

MEMORANDUM

TO: Sara Hess, Montana Legislative Services
FR: John Mudd & Bruce Spencer, State Bar of Montana
DT: October 30, 2023
RE: State Bar of Montana Background Information

The following information is provided to the Montana Legislative Services Division as background for the work of the Law & Justice Interim Committee of the Montana Legislature. This memo addresses the following key entities involved in Montana attorney regulation and certain rules and procedures we hope will provide context for the work of the State Bar of Montana (State Bar):

- Montana Supreme Court
- Commission on Character and Fitness
- Board of Bar Examiners
- Commission on Mandatory Continuing Legal Education
- Commission on Practice
- Office of Disciplinary Counsel
- State Bar of Montana

I. BECOMING A MONTANA LAWYER

Perhaps the best way to examine attorney regulation in Montana and the role of the State Bar is to follow a prospective new lawyer from college to law school, through the admission process, and on into membership in the State Bar. While rigorous, this process has been developed over many decades to ensure that Montana's citizens, businesses, and government are served by ethical and competent lawyers. The first step in assuring that is through attorney education process.

A. Education Requirements

Using requirements at Montana's Alexander Blewett III School of Law at the University of Montana as an example, a prospective law school student must first obtain a baccalaureate degree from a regionally accredited college or university.¹ The applicant also must be of "good moral character" (this will come up again in the bar admissions process described below) and must take the Law School Admissions Test (LSAT) or the Graduate Record Examination (GRE). Law school is most typically a three-year program of study which requires both doctrinal and experiential (clinical) training.

¹ Information on the requirements to attend UM can be found at:
<https://www.umt.edu/law/admissions/application/default.php>

Once a prospective lawyer has completed law school, the next step in the process of becoming a Montana lawyer is the bar admissions process.

B. The Bar Admissions Process

The Rules for Admission to the Bar of Montana (provided with this memo) are promulgated and adopted by the Montana Supreme Court under its constitutional authority to regulate the practice of law. The Rules set out the requirements for attorney admission, including the following process.²

First, an applicant must have graduated from a law school accredited by the American Bar Association. In the United States, the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association is the organization recognized by the U.S. Department of Education as the accrediting agency for law schools.³

Second, an applicant also must undergo a character and fitness review independent from any required by their law school. In Montana, that process is overseen by the Character and Fitness Commission of the Montana Supreme Court comprised of members of the profession and the public. The National Conference of Bar Examiners (NCBE) also assists in the character and fitness review process (and does so in most jurisdictions), in particular the background investigation. The Director of Admissions of the State Bar and associated staff provide administrative support for the character and fitness review process.

Once the Commission on Character and Fitness certifies that a prospective Montana attorney possesses the requisite good moral character, they may proceed to the next step of the process, the examination phase.

All applicants must complete the Multi-State Professional Responsibility Examination (MPRE), which examines fundamental lawyer ethics rules and law. The MPRE is administered directly by the National Conference of Bar Examiners and is required in all but one state and Puerto Rico.

Applicants also must pass the bar exam. The Montana Board of Bar Examiners, a group of attorneys appointed by the Montana Supreme Court, oversees the examination process (again with assistance from the State Bar's Director of Admissions and staff).

Montana administers what's known as the Uniform Bar Examination (UBE). As the name implies, the UBE is the bar examination used in the majority of jurisdictions. In addition to the UBE, prospective admittees also must complete the Montana Law Seminar, which provides information on Montana specific legal topics and law.

NCBE is in the process of implementing a new type of bar examination that more heavily tests lawyering skills, known as the NextGen Bar Exam. Jurisdictions will have to decide whether to

² This process is for a new graduate seeking admission. There are different processes for a lawyer admitted to practice in a different jurisdiction who seeks admission to practice in Montana, or lawyers who are seeking admission only for purposes of a particular case, which is known as pro hac vice admission.

³ The Council operates separately from the professional association of the ABA.

use that new exam format. Montana has not yet decided whether to adopt the NextGen Bar Exam.

Once an applicant has successfully passed character and fitness review, the MPRE, the bar examination, and has completed the Montana Law Seminar, except in unusual circumstances, they will appear before the Montana Supreme Court and a current member of the bar will move for their admission to the State Bar of Montana.

