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## Administering Justice in Montana's Rural Courts

John C. McKeon  
*Judge, Montana District Court*

David G. Rice  
*Judge, Montana District Court*

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# ARTICLES

## ADMINISTERING JUSTICE IN MONTANA'S RURAL COURTS

**Hon. John C. McKeon\* and Hon. David G. Rice\*\***

*A young mother sits among the prospective jurors holding her baby. When I inquire about hardships, she explains that she truly cares about our judicial system and wants to do her civic duty but that her mother just broke her wrist and she had no other childcare options. In another matter, an elderly juror shuffles forward to the bench and explains that he hitchhiked the 40 miles to court and he has no ride home.*

The foregoing is a typical scenario in Montana's rural courts. The district courts located in Montana's more rural areas deal primarily with respectful populations that greatly appreciate the judicial branch. Although serving less populated areas, these courts and the lawyers appearing before them often see the best rural Montana has to offer—these are community-minded and friendly people.

Montana is the fourth largest state in the United States,<sup>1</sup> but one of its most rural states.<sup>2</sup> It is third only to Alaska and Wyoming in fewest people

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\* District Judge, 17th Judicial District (Blaine, Phillips, and Valley counties), residing at Malta, Montana; rural member of District Court Council formed under Mont. Code Ann. § 3–1–1602 (2001).

\*\* District Judge, 12th Judicial District (Hill, Liberty, and Chouteau counties), residing at Havre, Montana.

1. Alaska – 656,425 sq. miles; Texas – 268,601 sq. miles; California – 163,707 sq. miles; Montana – 147,046 sq. miles. U.S. Census Bureau, *Statistical Abstract of the United States: Land and Water Area of States and Other Entities*, <http://www.census.gov/compendia/statab/tables/09s0344.pdf> (accessed Feb. 20, 2009).

2. Montana's estimated 957,860 population is less than 0.32% of the nation's population. Approximately 66% of Montana's population (634,610/957,860) resides in the eight counties of Yellowstone, Missoula, Gallatin, Flathead, Cascade, Lewis & Clark, Ravalli, and Silver Bow. U.S. Census Bureau, *2007 Population Estimates*. U.S. Census Bureau, *Census 2000 Public Law 94–171 File: Total Population, Population Density, and Land Area for Montana Counties*, <http://www.census.gov/compendia/statab/tables/09s0013.pdf> (last updated Mar. 21, 2001).

per square mile.<sup>3</sup> Montana's vast area is divided into 56 counties with each having their own local governing bodies. Nearly all govern more area in their respective counties than the Governor of Rhode Island.<sup>4</sup> Several of these counties cover an area close to, or exceeding, three times the size of Rhode Island.<sup>5</sup>

A district court is located in each of Montana's 56 counties. By state law, these 56 district courts are administratively structured into 22 judicial districts.<sup>6</sup> These judicial districts range in size from one county to as large as seven counties. As of January 1, 2009, Montana had 43 district court judges to serve all these judicial districts.<sup>7</sup>

Montana has ten district court judges to preside over a contiguous area larger than Maryland and the six states making up New England.<sup>8</sup> Nearly

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3. Alaska: 683,478 population /656,425 sq. mile; Wyoming: 522,830 population /97,818 sq. mile; Montana 957,861 population /147,046 sq. mile. U.S. Census Bureau, *Resident Population—States: 1980–2007*, <http://www.census.gov/compendia/statab/tables/09s0012.pdf> (accessed Feb. 20, 2009).

4. Rhode Island is 1,545 sq. miles. *Id.* Only six counties are smaller than Rhode Island: Deer Lodge County at 737 sq. miles, Wibaux County at 889 sq. miles, Treasure County at 979 sq. miles, Golden Valley County at 1,175 sq. miles, Liberty County at 1,420 sq. miles, and Wheatland County at 1,423 sq. miles. *Id.*; U.S. Census Bureau, *Census 2000 Public Law 94–171 File: Total Population, Population Density, and Land Area for Montana Counties*, <http://www.ceic.mt.gov/C2000/PL2000/PLcountyarea.pdf> (last updated Mar. 21, 2001); U.S. Census Bureau, *Statistical Abstract of the United States: Land and Water Area of States and Other Entities*, <http://www.census.gov/compendia/statab/tables/09s0344.pdf> (accessed Feb. 20, 2009).

5. Beaverhead County at 5,542 sq. miles, Phillips County at 5,140 sq. miles, Rosebud County at 5,012 sq. miles, Big Horn County at 4,994 sq. miles, Valley County at 4,921 sq. miles, Garfield County at 4,668 sq. miles, Fergus County at 4,339 sq. miles, Blaine County at 4,226 sq. miles, and Chouteau County at 3,973 sq. miles. U.S. Census Bureau, *Census 2000 Public Law 94–171 File: Total Population, Population Density, and Land Area for Montana Counties*, <http://www.ceic.mt.gov/C2000/PL2000/PLcountyarea.pdf> (last updated Mar. 21, 2001).

6. Mont. Code Ann. § 3–5–101 (2007).

7. *Id.* at § 3–5–102.

8. Montana's 16th Judicial District (Custer, Carter, Fallon, Garfield, Powder River, Rosebud, and Treasure counties – 22,699 sq. miles), 17th Judicial District (Blaine, Phillips, and Valley counties – 14,287 sq. miles), 7th Judicial District (Dawson, McCone, Prairie, Richland, and Wibaux counties – 9,726 sq. miles), 9th Judicial District (Glacier, Pondera, Teton, and Toole counties – 8,804 sq. miles), 12th Judicial District (Hill, Liberty, and Chouteau counties – 8,289 sq. miles), 10th Judicial District (Fergus, Judith Basin, and Petroleum counties – 7,863 sq. miles), 14th Judicial District (Musselshell, Golden Valley, Meagher, and Wheatland counties – 6,857 sq. miles) and 15th Judicial District (Sheridan, Daniels, and Roosevelt counties – 5,459 sq. miles) cover a contiguous area of 83,984 square miles. U.S. Census Bureau, *Census 2000 Public Law 94–171 File: Total Population, Population Density, and Land Area for Montana Counties*, <http://www.ceic.mt.gov/C2000/PL2000/PLcountyarea.pdf> (last updated Mar. 21, 2001). Maryland is 12,407 sq. miles and New England (consisting of contiguous states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut) covers 69,825 sq. miles for a total of 82,232 sq. miles. U.S. Census Bureau, *Statistical Abstract of the United States: Land and Water Area of States and Other Entities*, <http://www.census.gov/compendia/statab/tables/09s0344.pdf> (accessed Feb. 20, 2009).

