

CHAPTER ONE

PRELIMINARY AND GENERAL INSTRUCTIONS

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INSTRUCTION NO. [1-101]

[Preliminary Instruction 1]

It is important that as jurors and officers of this Court you obey the following instructions at any time you leave the jury box, whether it be for recesses of the Court during the day or when you leave the courtroom to go home at night.

First, do not talk about this case either among yourselves or with anyone else during the course of this trial. In fairness to the Defendants and to the State of Montana, you should keep an open mind throughout the trial and not form or express an opinion about the case. You should only reach your decision after you have heard all the evidence, after you have heard my final instructions and after the attorneys' final arguments. You may only enter into discussion about this case with the other members of the jury after it is submitted to you for your decision. All such discussion should take place in the jury room.

Second, do not let any person talk about this case in your presence. If anyone does talk about it, tell that person you are a juror on the case. If they won't stop talking, leave and report the incident to me as soon as you are able to do so. You should not tell any of your fellow jurors about what has happened. You should not talk to your fellow jurors about anything that you feel necessary to bring to the attention of the judge.

Third, although it is a normal human tendency to talk and visit with people, both at home and in public, you may not, during the time you serve on this jury, talk with any of the parties or their attorneys or any witnesses. By this, I mean not only do not talk about the case, but do not talk at all, even to pass the time of day. In no other way can all parties be assured of the fairness they are entitled to expect from you as jurors.

Fourth, during this trial you may not make any investigation of this case or inquiry outside of the courtroom on your own. You may not go to any place mentioned in the testimony without explicit order from me to do so. You must not consult any books, dictionaries, encyclopedias, research online, using Google, Yahoo, Bing, or any other Internet search engine, or use other reference materials or other sources of information unless I specifically authorize you to do so.

Fifth, do not read about the case in the newspapers. Do not listen to radio or television broadcasts about the trial. News accounts may be incomplete or may contain

matters that are not proper evidence for your consideration. This prohibition extends to all forms of communication, whether in person, written, or through any electronic device or media, such as the telephone, a cell or smart phone, BlackBerry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, and any Internet chat room, blog, or website such as Facebook, MySpace, YouTube, and Twitter. You must base your verdict solely on what is presented in Court. You are now sworn jurors in this case, and you will hear the evidence and thus be in a better position than anyone else to know the true facts.

Sixth, if during the course of the trial there is reason to believe any of these rules have been violated, I will make inquiry of individual jurors and take appropriate action.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-101 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Inst. No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Preliminary Instruction No. 1-101, 2009, Source and Comment]

SOURCE: MCJI 1-101

COMMENT: Cite as MCJI 1-101 Revised (2003)

This instruction was revised by the Commission in August, 2003 at the request of the media. Specifically, the language in the earlier version about news reports being “inaccurate” was deleted in favor of the present language. The Commission believes that the purpose of the instruction is to discourage jurors from reading news accounts of a case, not to be critical of the media. Also, the instruction has been supplemented from earlier versions to address changes in communications technology. It is based on a model used by the federal courts in Montana.

INSTRUCTION NO. [1-102]

[Preliminary Instruction 2]

Ladies and Gentlemen of the Jury:

It is my duty to instruct the jury on the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you.

No remarks I make or instructions I give are intended to express my opinion as to the facts in this case or what verdict you should return.

You should take the law in this case from my instructions alone. You should not accept anyone else's version as to what the law is in this case. You should not decide this case contrary to these instructions, even though you might believe the law ought to be otherwise. Counsel, however, may comment and argue to the jury upon the law as given in these instructions. If, in these instructions, any rule, direction or idea is stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. You are not to single out any sentence or any individual point or instruction, and ignore the others. You are to consider all of the instructions as a whole, and are to regard each in the light of all the others. The order in which the instructions are given has no significance as to their relative importance.

The function of the jury is to decide the issues of fact resulting from the **[charge]** **[charges]** filed in this Court by the State and the Defendant's plea of "not guilty" to the **[charge]** **[charges]**. You must perform this duty uninfluenced by passion or prejudice. You must not be biased against a Defendant because the Defendant has been arrested for this offense, or because charges have been filed, or because the Defendant has been brought before the Court to stand trial. None of these facts is evidence of guilt, and you are not permitted to infer or to speculate from any or all of them that the Defendant is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the

State and the Defendant have a right to demand, and they do demand and expect, that you will act conscientiously and dispassionately in considering and weighing the evidence and applying the law of the case.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-102 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

INSTRUCTION NO. [1-103]

[Preliminary Instruction 3]

You are the sole judges of the credibility, that is, the believability, of all the witnesses testifying in this case, and of the weight, that is, the importance, to be given their testimony. In judging the effect of evidence you must be fair and impartial and not arbitrary. While you have discretion in judging the effect of evidence, you must exercise that discretion in accordance with these instructions.

The evidence presented by one witness whom you believe is sufficient for the proof of any fact in this case.

You are not bound to decide any fact based upon the testimony of a larger number of witnesses whose testimony does not convince you against the testimony of a smaller number of witnesses (or against a presumption), or other evidence which does convince you.