New Montana lawyers take an oath to support the United States Constitution, the Constitution of the State of Montana and to abide by the Montana Rules of Professional Conduct which are established by the Montana Supreme Court and govern the conduct of all Montana lawyers. Upon taking the attorney oath, the new admittee becomes an officer of the court and signs the attorney roll maintained by the Clerk of the Montana Supreme Court.

Once admitted to the State Bar of Montana, attorneys then have obligations of continued membership in good standing discussed below and are subject to potential discipline for violations of the Montana Rules of Professional Conduct.

II. MEMBERSHIP IN THE STATE BAR OF MONTANA

The State Bar traces its roots back to 1885 when a group of attorneys met in Helena to form the Montana Bar Association (MBA). In 1974, upon petition of the MBA, the Montana Supreme Court created a unified bar for Montana and established the organization known today as the State Bar of Montana. The purposes of the State Bar are set forth in Article III of its Constitution:

... to aid the courts in maintaining and improving the administration of justice; to foster, maintain and require on the part of attorneys high standards of integrity, learning, competence, public service and conduct; to safeguard proper professional interests of the local bar associations; to provide a forum for discussion of and effective action concerning subjects pertaining to the practice of law, the science of jurisprudence and law reform, and relations of the Bar to the public; to provide for continuing legal education of members of the Bar and to ensure that the responsibilities of the legal profession to the public are more effectively discharged.

As noted, the ultimate regulator of the legal profession in Montana is the Montana Supreme Court; however, as with Montana's neighboring western states⁴, to maintain a self-regulating and independent legal profession often called upon by clients to challenge government action and secure their constitutional rights, the lawyers of Montana fund the State Bar and their regulatory structure under the constitutional authority of the judicial branch, without dependence upon the legislative and executive branches of government for the right to practice.

As the preamble to the Model Rules of Professional Conduct (and Montana's Rules of Professional Conduct) states:

⁴ Though each state's mandatory bar is structured uniquely, Idaho, Nevada, New Mexico, North Dakota, South Dakota, Utah, Wyoming, are among over thirty states that use some form of a mandatory bar structure similar to Montana's.

Self-regulation ... helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

A. Governance Structure

When the State Bar was established in 1974, a governance structure was created for the organization, including sixteen trustees elected from various districts around the state, as well as four officers: president elect, president, past-president, and secretary treasurer. Resident active and active-military members of the State Bar are eligible to vote in State Bar elections, along with judicial members, however, the members of the Montana Supreme Court are not eligible to vote in State Bar elections.

The State Bar is not a corporate entity but has its own tax identification number and a ruling from the IRS that it is not subject to tax. The State Bar maintains its own private bank accounts, investment reserve accounts, and is independently audited. Its employees are not employees of the State of Montana, they are not unionized, and they do not receive state benefits or retirement. Employees in the Montana Office of Disciplinary Counsel (ODC) are administratively attached to the State Bar for purposes of benefits, etc., however, ODC does not operate under management of the Trustees and Officers in order to maintain its own independence in lawyer disciplinary matters.

B. Classes of Membership, Dues and Assessments

All attorneys who wish to practice law in Montana must be active or active-military members of the State Bar. The State Bar also has several classes of membership which are voluntary, including the class of inactive members, senior members, emeritus members, and judicial members. As of June 20, 2023, there were 4,076 total active members of the State Bar (3,154 in state) and 7,796 total members (which also includes resigned and suspended members). The State Bar also has a group of paralegals who may join the organization through its Paralegal Section.

Dues and assessments paid by the Members of the State Bar are established under the authority of the Montana Supreme Court. The class of active members pay dues of \$300 per year, an assessment to the Lawyers Fund for Client Protection of \$20, a CLE transcript fee of \$45, a Discipline Counsel Assessment of \$125 and the attorney license tax of \$25. (The State Bar collects the attorney license tax on behalf of the Clerk of the Montana Supreme Court pursuant to a state contract and is paid \$7,500 per annum by the Clerk's office to do so).

Active-military members pay assessments but do not pay \$300 in dues. Inactive members, who voluntarily maintain that status, pay \$190 and the license tax, but not the remaining assessments. Senior members pay \$50 in dues, but none of the other charges, and emeritus members do not pay any dues or assessments. New admittees receive graduated discounts. Detailed information on dues and assessments can be found on the State Bar's website:

<https://www.montanabar.org/Membership-Regulatory/Member-Resources/General-Membership-Q-A>

The State Bar reports to the Montana Supreme Court on its dues structure every three years, most recently in 2023. The most recent Special Report is provided with this memo.