80% of Montana is covered by judicial districts that average no more than one judge per county.<sup>9</sup>

Many of these “rural courts” and the attorneys practicing law before them experience both satisfaction and challenges varying greatly from the experiences of those in more urban areas of the state. This article will share some thoughts and experiences on these matters from the perspectives of judges for two of Montana’s neighboring rural courts.<sup>10</sup>

## I. ACCESS TO COURT

Article II, Section 16 of the Montana Constitution provides:

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character.<sup>11</sup>

District courts are courts of general jurisdiction. As such, the district court in each county will preside over all felony, probate, abuse and neglect, and adoption cases. It will also preside over various special actions, such as naturalizations and writs, most parenting cases, cases in equity, as well as all civil cases with claims over \$7,000 and all civil actions that can result in a money judgment against the State. The district court also has appellate jurisdiction over cases arising within the justice and city courts of a county.<sup>12</sup>

The constitutional mandates for open access to all and for a speedy remedy for every injury are constant challenges for the rural courts in Montana.<sup>13</sup> To meet this challenge, the law requires regular accessibility to the district courts in every county.<sup>14</sup> This access calls for regular appearance by the court participants. Those participants routinely include the district court judge, the court clerk, the court reporter, attorneys, and litigants.

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9. These judicial districts include the 3rd (Deer Lodge, Granite, and Powell counties), 5th (Beaverhead, Jefferson, and Madison counties), 6th (Park and Sweet Grass counties), 7th Dawson, McCone, Prairie, Richland, and Wibaux counties), 9th (Glacier, Pondera, Teton, and Toole counties), 10th (Fergus, Judith Basin, and Petroleum counties), 12th (Hill, Liberty and Chouteau counties), 14th (Musselshell, Golden Valley, Meagher, and Wheatland counties), 15th (Sheridan, Daniels, and Roosevelt counties), 16th (Custer, Carter, Fallon, Garfield, Powder River, Rosebud, and Treasure counties), 17th (Phillips, Valley, and Blaine counties), 19th (Lincoln County), 20th (Lake and Sanders counties), and 22nd (Big Horn, Carbon, and Stillwater counties). Mont. Code Ann. § 3–5–101.

10. The 12th and 17th judicial districts are located adjacent to each along an area of northcentral Montana that covers approximately 23,000 square miles. The main travel corridor, U.S. Highway 2, stretches approximately 265 miles from east to west. Although their residential chambers are 90 miles apart, each judge is the closest district judge.

11. Mont. Const. art. II, § 16.

12. Mont. Const. art. VII, § 4; Mont. Code Ann. §§ 3–5–301 to 3–5–303.

13. Mont. Const. art. II, § 16.

14. Single county judicial districts must be open every business day; multi-county judicial districts must fix a term of court in each county at least four times a year. Mont. Code Ann. § 3–5–401.

With various witnesses and jurors, the number of participants can be quite large.

*The parking lot is filled with muddy vehicles. The corridor is standing room only. Many of the summoned jurors know each other and others just get acquainted. The conversations cover topics such as last week's livestock market, the weather forecast, a quilting project, the upcoming ballgame, a hot fishing hole and, of course, the grandchildren.*

*The deputies maneuver among the crowd to direct counsel to a secure room to meet with the defendant. The sheriff lingers to visit and assure witnesses are kept elsewhere. Ultimately, the defendant, counsel and jurors are directed to the courtroom. The prosecutor is already there. Voir dire begins. As individual jurors are excused, they nod goodbye to those still on the panel. The whole process seems to bring the community closer together.*

The regular appearance must move court matters toward a “speedy remedy . . . for every injury.”<sup>15</sup> This constitutional requirement means the court must hold regular “law and motion” dates in each county. Throughout rural Montana, these regular law-and-motion days are generally no less than two days per month and up to several days per week.<sup>16</sup>

The regular law-and-motion calendar frequently requires travel. Litigants, attorneys, and witnesses can be from another county or state. Local litigants and jurors frequently reside several miles from the county seat where the courthouses are located. Travel burdens for all must be considered in assuring the court remains accessible.

*The mother and children moved to northeastern Montana two years ago. The father and paternal relatives still reside in Idaho. The children attended school and received professional counseling there. Father retains an attorney from western Montana and closer to his witnesses. Mother lists Montana school teachers and counselors as witnesses. In a pretrial order, parties are informed to know witness' schedule conflicts and be prepared for a firm trial setting.*

The judge of the multi-county judicial district must travel to each county. This travel significantly impacts the availability of the rural court judge and staff. A 2007 National Center for State Courts (NCSC) survey showed several Montana rural court judges spend nearly one-fourth of the time available for court activity traveling.<sup>17</sup>

*I am assigned a state motor vehicle. On occasion, I use my personal vehicle due to road conditions or other travel limitations. My travel logs*

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15. Mont. Const. art. II, § 16.

16. The number of days varies among multi-county courts as some judicial districts' residential workload is essentially divided equally among all the counties in that district. Other multi-county courts may have the bulk of their residential workload in one county.

17. National Center for State Courts: Court Services Division, *Montana District Courts Judicial Workload Assessment Study*, December, 2006, <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=942> (accessed Feb. 20, 2009).

*show that I average nearly 20,000 miles per year for judicial business. The court reporter has a corresponding demand.*

This travel demand comes with Montana's travel hazards, such as two-lane traffic, road construction, sudden storms, the blinding sunrise or sunset, and the ever-present roadside wildlife. Large trucks, tractors, RV's, and travel trailers use the same roads. All these hazards can, and frequently do, delay matters.

