that allegedly reflected her sexual views.\textsuperscript{123} The decision was based on two provisions in Rule 608(b). First, the impeachment evidence had little, if any, probative value as to truthfulness or untruthfulness as required by the rule.\textsuperscript{124} Second, the rule expressly grants the trial court discretion in determining whether to permit cross-examination into specific conduct of a witness.\textsuperscript{125}

\textit{Runkle v. Burlington Northern}\textsuperscript{126} is consistent with prior Montana case law in holding that evidence of subsequent remedial measures is admissible for purposes of impeachment. Quoting Rule 407,\textsuperscript{127} the opinion concluded that evidence of defendant's subsequent installation of signals at a railway crossing was admissible either to show feasibility of repair or to impeach defendant's witness who asserted that the crossing was not extra-hazardous.\textsuperscript{128}

\textbf{D. Opinion Testimony: Rules 701-705}

Opinion testimony by expert or lay witnesses is generally admissible under Rules 701\textsuperscript{129} and 702\textsuperscript{130} if it will assist the jury in

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\textsuperscript{122} Higley, _Mont._, 621 P.2d at 1050-51, citing Chambers v. Mississippi, 410 U.S. 284, 302 (1972) and MONT. R. EVID. 405(b), Commission Comment.

\textsuperscript{123} Higley, _Mont._, 621 P.2d at 1051.

\textsuperscript{124} Id.

\textsuperscript{125} Id., citing MONT. R. EVID. 608(b), Commission Comment.


\textsuperscript{127} MONT. R. EVID. 407 states:

Subsequent remedial measures. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

\textsuperscript{128} Runkle, _Mont._, 613 P.2d at 987.

\textsuperscript{129} MONT. R. EVID. 701 provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.
understanding the evidence or determining a fact in issue. Under Rule 704, an opinion which is otherwise admissible may encompass an ultimate issue to be decided by the jury. In Ployhar v. Board of Trustees of Missoula, the Montana court appeared to restrict the effect of these rules by invoking traditional limitations on such testimony that were based upon the doctrine that opinions by a witness "invade the province of the jury." 

The trial court in Ployhar granted the plaintiff's motion for a new trial upon grounds that an expert's opinion as to the cause of a heavy equipment accident was not necessary, and, as such, improperly admitted. The supreme court affirmed, in a three to two decision, noting its reluctance to reverse an order granting a new trial. The majority relied upon case law, predating the adoption of the Rules of Evidence, that permits opinion testimony regarding the cause of an accident only if the cause of the accident is beyond the ordinary understanding of the jury or sufficiently complex to require explanation. Deciding that the accident in this case was relatively simple, the court held that the opinion testimony was unnecessary and therefore inadmissible.

The dissenting opinion by Justice Harrison cited the policy of the Rules of Evidence to allow the liberal use of expert testimony and applied Rule 702. Pointing to several factors which compli-

130. Mont. R. Evid. 702 provides:
   If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

131. Mont. R. Evid. 704 states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."


133. The Rules of Evidence attempted to abolish this doctrine on the grounds that opinions by either expert or lay witnesses, like other evidence, may be rejected by the trier of fact, and therefore, do not invade the province of the jury. See Mont. R. Evid. 704, Commission Comment.

134. Ployhar, _ Mont. _, 609 P.2d at 1228. Justice Shea wrote the majority opinion, with Justices Daly and Sheehy concurring. Chief Justice Haswell and Justice Harrison dissented.


136. Ployhar, _ Mont. _, 609 P.2d at 1228. The majority found that the accident was "relatively simple" because it involved a single tractor and the actions of only the driver and the accident victim who was killed when the tractor backed over him. In addition, witnesses testified at the trial concerning those actions and an eyewitness gave his description of the accident to the jury.

137. Id. The dissenting opinion proceeded to analyze the two issues presented by Mont. R. Evid. 702: (1) whether the subject of testimony is of such a nature that the trier of
cated the cause of this accident, the minority concluded that the opinion testimony was admissible under Rule 702 because it assisted the jury in understanding the factual issue to be determined. 138

Two cases decided after Ployhar indicate that its holding may be somewhat limited in scope. In Workman v. McIntyre139 and Wollaston v. Burlington Northern, Inc.,140 the court held that opinion testimony by a highway patrolman regarding the cause of an accident is admissible under Rules 702 and 704. Neither opinion referred to Ployhar or discussed the complexity of the accidents involved. In Wollaston, the court further held that a patrolman’s opinion testimony is admissible even though he has lost his investigation notes made at the time of the accident.141 The disclosure of facts underlying an expert’s opinion is no longer a foundation requirement, under Rule 705,142 but a function reserved for cross-examination.143 The Workman court expressly acknowledged that a highway patrolman may be qualified as an expert based upon training and experience.144