In order to remain a member in good standing, State Bar members are required to pay their annual dues and assessments (and the license tax if required) and active members must receive at least fifteen (15) credit hours of continuing legal education as required under the Rules for Mandatory Continuing Legal Education adopted by the Montana Supreme Court and overseen by the Court's Commission on Continuing Legal Education. *See* State Bar Bylaws, Article I, Section 5. Failure to meet the requirements of continued membership, including failure to obtain the necessary CLE credits, may result in suspension of membership and/or an involuntary change in status to inactive.

C. Mandatory Continuing Legal Education

As noted above, Montana is a jurisdiction that requires all active attorneys to complete annual mandatory continuing legal education, known as CLE. The oversight of the mandatory continuing education is under the Montana Supreme Court's Commission on Continuing Legal Education which develops and enforces rules regarding the same. Again, those rules are adopted by the Montana Supreme Court. The Commission is comprised both of attorneys and members of the public appointed by the court. As with the admissions process, the daily tracking and approval of CLE and administration of the program is facilitated by State Bar staff. The Rules for Mandatory Continuing Legal Education are submitted with this memo.

D. Programs of the State Bar

The State Bar administers a variety of programs for its members and, importantly, for the public. Two of the important public programs are the Lawyer's Fund for Client Protection and the Fee Arbitration Program.

The Lawyer's Fund for Client Protection (LFCP) is a trust funded by the active members of the State Bar that was established by the Montana Supreme Court and is overseen by the Board of Trustees through the Lawyer's Fund for Client Protection Board. A client injured by the dishonest conduct of a lawyer (as defined by the program rules) is eligible for reimbursement from LFCP. In most cases, that lawyer has been disbarred and ordered to repay the client. The State Bar administers the LFCP program.

The Fee Arbitration program was created by the Montana Supreme Court and is also administered by the State Bar. The program is in place to decide, through binding arbitration, disputes between clients and their lawyers over the appropriateness of a lawyer fees. The arbitration panels are comprised of volunteer attorneys and members of the public. The Rules on Arbitration of Fee Disputes and the Lawyers Fund for Client Protection Rules are available with the electronic version of the Lawyers Deskbook we are providing with this memo.

The State Bar also produces a variety of continuing education programs for its members and runs the Lawyer Assistance Program (LAP) which provides confidential assistance for lawyers struggling with challenges including mental health and addiction issues. Attorneys may seek help from the LAP themselves, though other concerned attorneys, judges and members of the public often contact the LAP with their concerns. The LAP not only helps lawyers, but serves the public through intervention, ideally before a struggling attorney injures a client. All of these programs, and others, are funded by the membership of the State Bar.

III. LAWYER DISCIPLINE

The process of lawyer discipline in Montana is independent from the State Bar proper. That process involves two key entities: the Montana Office of Disciplinary Counsel (ODC) and the Montana Supreme Court's Commission on Practice. It exists to protect the public through the enforcement of the Montana Rules of Professional Conduct.

A. The Montana Rules of Professional Conduct

It is important to note that lawyer discipline occurs for violations of the Montana Rules of Professional Conduct; that is not the same as legal malpractice. Legal malpractice involves the negligence of the attorney and is a matter of tort law handled through the courts, much as other professional negligence matters. Lawyer discipline is different.

As noted previously, when an attorney is admitted to the practice of law in Montana, part of their oath as officers of the court is to be bound by the Montana Rules of Professional Conduct adopted by the Montana Supreme Court. As in all states, those conduct rules are largely modeled on the Model Rules of Professional Conduct, which are developed by national experts and the American Bar Association as a guide so that there is relative uniformity among the states in the rules of conduct, particularly as many attorneys are now licensed in multiple states. (Again, keep in mind that all new admittees to the State Bar must take a national lawyer ethics examination, the MPRE).

The State Bar does play a role in suggesting additions or revisions to the Rules, normally through its Ethics Committee and then the Board of Trustees. The latest revisions were suggested by the State Bar in 2019. Those revisions are offered to the Montana Supreme Court which then calls for public comment before it adopts any changes to the Rules. In some cases, the court has suggested changes itself, with that same public comment period before adoption.