*It is ten minutes before start of court. The court reporter has not yet arrived. The clerk appears to advise she hit a deer and her vehicle is temporarily inoperable. Court is delayed to allow alternate transportation. I hit two pheasants on the same stretch of roadway just a week later.*

The travel requirement makes for practical challenges as well. To ensure a vehicle is fueled and properly maintained requires extra effort. Updated weather and road reports must be considered. The judge must provide time at each court for administrative and chamber tasks. All this traveling can impose fatigue. After a long and tiring day in court, the rural court judge often travels many miles back home alone.<sup>18</sup>

*I'm thinking, "Just don't hit the brakes."*

*It's a dark autumn evening. The northwest wind is blowing and the temperature hovers around 32 degrees. I have spent all day presiding in a contentious case at Roundup. As I drive the 160 miles home, I follow another vehicle traveling the same direction. At the crest of a hill, we encounter black ice. The vehicle in front of me slides sideways towards oncoming traffic. The two vehicles collide.*

*I carefully guide between the two and go another quarter mile before I am able to stop. On turning around, I find the occupants not seriously injured and wait the two hours for assistance.*

At the same time, this travel time offers a peaceful opportunity to reflect on the day's events. During the trip home, many rural judges sort out the legal argument just heard and mentally organize their decisions. Attorneys do the same regarding their presentations of the case and oral arguments. An occasional sunrise, sunset, or other encounter can provide a memorable and stress-relieving event.

*On my way through the Missouri River Breaks, I notice four bull elk about to cross the highway. They wait along the road edge as vehicles slowly pass within a few feet of them. The day in court was long but the memory of this event made it easier.*

Accessibility also means the rural court's calendar must be somewhat flexible. During regular law and motion, a rural court can expect to conduct initial appearances, arraignments, omnibus hearings, hearings for a change

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18. Those rural court judges with assigned state vehicles are generally precluded by state policy from having non-state employee passengers. See Admin. R. Mont. 2.6.204 (2001); St. Vehicle Use, Admin. Pol. 770, Mont. Jud. Branch (revised Oct. 28, 2008).

of plea, adult sentencings, youth dispositions, abuse and neglect hearings, temporary orders of protection, default or stipulated divorces, parenting modifications, name changes, step-parent adoptions, probate statuses, pre-trial civil motions, and the like. Since the judge is not always in that county, parties sometimes present matters with little or no notice. A rural court judge cannot always anticipate this type of “last-minute activity.”

*It's one-hour travel—then regular law and motion at 9:00 A.M. An arraignment turns into a change of plea. The omnibus hearing has several contested motions. The dispositional hearing involves a factual dispute. The summary judgment hearing is delayed until after lunch. The afternoon calendar is more of the same. Court finally adjourns after 7:00 P.M. Another hour to review and sign documents in chambers. I leave for home.*

Carryover of regular law-and-motion matters to the following day is difficult for many rural courts. The calendar must allow time for extended hearings and trials at each district court. For this purpose, certain days of each month are generally assigned for regular law and motion and the balance of the month is assigned for extended hearings and trials.

The rural court's schedule and schedule of counsel often result in stacking of matters (i.e., setting more than one matter for the same time). In the multi-county districts, this stacking can result in the court scheduling matters for the same time at different locations. As earlier-stacked matters proceed to hearing or trial, the others move to a different date but, even then, there is no assurance the delayed matter is heard.

*On a particular day, I schedule extended hearings or trials at three different locations—260 miles apart. One setting is actually a carryover requested by counsel from a week-long jury trial that was set to commence the previous week.*

Hearings or trials that extend beyond the allotted time can significantly disrupt a rural court's accessibility. As noted, later-stacked matters must be moved. Regular law and motion may need to be moved to accommodate these matters. All of these changes will have a domino effect on the participants' availability and the timely hearing of other matters.

Long-term detention facilities are frequently in other communities and the smaller sheriff's offices need time to arrange transportation. Attorneys will have matters in several courts and judicial districts. The expert witness may have already set aside appointments for the hearing or trial. Jurors, litigants, and other witnesses sometimes have personal or seasonal hardships.<sup>19</sup>

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19. Most medical providers are in the urban areas. Montana's rural areas involve agricultural operations with seasonal demands such as calving, seeding, and harvest. Rural Montana has many small businesses that depend heavily on seasonal revenues and have few or no employees.

Certain priority settings must also be recognized. The criminal matters must be calendared to provide the accused with his or her right to a speedy public trial.<sup>20</sup> By statute, Youth Court proceedings must be heard without delay.<sup>21</sup> Other statutes also impose deadlines. For example, unless respondent requests additional time, initial hearings and dispositions of petitions for mental commitment must occur within five days.<sup>22</sup> Hearings after a temporary order of protection or an initial show-cause hearing on an abuse-and-neglect petition must occur within 20 days.<sup>23</sup>

Rural courts, like all courts, can face a variety of complex issues every day. Pretrial matters on multi-million dollar damage claims over natural resource development and extraction issues can be heard just moments after approving an accounting and property division in the split of a large family farm. Interesting and challenging jurisdiction issues develop. Pretrial challenges to the admission of evidence are common. Resolution of personal injury claims will frequently require in-depth knowledge of the human anatomy and medical procedures.

*The criminal offense involved the collision of two boats in the middle of the Fort Peck Reservoir in northeastern Montana. This reservoir has more shoreline than the west coast of California.<sup>24</sup> A jurisdictional issue arose involving the location of the collision. The issue was resolved only after old surveys and aerial photographs were presented and explained through expert testimony.*

Rural Montana needs more residential attorneys. Many county prosecutor offices are understaffed. Other counties employ only part-time prosecutors whose prosecution work must balance with private practices. A few counties have no residential attorneys outside of the prosecutor's office. Other established attorneys often do not have the time or the willingness to perform public defender services.

Public defenders can travel hundreds of miles just to get to the courtroom.<sup>25</sup> When the case involves multiple parties entitled to counsel, it can prove a challenge to find independent counsel for each party.

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20. Mont. Const. art II, § 24.