State Highway Commission v. Donnes145 establishes that Montana’s unique rule regarding opinion testimony by a landowner in a condemnation proceeding will be retained but not expanded under the Rules of Evidence. The Donnes opinion affirmed the rule in Montana that a landowner may testify as to the reasonable value of condemned land according to its existing use.146 Nevertheless,
with two justices dissenting, the court held that the landowner’s opinion in this case as to the depreciated value of the remaining land, caused by the taking, was properly rejected.\textsuperscript{147}

The majority adopted a rule that an opinion on the depreciated value of uncondemned land is admissible only upon a foundation that the owner has some peculiar means of forming an intelligent and correct judgment on the value of the property beyond what is presumed to be possessed by men generally.\textsuperscript{148} The dissenting opinion rejected the foundation requirement, concluding that objections to the landowner’s opinion in \textit{Donnes} were applicable to the weight of the testimony, not its admissibility.\textsuperscript{149}

\textbf{E. Hearsay: Rules 801 and 803}

The Montana Supreme Court adhered to literal interpretations of the Rules of Evidence in resolving most hearsay issues raised on appeal during the survey period.

\textit{In re D.W.L.}\textsuperscript{150} provides an illustration of several fundamental concepts included within the definition of hearsay. The state attempted to prove the “unauthorized control” element of a theft charge, in this case, through testimony of one officer that he saw the victim sign a stolen vehicle report and the testimony of another officer that he drove to the victim’s residence to pick up the report.\textsuperscript{151} The court relied on the definitional components of Rule 801\textsuperscript{152} in holding that the testimony of both officers was hearsay and inadmissible under Rule 802.\textsuperscript{153}

\begin{itemize}
  \item \textsuperscript{147} \textit{Donnes}, - Mont. -, 609 P.2d at 1215. Chief Justice Haswell and Justice Harrison concurred in the majority opinion written by Justice Shea. Justices Sheehy and Daly dissented.
  \item \textsuperscript{148} \textit{Id.}
  \item \textsuperscript{149} \textit{Id.} at -, 609 P.2d at 1216. The dissent interpreted State Highway Comm’n v. Marsh, 165 Mont. 198, 203, 527 P.2d 573, 575 (1974) as giving the landowner an unqualified right to give an opinion as to the reasonable value of his property when the use before and after the condemnation is the same.
  \item \textsuperscript{150} \textit{Id.} at -, 615 P.2d at 887 (1980).
  \item \textsuperscript{151} \textit{Id.} at -, 615 P.2d at 889. The proceeding involved was an adjudicatory hearing on the state’s petition seeking to have the offender, a minor, declared to be a delinquent youth based on allegations that he committed the offense of theft in violation of MCA § 45-6-301(1)(a) (1979).
  \item \textsuperscript{152} \textit{Mont. R. EvID.} 801 provides in part:
    \begin{enumerate}
      \item Statement. A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
      \item Declarant. A declarant is a person who makes a statement.
      \item Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
    \end{enumerate}
  \item \textsuperscript{153} \textit{In re D.W.L.}, - Mont. -, 615 P.2d at 889, \textit{citing Mont. R. EvID.} 802, which states
\end{itemize}
The victim's act of signing the report was determined to be "nonverbal conduct . . . intended . . . as an assertion" of the unauthorized control of the vehicle and was offered, through the first officer's testimony, to prove the truth of the matter asserted. The court reasoned further that the report itself was hearsay, in the form of a written assertion, and the second officer's testimony regarding the report was an attempt to introduce this assertion. The state's contention that the second officer's testimony was not "offered . . . to prove the truth of the matter asserted" was rejected because the testimony was not relevant to prove any issue in the case other than unauthorized control.

State v. Fitzpatrick is a leading case on the Rules of Evidence primarily due to the court's interpretation of Rule 801(d) and the related application of rules on impeachment discussed previously. In Fitzpatrick, the state called a former co-defendant in the case and questioned him in detail concerning a prior statement he had made implicating the defendant. The witness denied making the statement both on direct and cross-examination. The state then called a second witness who had been present when the prior statement was made. He was allowed to testify, over hearsay objections, as to the substance of the prior statement. The statement was offered for the dual purpose of introducing its substantive content and impeaching the former witness.