B. The Office of Disciplinary Counsel and the Commission on Practice

After study of the lawyer discipline system in Montana several decades ago, Montana revised its lawyer discipline system, creating the Office of Disciplinary Counsel (ODC) and hiring a Chief Disciplinary Counsel to investigate and, as necessary, prosecute claims before the Montana Commission on Practice. The Chief Disciplinary Counsel is hired by the Montana Supreme Court.

Lawyers began paying a new disciplinary assessment to pay for operations of the office. ODC is administratively attached to the State Bar for purposes of employee benefits and functional

support like accounting and information technology, however, it operates independently from the State Bar governance structure. The Rules for Lawyer Disciplinary Enforcement are established by the Montana Supreme Court. Those Rules are available through the ODC website:

www.montanaodc.org.

The Commission on Practice, which hears cases involving alleged violations of the Rules of Professional Conduct, is comprised of fourteen (14) members, nine (9) of whom are lawyers and five (5) of whom are members of the public. While all of the members of the Commission on Practice are ultimately appointed by the Montana Supreme Court, importantly, eight of the lawyers are picked through an election process whereby the lawyers in the Commission on Practice districts (which match the districts for the selection of State Bar Trustees) elect lawyers for selection by the court for the Commission. The Montana Supreme Court must select a lawyer from among the top three receiving the highest number of votes in each district.

The Montana Supreme Court also selects one attorney member at-large and five members of the public to serve on the Commission on Practice. This process assures that the lawyers of the state may nominate their respected peers for service, though the attorneys themselves do not have the final say in selection. It also assures that, as with the Montana Supreme Court's other commissions, members of the public are represented in the attorney disciplinary process.

The Commission operates like other professional licensing boards in Montana in that there is a screening panel for cases, the members of which do not sit on the final adjudication of the matter.

IV. SPECIFIC CONDUCT RULES: LAWYER TRUST ACCOUNTS AND "IOLTA"

One of the reasons that prospective lawyers go through a rigorous character and fitness investigation, which includes their financial history, is because lawyers routinely handle funds from and for clients, such as settlement proceeds. There are some very specific provisions of the Montana Rules of Professional Conduct concerning holding client funds.

First, it is important to understand that lawyers have an obligation not to mix the lawyer's own funds with those of their clients. *See* M.R.Prof.C.1.15. Therefore, in many, if not most, private law offices, lawyers will have a business operating account and then a client "trust account" or accounts. The integrity of those trust accounts is a source of significant regulation for the attorney. Trust accounts are regulated by the Lawyers Fund for Client Protection Board's Trust Account Maintenance & Audit Requirements, and the Montana Supreme Court's Trust Account Overdraft Notification Rule, which requires that banks with lawyer trust accounts be approved by the LFCP Board and that notification of any overdrafts in a trust account are reported to the State Bar. Both of these sets of rules and requirements are included in the Lawyers Deskbook available to all Montana attorneys. Failure to properly maintain a trust account may also subject a lawyer to disciplinary action by ODC and the Commission on Practice.

Lawyers also cannot pay themselves from client trust monies until they earn the fees assessed, such as in the case of a deposit of funds in advance for the lawyer to bill against. M.R.Prof.C. 1.15(c).

Under the Rules of Professional Conduct, if a lawyer is holding significant client funds for a long period of time, the lawyer should place those funds in an interest-bearing account for the benefit of the client. M.R.Prof.C. 1.18(c)(3). This might occur in matters such as class action settlements where a significant amount of money might be held for the benefit of the class members while the settlement awaits final distribution and/or accounting, etc.

However, many lawyers also routinely hold smaller amounts of client money for a shorter amount of time when setting up a separate interest-bearing account may not be practical.

For example, let's suppose that Lawyer Smith is representing Client Jones in a personal injury case where Client Jones was rear-ended, and Lawyer Smith has agreed to be paid only if there is a recovery and has a written agreement for that (what's known as a contingency fee case). *See* M.R.Prof.C. 1.5(c). Lawyer Smith recovers \$30,000 for Client Jones and receives a check from the insurance company for the other driver to settle the case.