21. Mont. Code Ann. § 41-5-110.

22. Mont. Code Ann. §§ 53-21-122(2), 53-21-127(1).

23. Mont. Code Ann. §§ 40-15-202(1), 41-3-432(1).

24. Fort Peck Reservoir has more than 50 kinds of fish and is Montana's largest body of water. The lake is 134 miles in length and has a maximum depth of 220 feet when full. There are over 1,520 miles of shoreline, longer than the California coast. The reservoir was created from 1933 through 1937 by constructing a 3.8 mile-long dam across the Missouri River. Surrounding this large expanse of water is the Charles M. Russell (CMR) National Wildlife Refuge which provides over one million acres of public land for fishing, hiking, hunting, camping, bird-watching, and other outdoor recreation. Montana Big Sky Country Official State Travel Information Site, *Fort Peck Lake Reservoir and Recreation Area*, <http://visitmt.com/categories/moreinfo.asp?SiteID=1&IDRRecordID=2181> (accessed Feb. 20, 2009).

25. The Office of the State Public Defender contracts with attorneys to cover many rural courts. Mont. Code Ann. § 47-1-215. These contract attorneys can travel over 300 miles for court appearances

*In a recent case, the State removed a young child from the home based on alleged abuse and neglect. The Office of the State Public Defender had attorneys from three different communities representing the parents and the child. At the show-cause hearing, the child's attorney appeared in person, the mother's attorney appeared by audio-video conference from 165 miles to the west and the father's attorney appeared in a similar fashion from 150 miles to the southeast.*

The shortage of attorneys and the increased availability of forms through today's technology have resulted in courts seeing a significant rise in self-represented litigants. Self-represented litigation is more time-consuming. Pleadings do not clearly recite the issues or legal authority. Parties do not understand what evidence is relevant to a claim or a defense. Litigants generally are not familiar with procedural or evidentiary rules.

*The next case on the daily docket involves a pro se pleading entitled "Motion and Affidavit for Enforcement of Parenting Plan." On closer review, I find the petitioner-mother is actually seeking contempt findings and modification of a previously stipulated parenting plan. The previous plan contained the parents' written agreement for a joint residential schedule.*

*At the hearing, the mother testifies that the parties made several modifications to the residential schedule. None of these modifications was reduced to writing. She also states that following these modifications, the father has moved out of the state with the child more than a year ago and has refused to allow her contact with the child or to identify his new residence.*

*The father also appears pro se and responds by stating that a local child protection specialist authorized the move during an abuse-and-neglect investigation of the mother that resulted in removal of other children from the home. The father claims this investigation involved serious bodily injury to an infant caused by the mother's brother and the mother's efforts to conceal the cause of injury. The father states that the child thrives under his care and that he would fear for the safety of the child if he disclosed the whereabouts of the child or returned the child to the mother.*

*The mother replies by stating the abuse-and-neglect investigation has long since closed. She also attempts to rebut the father's statements with investigative reports and with email correspondence between herself and the father's current wife. On my inquiry, she attributes the delay in seeking judicial relief to failed efforts to obtain help from local law enforcement, prosecutors, and the child protection services, as well as her limited financial resources and uncertainty on how to proceed as a self-represented litigant.*

*Neither parent calls any other witness. I recess the proceedings to subpoena local law enforcement and child protection services representatives. When we reconvene, it takes a full day to gather and sort out the relevant evidence.*

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(for example, in the 17th Judicial District, contract attorneys travel from Havre to Glasgow, a distance of 165 miles, one way).

Today's technology also provides considerable help in making rural courts more accessible. Since state assumption in 2001,<sup>26</sup> the Supreme Court and the District Court Council have made available to district courts throughout the state technology such as the Internet, case-management software, fax machines, and two-way audio-video communication.<sup>27</sup>

*I have ten matters scheduled on law-and-motion day. With a raging blizzard outside, cancellations are coming constantly. Of the few hearings held, one had to be continued because of the absence of a witness. I can conduct the other hearings only because the local attorneys make it to the courthouse and the out-of-town counsel appears by video conferencing.*

These technological resources still have their limits. Fax copies do not transmit in color and can be illegible. Audio can be subject to static interruption and the microphone is unclear if it is too sensitive. The video limits the viewing of a witness's demeanor or manner of testifying and prevents use during testimony of most demonstrative charts. Momentary delay in both the audio and video can occur. The court can have difficulties controlling the physically absent witness or attorney. Confrontational problems exist in criminal cases.<sup>28</sup> Montana statute allows this type of communication to be used in only certain criminal proceedings.<sup>29</sup>

As the technology improves and fewer litigants object to its use, it can become a valuable timesaving tool. It can also increase workload as the technology allows better access for litigant research and the increased availability of experts.

*In the weeks before a trial, I hold two summary judgment hearings where all counsel appear by audio-video conferencing. I also receive by email the proposed findings of fact and conclusions of law. At trial, I set up my laptop to real-time reporting. The laptop is connected to the Internet at the bench and contains an updated disk with all Montana Supreme Court decisions and statutes.*

*The attorneys set up their own laptops and provide me with a disk containing the master exhibit list and bench copies of the exhibits. The parties stipulate to an expert witness appearing by two-way audio-video connection. During cross-examination, the expert is faxed a document for review. At a recess, I check an email with a recent schedule change. When counsel requests a short delay, the updated calendar is at my fingertips.*

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26. 2001 Mont. Laws ch. 585.

27. The two-way audio-video technology, often known by its provider's name, Vision Net, allows instant sight and sound communications.

28. An accused has the right to confront witnesses against him. U.S. Const. amend. VI; Mont. Const. art. II, § 24.

29. See Mont. Code Ann. §§ 46-7-101 (initial appearance), 46-9-206 (bail hearing), 46-10-204 (preliminary examination), 46-12-201 (arraignment), 46-12-211, (plea agreement), 46-16-105, (guilty or nolo contendere plea), 46-16-123, 46-18-102, and 46-18-115, (verdict or sentencing), 46-16-229 (child witness testimony on certain findings).