The supreme court upheld the admission of the prior statement on two grounds. First, it constituted a prior inconsistent statement under Rule 801(d)(1)(A) and was not hearsay by definition. The opinion notes that the Montana rule deleted the requirement, found in the corresponding federal rule, that the prior statement be made under oath and subject to the penalty of perjury. Furthermore, under Rule 801(d)(1), the prior statement that "[h]earsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state."

154. In re D.W.L., Mont., 615 P.2d at 889.
155. Id.
156. Id.
158. Mont. R. Evid. 801(d).
159. See notes 107-11 and accompanying text supra.
160. Fitzpatrick, Mont., 606 P.2d at 1348-49. Mont. R. Evid. 801(d)(1)(A) provides: "(d) Statements which are not hearsay. A statement is not hearsay if: (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony . . . ."
161. Fitzpatrick, Mont., 606 P.2d at 1348.
may be considered as substantive evidence by the jury, whereas, under the traditional rule, it could be admitted only to impeach the declarant. Second, the prior statement was admissible as an admission of a party-opponent pursuant to Rule 801(d)(2)(E).

The former co-defendant was considered a "co-conspirator" under that rule because he had engaged in ongoing cooperation with the defendant to accomplish a criminal goal.

The court's decision in *State v. Dolan* confirms that where a declarant testifies that his memory is unclear regarding the subject matter of a prior statement, his testimony is inconsistent with the prior statement under Rule 801(d)(1)(A). Therefore, testimony by another witness as to the prior statement is admissible.

*State v. Martinez* contains confusing statements concerning the operation of Rule 801(d)(1). The declarant in *Martinez* was questioned on redirect examination regarding his prior statement to a detective. The prior statement was inconsistent with an assertion he made during cross-examination. The court held that his testimony, admitting that he made the prior statement, was admissible under Rule 801(d)(1)(A) and (B).

This analysis is inconsistent with both the language of Rule

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162. *Id.* at __, 606 P.2d at 1349, *citing* Advisory Committee's Note 56 F.R.D. 183, 296 (1972) and *Mont. R. Evid.* 801, Commission Comment.
163. *See Mont. R. Evid.* 801, Commission Comment.
164. Fitzpatrick, *Mont.* 606 P.2d at 1348-51. *Mont. R. Evid.* 801(d)(2)(E) states: "(d) Statements which are not hearsay. A statement is not hearsay if . . . (2) Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."
167. *Id.* at __, 620 P.2d at 358-59.
169. *Id.* at __, 613 P.2d at 980-81. The declarant testified on direct examination that he did not give the defendant permission to take his property, which was essentially what he had stated previously to a detective. During cross-examination by the defense, he stated that he was, at that point in time, authorizing the conduct.
170. *Id.*, *citing Mont. R. Evid.* 801(d)(1)(A) and (B).
801(d)(1) and the court's holdings in Fitzpatrick and Dolan. The rule itself requires only that the declarant testify at some point during the trial and be subject to cross-examination concerning the statement.\textsuperscript{172} Provided that condition is satisfied, other witnesses may testify regarding the declarant's prior statement as allowed in Fitzpatrick and Dolan. Accordingly, the court's holding in Martínez should be limited to factual situations, like Martínez, where the declarant has admitted making the prior statement, and therefore, no inconsistency remains.\textsuperscript{173}

The supreme court considered three hearsay exceptions under Rule 803\textsuperscript{174} in the recent case of Runkle v. Burlington Northern.\textsuperscript{175} The court held that minutes of town council meetings are admissible under Rule 803(8)\textsuperscript{176} if they set forth regularly conducted and recorded activity.\textsuperscript{177} Letters between a town council and the defendant concerning the safety of a railroad crossing were held to be admissible under the business records exception of Rule 803(6).\textsuperscript{178} The court also concluded that portions of the defendant's intercorporate memoranda could be admitted as admissions of a party-opponent under Rule 801(d)(2).\textsuperscript{179}

The Runkle opinion delineates the requirements of Rule 803(18)\textsuperscript{180} as well as common law requirements for the admission of advisory governmental reports. The court upheld the admission of one report used in the defendant's cross-examination of an expert witness called by the plaintiff.\textsuperscript{181} The defendant satisfied the requirements of Rule 803(18) by establishing the reliability of the

\textsuperscript{172} See Mont. R. Evid. 613(b), Commission Comment; Mont. R. Evid. 801(d), Commission Comment. See also note 116 supra.

\textsuperscript{173} Mont. R. Evid. 801(d), Commission Comment, states in part: "[T]he clause also indicates that the statement must be inconsistent with the declarant's testimony; this requires that an inconsistency does exist . . . ."

\textsuperscript{174} Mont. R. Evid. 803 enumerates 24 specific categories of evidence which "are not excluded by the hearsay rule, even though the declarant is available as a witness."