When Lawyer Smith receives the settlement check, those funds do not belong in their entirety to Lawyer Smith, who must deposit the check into a trust account before taking the agreed upon (and now earned) contingency fee. Lawyer Smith deposits the settlement check into her trust account, waits to make sure it clears, and then starts to parse out the settlement.

Once the check has cleared, Lawyer Smith may pay herself the agreed upon contingency fee and move that into her firm's operating account since that fee has been earned. But Client Jones also has some hospital liens filed with Lawyer Smith's office that need to be paid from the settlement, so Lawyer Smith sorts those out and pays them. Client Jones also agreed to pay costs incurred during the case, and Lawyer Smith reimburses her firm for the court reporter's fee she paid in advance for a deposition taken during the case. The process of doing all of this could take several days to several weeks and then the proceeds to Client Jones are paid and the matter is closed.

Interest on Lawyer's Trust Accounts (IOLTA) solves many operational problems with holding funds for a short term as in our example. Without IOLTA accounts Lawyer Smith must separately account for interest accruing on separate client matters in only a matter of weeks. It is cost prohibitive and administratively prohibitive to do so. Lawyer Smith would have to open a new account and acquire and calculate taxable interest for Client Jones and then immediately close the account without an IOLTA account. Lawyer Smith cannot put the settlement money in her operating account because she cannot mix her funds with the clients. Short-term money market accounts (remember they probably must be FDIC insured) are impractical as well. Placing the money in a non-interest-bearing trust account only permits the bank to benefit from the money by loaning it to other banks at the federal funds transfer rate.

These smaller amounts of money held for a short amount of time are problematic, or were, until a change in federal banking law. In this type of situation, lawyers in Montana may use what's known as an IOLTA trust account. M.R.Prof.C. 1.18(1)(2)(A). But what exactly is an IOLTA trust account?

Prior to the 1980s, interest was not allowed on checking accounts, so Lawyer Smith would have had to deposit the settlement proceeds into a non-interest-bearing trust account, but a change in

federal banking law significantly improved this scenario, allowing for pooled interest-bearing checking accounts.

Lawyer Smith still cannot earn the interest on her client's settlement funds and as discussed above, calculating interest on nominal and short-term funds is simply impractical and any potential economic benefit to a client is eclipsed by the administrative cost. However, because of the change in the law allowing the use of a pooled interest-bearing checking account (typically a Negotiable Order of Withdrawal ("NOW") account, if the interest is paid, not to the lawyer or the client, but to a charitable entity, an interest-bearing pooled checking account can be used.

With this change in the law, IOLTA programs were born with the banking industry funding the charities by agreeing to pay an agreed upon interest rate on the pooled account balance comprised of nominal funds or those held for a short amount of time. *See generally* M.R.Prof.C. 1.18. These IOLTA accounts are heavily regulated and attorneys report whether they maintain an IOLTA account to the State Bar (and the Montana Justice Foundation – see below) during their annual dues and compliance process.

Today, in all fifty states, the District of Columbia and Puerto Rico, IOLTA programs fund various foundations (typically associated with the jurisdiction's bar organization) which, in turn, fund a variety of programs connected with the justice system. In Idaho, the IOLTA program funds the Idaho Law Foundation, in North Dakota, it's the North Dakota Bar Foundation, and so on and so forth.

In Montana, the entity which receives the interest paid by the banks through the IOLTA program is the Montana Justice Foundation (MJF) (formerly known as the Montana Bar Foundation). MJF, which is an independent 501(c)(3) not controlled by the State Bar or the Montana Supreme Court, funds programs throughout Montana, ranging from domestic violence and CASA programs to civil legal aid programs, to educational programs like the American Legions Girls' State Program and the We the People high school civics competition. Nearly 50 state and national financial institutions participate in Montana's IOLTA program and remit interest to MJF.

In fact, the Montana Legislature enacted a program similar to IOLTA allowing for the use of pooled interest-bearing accounts for nominal or short-term trust monies to provide funding for the Montana Land Title Association Foundation. *See* § 33-25-201(3), MCA.

V. CONCLUSION

We hope that this Memorandum and the associated materials, including the various rules and the Montana Attorney Deskbook, will assist you in preparing for the upcoming meeting of the Law & Justice Interim Committee meeting on November 15, 2023.

If we can provide any additional background information or assistance, please do not hesitate to reach out.