## II. RESOURCES

The District Court Council determined the minimum level of staff support for each judge should be one court reporter, one law clerk, and one judicial assistant.<sup>30</sup> The NCSC premised its 2007 Judicial Workload Assessment Study upon each district court judge having this staff support.<sup>31</sup> Several rural courts still do not have this minimal staffing.<sup>32</sup> To that extent, the study does not paint the true workload assessment for the understaffed rural court.

The NCSC Study acknowledged this deficiency in its findings that identify the uniqueness of rural courts and that state the study was based only on a quantitative model and not on qualitative factors.<sup>33</sup> Such qualitative factors include staff shortages and the corresponding additional workload placed on the residential judge of that court.<sup>34</sup> Rural judges often spend time on tasks that judicial staffs perform in other courts.

Lack of judicial assistance means all the time-consuming scheduling and administrative tasks are placed on the judge. Without a law clerk, the rural court spends precious time doing all the reading, research, legal analysis, reflection, and opinion-writing. In addition, the court is unable to use the law clerk as a special or standing master<sup>35</sup> to conduct preliminary matters such as initial appearances, arraignments, detention hearings, bail-re-

30. District Court Council, *Minutes of January 18, 2008 Meeting at the State Law Library Conference Room, Helena, MT, January 18, 2008*, <http://www.courts.mt.gov/dcourt/dcc/min/2008%20Minutes/Jan%20%202008%20%20minutes.doc> (accessed Feb. 20, 2009).

31. National Center for State Courts: Court Services Division, *Montana District Courts Judicial Workload Assessment Study, December, 2006* i–iv, <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=942> (accessed Feb. 20, 2009) (finding no distinction between staffing in 22 judicial districts other than to note two special masters in the Fourth Judicial District).

32. These minimum staffing levels are not in place in the 3rd, 6th, 7th, 14th, 15th, 16th, 17th, 19th, and 20th judicial districts. Proposals are before the 2009 Montana Legislature to address staff deficiency in the 3rd, 7th, 15th, and 17th judicial districts.

33. “Workload assessment models need to be viewed in context with other consideration, including more qualitative, court-specific factors that may affect the demand for judicial or staff resources differently from district to district because a quantitative model often does not account for such qualitative factors, administrators and policymakers must be aware of the limitations of any model in defining exact resource demand and allocation.” National Center for State Courts: Court Services Division, *Montana District Courts Judicial Workload Assessment Study, December, 2006* iv, <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=942> (accessed Feb. 20, 2009).

34. For simplification purposes, the assessment model was based on a time study for case-specific and non-case-specific workload without distinguishing whether staffing was available to perform any of that workload. National Center for State Courts: Court Services Division, *Montana District Courts Judicial Workload Assessment Study, December, 2006* iii, 2–6, <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=942> (accessed Feb. 20, 2009).

35. Mont. Code Ann. §§ 3–5–113(1)(a), 3–5–122(2), 3–5–124 to 3–5–126, 41–3–422(15), 41–5–201(3).

duction requests, abuse-and-neglect, show-cause, and temporary support arrangements.

The absence of minimal staffing can impact the quality of a court's performance in other ways. Many rural court judges spend evenings and weekends trying to keep up with the workload. Judicial burnout can result from consistently putting in these additional hours. Such consistent effort can also isolate the judge from a community, potentially placing him "out-of-touch" with the community's values.

Complex pretrial matters for an understaffed court delay the setting of the trial date. The judge cannot hastily review a pending pretrial motion without risking the oversight of critical evidence or of controlling legal precedent. During this time, decisions on other preliminary but essential matters such as support or child removal issues may be delayed to the maximum deadline, risking application of the legal cliché that "justice delayed is justice denied."

*The national collection agency asserted several claims. The local farmer countered with several claims, including punitive damages, violation of federal collection law, and intentional infliction of emotional distress for consistent misapplication of payments. The record submitted on summary judgment included several depositions and multiple "fine print" exhibits. My calendar was full with travel, law and motion, extended hearings, research projects, and opinions to draft. I compared the summary judgment task to the farmer doing a harvest on his own. The harvest would have been ruined as it took me nearly five months to review the record and render a decision.*

Rural Montana has a limited pool of stenographic reporters. District courts are courts of record.<sup>36</sup> Without a record, the courtroom proceedings grind to a halt. Substitute stenographic reporters are not readily available to the rural courts. Contract reporters often travel more than 100 miles to get to the court.

Some rural courts successfully use electronic reporting systems. It may be that with the close of several reporting schools, more and more courts will be going to this type of recording. However, these electronic systems still require an operator to regularly monitor the record. Further, they also do not provide the rural court with a real-time or readily available transcript. Timely production of this record is essential to various court operations.

*The mental commitment is hotly contested. I issue detailed findings from the bench that include commitment to Warm Springs Hospital. The sheriff is prepared to transport the defendant 400 miles to Warm Springs for immediate treatment. The only problem—the findings are so detailed the county attorney wants a transcript before preparing the order of commitment.*

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36. *Id.* at § 3–1–102.

Mental health and chemical dependency issues can heighten in areas of poverty and in the isolation of rural areas. Mental health professionals or dependency treatment providers are often miles from a county seat. The absence of community treatment professionals can contribute to delinquent, criminal, abusive, or erratic behavior. The logistics of arranging for and allowing the performance by distant service providers increase the court's workload.

*Prior to arraignment, defense counsel sought a mental competency examination. It took several days to obtain approval from the Office of the State Public Defender. The approval requires examination 200 miles away. The earliest available appointment is a month away. Arraignment was postponed. On the date for arraignment, counsel explains that his client's transportation fell through. It took another six weeks for the examination to be completed and arraignment conducted.*

Emotions in small communities can run deep, especially in family matters. At the same time, the way of life for many in these communities involves the ownership or possession of firearms and weapons. Courtroom security is the primary responsibility of the county sheriff.<sup>37</sup> However, the county sheriff can be short-staffed and have other responsibilities during court appearances such as prisoner transport. Older structures do not always present a secure facility. The rural court must constantly be attuned to these security concerns.