\textsuperscript{175} Id., Mont., 613 P.2d at 982 (1980).

\textsuperscript{176} Mont. R. Evid. 803(8) provides an exception to the hearsay rule for "public records and reports" as defined under that section.

\textsuperscript{177} Runkle, Id., Mont., 613 P.2d at 988.

\textsuperscript{178} Id., citing Mont. R. Evid. 803(6).

\textsuperscript{179} Runkle, Id., Mont., 613 P.2d at 988.

\textsuperscript{180} Mont. R. Evid. 803(18) provides:

Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

\textsuperscript{181} Runkle, Id., Mont., 613 P.2d at 992.
report through testimony of its own expert witness.

A second advisory report was offered by the plaintiff, in conjunction with expert testimony, to establish negligence by demonstrating the types of safety equipment available to the defendant. This report was held to be inadmissible under the previously adopted rule that advisory standards are not admissible to prove negligence.\(^{182}\) Citing a trend toward acceptance of advisory material as evidence, the court then modified its previous rule by stating that such reports may be admitted but only upon the foundation that they: (1) show what is feasible to the jury; or (2) show what the defendant knew or should have known about safety precautions.\(^{183}\) In addition, advisory standards may not be admitted as substantive evidence of negligence without a showing of general acceptance in the industry concerned.\(^{184}\) In \textit{Runkle}, the plaintiff failed to meet these foundational requirements.\(^{185}\)

\section*{F. Miscellaneous}

\subsection*{1. Authentication: Rule 901}

Rule 901\(^{186}\) provides the basic rule for authentication of evidence and enumerates proper methods to authenticate certain forms of evidence. \textit{State v. Hamilton}\(^{187}\) confirmed that the supreme court will not construe or apply the enumerated methods as exclusive requirements for admissibility. In \textit{Hamilton}, the court held that a telephone conversation was properly admitted even though the identity of the defendant as the speaker was not established according to Rule 901(6).\(^{188}\) The court adopted a general rule, consistent with Rule 901(a),\(^{189}\) that authenticity can be demonstrated by direct or circumstantial evidence, and the suffi-


\textit{Id.}, citing Charleston Nat'l Bank v. International Harvester Co., 22 Ill. App. 3d 999, 317 N.E.2d 585 (1974). The court retains part of the rationale of the \textit{Hackley} rule by stating that governmental codes or standards are not to be admitted as conclusively determining the standard of care imposed upon the defendant unless they have been adopted by an agency so as to have the force of law.


\textit{Id.}, citing MONT. R. Evid. 901(a), Commission Comment.
ciency of evidence for a foundation is within the discretion of the trial court. 190

2. Pretrial Order: Effect on Admissibility

The Montana Supreme Court established that pretrial orders may have a determinative effect on the subsequent admission of evidence in Workman v. McIntyre. 191 In this case, a film exhibit not listed on the pretrial order was admitted upon the court's requirement that test films, which the exhibit summarized, would be made available to the plaintiff for viewing. This requirement was never satisfied by the defendant. The court relied on the controlling effect of a pretrial order under Rule 16 192 and held that under these circumstances, the exhibit was improperly admitted. 193

3. The Completeness Rule: Rule 106

The purpose of Rule 106, 194 construed in State v. Sheriff, 195 is to avoid leaving a misleading and unfair impression which may result when matters are presented out of context. In Sheriff, portions of a recorded statement were used on direct examination of a witness, but the trial court refused to permit cross-examination concerning other portions of the same statement. The supreme court affirmed. 196 The court concluded that the omitted portions of the statement had no bearing on the issue raised during direct examination; therefore, no misleading or unfair impression was left with

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192. Mont. R. Civ. P. 16 states in pertinent part:
   The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.
193. Workman, _ Mont. _, 617 P.2d at 1285.
194. Mont. R. Evid. 106 provides in pertinent part:
   Remainder of or related acts, writings, or statements.
   (a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:
   (1) an adverse party may require him at that time to introduce any other part of such item or series thereof which ought in fairness to be considered at that time
the jury. Finally, the court held that, assuming the defendant should have been allowed to use the complete statement, the trial court's decision to the contrary constituted harmless error.

Kenneth R. Dyrud

197. Id. An officer used the defendant's recorded statement in testifying as to defendant's answers to questions regarding articles of clothing linked to the commission of the crime. The defendant's counsel sought to cross-examine the officer concerning portions of the recorded statement which indicated the defendant's willingness to take a polygraph examination and cooperate with the police.

198. Sheriff, ___ Mont. __, 619 P.2d at 184.