Courtroom security has improved over the past few years. The District Court Council had security audits performed by trained officers and coordinated the formation of local security committees in most county seats.<sup>38</sup> Only a portion of the funds needed to implement the audit recommendations have been allocated.<sup>39</sup> More security funding will be necessary as the local committees develop and upgrade security measures.

District courts operate with state funding, but many programs for diversionary, rehabilitative, assessment, and treatment purposes have other funding sources. The Cognitive Principles of Restructuring Therapy (CP&R) is a well-accepted program used to assist offenders in recognizing their own thinking errors and their lack of empathy for their victims.<sup>40</sup> It is offered in prison and in some of the more populated jurisdictions in Mon-

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37. *Id.* at § 7–32–2121(5).

38. Court Security Advisory Group, *Recommendation Approved by the District Court Council*, October 12, 2005, [http://www.montanacourts.org/dcourt/dcc/safety\\_recommend\\_DCC.doc](http://www.montanacourts.org/dcourt/dcc/safety_recommend_DCC.doc) (accessed Feb 20, 2009).

39. Only \$300,000 funded by the 2007 Legislature of the \$513,710 need recorded in the District Court Council's Security Spreadsheet and Final Report. District Court Council, *Court Inspection Equipment Needs*, <http://courts.mt.gov/dcourt/dcc/security/Court%20Security%20Spreadsheet.pdf> (accessed Feb 20, 2009).

40. See National Institute of Corrections, *Cognitive/Behavioral Strategies to Changing Offender Behavior (Training Broadcast)*, <http://nicic.gov/Library/014794> (accessed Feb 21, 2009); see also D.B.

tana.<sup>41</sup> Without additional funds or training of probation officers to conduct the sessions, rural courts have no access to this valuable tool for rehabilitation. The additional funding is often not available to rural courts. Due to smaller tax or membership bases, the local sponsoring bodies have less revenue and higher staff turnover. The lack of basic services slows the judicial process.

*The father's use of alcohol was placed at issue. The father was instructed to obtain a chemical dependency evaluation. The closest evaluator was 70 miles away at a mental health center. The evaluation was timely completed but the report was delayed due to emergency medical leave and staff shortages. The child custody proceeding was continued for several weeks.*

Many rural courts have only one courtroom. Visiting judges may have to compete with a residential judge for use of a courtroom. The courtroom can also be used for justice and city court trials. Some rural courthouses even use the courtroom and other court facilities as meeting or polling places. It takes a patient and dedicated rural judge to work out the tangles.

*I assumed jurisdiction over the felony jury trial. On my arrival, I found the jury room was the county commissioner's meeting room. During voir dire, I had the county commissioner clean the room of all materials.*

The court facility will often have other limitations. Acoustic and structural problems can slow jury selection and trial presentation.

*The witness is being cross-examined. Suddenly, the sounds of a tractor and truck filter through the windows. The windows are closed but the steam heat becomes almost unbearable. More frequent recesses are taken to assure the jury remains alert.*

Older floor plans can make it difficult for security and confidential communication.

*The county moves my chambers to make room for the prosecutor's office. The new chambers have no door and an open area shared with the clerk's office. A bi-fold closet door is installed. I press for a solid door with a lock. The sheriff then asks to use my chambers to temporarily hold a prisoner as there is no other place to keep him secluded.*

As stated above, attorneys are not always available to rural courts. Even when available, the attorney may have a conflict that prevents representation of a particular party. Most rural courts have no legal aid services in the community. Many litigants cannot afford the time and money to

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Wilson, L.A. Bouffard & D.L. Mackenzie, *A Quantative Review of Structured, Group Oriented Cognitive-Behavioral Programs for Offenders*, 32 Crim. Just. & Behav. 172 (2005).

41. Montana Department of Corrections, *Offender Treatment Programs: Policy DOC 5.4.1*, <http://www.cor.mt.gov/resources/POL/5-4-1.pdf> (accessed March 18, 2009); Counseling and Correctional Services, Inc., *Warm Springs Treatment and Change (WATCh) Program Community*, <http://www.cc-scorp.com/watch2.htm> (updated Feb. 3, 2009).

travel elsewhere for professional services.<sup>42</sup> The challenge for the rural court is to assure the self-represented litigant has access to legal information and material to present an understandable and timely case.

In this regard, grant programs are available and are used to contract attorneys for pro bono services. Local librarians have been instructed through the State Law Library on methods of accessing online services. Individual attorneys in some rural communities offer free or low-cost services to assist needy people. Some legal forms are available over the Internet. The Montana Supreme Court offers these forms on its website free of charge.

Resources are of little help to those unaware of their availability or to those lacking the basic knowledge to access them. Rural courts can educate the user regarding these resources only within ethical constraints.

### III. ETHICS

The recently revised Judicial Code of Ethics<sup>43</sup> contains specific and enforceable rules for a judge to uphold the independence, integrity, and impartiality of the judiciary and to avoid the appearance of impropriety. Personal and extrajudicial activity should minimize the risk of conflict with judicial obligations. Judges must perform their duties competently and diligently.

The court's competency and diligence, as noted above, are influenced by the court's access demands and resource limitations. Further, rural courts are generally located in small communities where close acquaintanceships can develop between the court, its staff, the attorneys, and the public generally being served. This familiarity generally promotes flexibility and allows the rural court to tailor justice to individual circumstances. But, it also presents situations that can encourage transgression of due process standards or question the integrity and independence of the court.

*It is late afternoon. I am doing research in non-residential chambers. The clerk enters to advise me that petitioner's attorney has a last-minute oral request to continue a guardianship matter. I instruct the clerk to remain and take notes. Counsel explains the matter has just become contested and continuance is not opposed. When heard a month later, the petitioner testifies on*

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42. The median income level in the State of Montana is approximately 27.2% lower than the median household income in the United States. The top ten Montana counties in terms of poverty rate are all within the area of rural courts (Roosevelt, Big Horn, Blaine, Glacier, Golden Valley, Petroleum, Rosebud, Garfield, Judith Basin and Chouteau counties). The Native American ethnicity group holds the highest poverty rate with 38.4% of residents living in poverty. U.S. Census Bureau, *Poverty Status in 1999 by Census Tracts with 20 Percent or More in Poverty: Montana*, <http://blueprod.ssd.census.gov/hhes/www/poverty/20percent/montana2.html> (accessed Feb. 20, 2009).

43. Mont. Code Jud. Ethics R. 1.1 to 1.3.

*cross-examination that her attorney met in chambers with the judge. I immediately have the clerk recite from her notes.*

When local citizens observe the judge in their rural community, they may be more inclined to approach and make innocent remarks on a matter relevant to a pending case. To minimize risk of an ethical violation, the rural judge must proceed with caution at all social gatherings. Court staff must follow similar steps to avoid becoming an intermediary in ex-parte communication.

*I am at the grocery store. In the bread aisle, I am approached by a relative who makes innocent reference to a paternity case set that week. I tell her to stop and that I am not allowed to hear such information unless properly presented by pleading or in the courtroom. She complies. At commencement of the hearing, I inform the parties and their counsel about the nature of the contact.*

Rural court judges are more likely to be presented with litigation where at least one party or a key witness will be known by the court. Automatic disqualification would mean that the court would never be able to operate in a close-knit rural community. The rural court often conducts an early review of pleadings to determine whether circumstances call for recusal.

*A former trial judge advised me to use the "take to dinner" test. If I would take the litigant or key witness to dinner or be taken to dinner by the individual, I should recuse myself. At a recent trial, a witness was being asked about the date he had seen the defendant. The witness turned to me and said, "Judge, do you remember the day I waved to you and your wife as you walked on the highway early one morning? If you do, that was the date that I last saw the defendant." Fortunately, the date was not a disputed material fact.*

Even review of the pleadings may prove insufficient to place the rural court on notice of an ethical concern. A district judge is prohibited by statute from sitting or acting in any case in which he has an interest or has a relationship to a party or member of a firm of attorneys of record by consanguinity or affinity within the third degree.<sup>44</sup> Rural courts want and expect attorneys or litigants to inform the court of potential statutory or ethical conflicts requiring recusal.

*The dissolution action involves parties who have been separated for months. On the morning of trial, I am advised that my nephew is now dating one of the parties. I am prepared to discuss this matter when counsel for each party approach to advise they had just learned of the same. I offer to recuse myself but the parties decline and present a property settlement agreement and negotiated parenting plan.*

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44. Mont. Code Ann. § 3-1-803.

Montana statute also entitles each adverse party upon payment of a minimal filing fee to one timely substitution of a district judge.<sup>45</sup> A substitution motion need not state cause for removal. When a rural court judge recuses himself or is timely substituted, he must find another willing to take the case. Often, the available judge is another rural court judge with a similar workload.

As a courtesy, parties are instructed to send copies of pleadings to any “outside” judge assuming jurisdiction in the rural court. This courtesy allows that judge to keep better track of cases “outside” a residential judicial district. Attorneys should still check with the court staff of the “outside” judge to comply with any other court management tools used by that judge.

#### IV. CULTURAL

Due to generations of working and living among each other, residents of Montana’s rural communities are more likely to be closely connected. The rural court and attorneys must be more inclined to ask questions of prospective jurors and witnesses in the effort to search for the truth and to understand any bias or prejudice. When everyone knows either you or your family, there can be reluctance to speak out and reluctance to sit in judgment of another.

*Sisters have been chosen to sit on the jury. During deliberations, the sisters get into an argument with each other. I allow one sister to “cool off” in the courtroom under observation of the bailiff. After this “cooling off” period, deliberations continue.*

The remoteness of these communities often breeds a mix of independence and distrust of “outsiders.” This independent culture is one of the greatest strengths of rural Montana. But it can represent one of the greatest challenges in administering justice in these communities.

Jurors or witnesses may become reluctant to bring forth their true feelings or beliefs during questioning by an attorney or in the presence of other community members. They may misstate or simply fail to recognize the significance of their role as the impartial trier-of-fact or as the factual witness. Court and counsel must recognize this rural culture for what it is and take appropriate action to assure fair presentation of the case.

*The parties to the personal injury case are well known in the community. For the most part, the young attorney is merely getting a “yes” or “no” group response at voir dire. Occasionally, he will get the brief response “I can do it.” At a recess, I invite both attorneys to my chambers to encourage more interaction with the jury panel.*

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45. *Id.* at §§ 3–1–804, 25–1–201(p).

Traditional values engrained over many generations and built into teachings can influence the search for truth.

*The Hutterite colony is 15 miles from town. The excited son informed his father of a near collision with a parked vehicle located near the colony. The father called law enforcement and watched the movement of the vehicle from a distance. It became apparent the operator was under the influence of an intoxicating substance. Concerned for his son, the elder made several more calls to dispatch. At trial, the elder was reluctant to testify because it was against his religious beliefs to swear the oath as administered by the Clerk. He was allowed to affirm his testimony as the truth. His testimony included regret for placing the calls based on a strongly rooted belief in passivism.*

The Native American culture plays a big part in rural courts. Seven Indian Reservations with their respective sovereign powers are located within or near many rural courts.<sup>46</sup> Montana also has Indian tribes without a reservation base. Native Americans will often appear before the court as litigants, witnesses, and jurors.

Close familial relations in Native American cultures extend through several generations. Deference is given based on age or position within a tribe. Community interest often prevails over individual interest. Respectful relationships become the center of many decisions. Lowering the eyes and speaking softly are signs of respect. It is common for Native Americans to be reluctant witnesses or to seek to be excused from the jury based on these and other traditional values that forbid the judging of another. Care must be taken to conduct legal proceedings in a manner that gives respect to this culture but yet assures a fair and impartial deliberation.

The Native American culture is particularly important in abuse-and-neglect proceedings involving Indian children. Rural courts and counsel that regularly practice in these courts must develop a working knowledge of the operations of tribal social services. Whenever an Indian child is removed from the home, the Indian Child Welfare Act (ICWA)<sup>47</sup> requires judges and parties to be aware of cultural practices in child-rearing. Availability of ICWA experts on these cultural practices is limited in part due to the required travel. The rural courts and litigants must accommodate through the use of audio-video conferencing or other technology.

Jurisdiction issues often arise between the rural courts and the tribal courts within the Indian Reservation. Most Native Americans residing within the Reservation are subject to tribal law but non-tribal members residing there (even Native Americans that are enrolled in another tribe) can

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46. Blackfeet, Northern Cheyenne, Flathead, Crow, Rocky Boy, Fort Belknap, and Fort Peck.

47. 25 U.S.C. §§ 1901–1963 (2006); Mont Code Ann. § 41–3–109.

be subject to state law.<sup>48</sup> This multi-jurisdictional component can be a source of frustration for attorneys and the rural court if clear and understandable boundaries are not maintained.

The rural court must be educated and informed regarding tribal court law and procedure. Domestic-relation or protection-order cases require an understanding of a tribal family law order. Various business relationships conducted pursuant to state law can be impacted by tribal court proceedings. An offender's criminal history may include tribal court sentencing. Parties may seek enforcement of tribal court judgments as a matter of comity. In many cases, the tribal court procedures can be less stringent than those of the state court.

## V. EDUCATION

With work demands and staff shortages, the rural courts struggle to stay informed regarding court decisions or procedural and statutory changes. Periodic conferences help, but these conferences often involve additional travel and increased workload. Rural courts simply have little time to squeeze educational sessions into busy schedules.

The distance factor also means less contact between the rural courts. A judge of a rural court will often lack the collegial contact that can develop between judges working in the same community. Without this contact, the rural court has little exposure to helpful ideas or information regarding the organization and processes of similar courts.

A trained staff is a more efficient staff. However, funding, geographic location, and small size make it harder for staff members to receive this training. The judge, who bases the training on his or her own experiences, does most staff training.

## VI. EFFICIENCY TIPS

For judicial efficiency, self-represented litigants and attorneys appearing in the rural courts of Montana should:

1. Familiarize themselves with all pleadings.
2. Where reasonably possible, do not wait until the last minute to present matters that impact the court's schedule.
3. Provide a copy of any motion or pleading to the residential chambers of the presiding judge.

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48. Tribal courts cannot prosecute non-Indians for crimes committed on a reservation. *Oliphant v. Suquamish Indian Tribe*, 453 U.S. 191 (1978). States may have jurisdiction over offenses on a reservation between non-Indians, but federal courts have jurisdiction for offenses by a non-Indian against an Indian. *Williams v. U.S.*, 327 U.S. 711, 714 (1946). These principles are discussed well in *Mont. v. Greenwalt*, 663 P.2d 1178 (Mont. 1983). See also Scott W. Wilson, *Criminal Jurisdiction in Montana Indian Country*, 47 Mont. L. Rev. 513 (1986).

4. In motions seeking immediate relief, state what efforts have been made to contact the opposing party and any represented position by that party.
5. Use technology to help present your case. Test it in advance if there are any reliability concerns.
6. Be aware of document software used by the court and present proposed orders or documents using that software.
7. Present proposed orders with any motion seeking early relief, such as a motion for continuance.
8. Be open to mediating disputes.
9. Use pretrial conferences to seriously discuss the stipulation of facts not in dispute and recite those stipulated facts in a proposed pretrial order.
10. Present proposed findings of fact or conclusions of law on disks or by email attachment to the court's administrative staff.
11. Present bench copies of exhibits.
12. Be sufficiently detailed in any pleading to inform the court on review of any potential ethical concerns.
13. Understand the culture of the area. Do not be afraid to ask questions of the unique cultural groups.
14. Where reasonably possible, advise the court in advance of any security issues, witness accommodations, or other concerns for in-court presentations.
15. If you are a new to the area, introduce yourself to the court's staff. Do not hesitate to ask questions or seek assistance from the clerk of court, judicial assistant, or from experienced local attorneys regarding a particular court practice.

## VII. CONCLUSIONS

An understanding of court operations and a commitment to adequate funding are essential to the administration of justice in Montana's rural courts. Without this understanding and commitment, rural courts struggle to provide litigants with timely justice. The potential for error or violation of fundamental and statutory rights also increases.

The community-oriented people of rural Montana need legal representation readily available to them. Resident attorneys best fill the need for these independent thinkers, but the number of resident attorneys is shrinking. Established firms need to encourage and seek out associates. Governing bodies, law schools, and community members themselves need to encourage attorneys to locate their law practice in rural Montana. The incentives can include residing closer to family and friends, open areas, recreational opportunities, improved teacher-student ratios, and a quieter life.

Attorneys looking for a place to settle and practice law should know that the practice before rural courts can be as varied as any court in Montana. Attorneys that desire a solo practice should consider doing prosecution or public defender work while getting established. The defender offices frequently seek contracted counsel. Whatever the reason, the nature of

practice can involve a quality of life that can only come from living in a rural area.

A 60-mile trip is truly only an hour away. The lack of traffic congestion makes any commute quicker and less stressful. Essential air, train, and bus services are generally available locally or within a few-hours drive. Local schools and their extracurricular activities are a focal point and become a very good way to become acquainted with members of the community. Social gatherings are as close as the corner café. Anyone willing to serve will find a community organization more than ready to accept them as a member. Neighbors become family.

*The visitor's report<sup>49</sup> reads: X has applied to be full guardian and conservator of Y due to ongoing concerns that Y is unable to manage his own care. Y resides in (the local community). He has no children. He does have some elderly relatives in South Dakota and possibly Canada. However, Y is not in contact with them and feels his neighbors are his support . . . All neighbors felt Y was a wonderful man. All also stated they would visit Y regularly if he were to move. This is a big concern for Y because his neighbors appear to be his family. Y does not talk about relatives, but often speaks highly of his "wonderful neighbors."*

Residents usually hold Montana's rural courts in high regard and greatly appreciate attorneys and other professionals. The rewards of administering justice in rural Montana clearly outweigh the challenges. It is a wonderful place to call home.

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49. Filed under Mont. Code Ann. § 72-5-315.