In determining what the facts are in the case, it may be necessary for you to determine what weight should be given to the testimony of each witness. To do this you should carefully consider all the testimony given, the circumstances under which each witness has testified, and every matter in evidence that tends to indicate whether a witness is worthy of belief. You may consider:

1. The appearance of the witnesses on the stand, their manner of testifying, their apparent candor, their apparent fairness, their apparent intelligence, their knowledge and means of knowledge on the subject upon which they have testified.
2. Whether the witnesses have an interest in the outcome of the case or any motive, bias or prejudice.
3. The extent to which the witnesses are either supported or contradicted by other evidence in the case.
4. The capacity of the witnesses to perceive and communicate information.
5. Proof that the witness has a bad character for truthfulness.

If you believe that any witness has willfully testified falsely as to any material matter in the case, you must reject such testimony as you believe to have been false and you have the right to view the rest of the testimony with distrust and in your discretion disregard it, unless, after examination of all the evidence, you find such testimony worthy of belief. This rule does not apply if, a witness:

1. unintentionally commits an error in the witness' testimony, or
2. is unintentionally mistaken as to some matters or facts about which the witness testifies, or
3. gives evidence concerning matters not material in this case without intention of deceiving the Court or jury.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-103 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

INSTRUCTION NO. [1-104]

[Preliminary Instruction 4]

An Information has been filed charging the Defendant, _____, with the offense of _____, alleged to have been committed in _____ County, State of Montana, on or about _____, 20___. The Defendant has pled not guilty. The jury's task in this case is to decide whether the Defendant is guilty or not guilty based upon the evidence and the law as stated in my instructions. These are some of the rules of law that you must follow:

1. The filing of an Information is simply a part of the legal process to bring this case into Court for trial and to notify the Defendant of the charges against him/her. Neither the Information nor the charges contained therein are to be taken by you as any indication, evidence or proof that the Defendant is guilty of any offense.
2. By a plea of not guilty, the Defendant denies every allegation of the charge.
3. The State of Montana has the burden of proving the guilt of the Defendant beyond a reasonable doubt. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt.
4. The Defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the Defendant is guilty. The Defendant is not required to prove his innocence or present any evidence.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-104 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Preliminary Instruction No. 1-104, 2009, Source and Comments]

SOURCE: *State v. Gould*, 216 Mont. 455, 704 P.2d 20 (1985);
 State v. Degraw, 235 Mont. 53, 764 P.2d 1290 (1988)
 State v. Lucero, 214 Mont. 334, 693 P.2d 511 (1984)

INSTRUCTION NO. [1-105]

[Function of Bailiff and Questions to Court]

During the trial, the bailiff will keep you together and will prevent inappropriate conversations between you and any other persons. The bailiff will see to your needs during the trial. However, the bailiff cannot answer any questions about this case or provide you with any information, books or materials, as I have strictly forbidden the bailiff to do so.

I will instruct you on the laws you must apply to the evidence presented in the case in order to reach a verdict, both orally and by giving you a set of written instructions which you will take with you during your deliberations. These instructions are intended to cover all necessary laws which are pertinent to the case.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-105 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

INSTRUCTION NO. [1-106]

[Jury Deliberation]

The law requires the jury verdict in this case to be unanimous. Thus, all twelve of you must agree that the defendant is either guilty or not guilty in order to reach a verdict.

When you are taken to the jury room to begin your deliberations, you should first select a foreperson. The foreperson should see to it that jury discussion goes forward in a sensible and orderly fashion and that each juror has the opportunity to discuss the issues fully and fairly. The attitude and conduct of jurors at the beginning of their deliberations is very important. At that time it is usually not helpful for any juror to make a strong expression of opinion or to stand for a certain verdict. Such a juror may be unwilling to change an opinion even if it is later thought to be incorrect.

The jurors have a duty to consult with one another and to deliberate for the purpose of reaching an agreement, if it can be done without violence to individual judgment. This means that you may fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom about this case together with the law which relates to this case as contained in the instructions.

In the course of deliberation, a juror has a right to re-examine prior held views and opinions if the juror is convinced to do so by fair and honest discussion by any member or members of the jury, based upon the evidence the jury saw and heard in the trial and the law as given you in these instructions.

However, no juror should surrender an honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the Defendant because the majority of the jury feels otherwise, or for the purpose of returning a unanimous verdict or to prevent a mistrial. Your foreperson must sign any verdict upon which you agree.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-106 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Jury Deliberation, No. 1-106, 2009, Source and Comment]

COMMENT: Cite as MCJI 1-106. This instruction is to be given as part of the judge's original charge and as a reasonable substitute for the "Allen Charge." *Allen v. United States*, 164 U.S. 492 (1896). *See also*, *State v. Bell*, 225 Mont. 83, 731 P.2d 336 (1987), and *State v. Cline*, 170 Mont. 520, 555 P.2d 724 (1976). If a continuous course of conduct is being alleged, use Instruction No. 1-106(a).

INSTRUCTION NO. [1-106(a)]

[Continuous Conduct]

The Defendant is charged with the offense of _____. The Defendant may be found guilty if the proof shows beyond a reasonable doubt the Defendant committed any one or more of such acts, but in order to find the Defendant guilty, all the jurors must agree that the Defendant committed the same act or acts. It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict.

[Or the following format may be used].

Defendant is charged in Count _____ of the information with the crime of _____, a violation, on or about a period of time between _____ and _____. In order to find the Defendant guilty, it is necessary for the prosecution to prove beyond a reasonable doubt the commission of a specific act [or acts] constituting the crime within the period alleged. Also, in order to find the Defendant guilty, you must unanimously agree upon the commission of the same specific act [or acts] constituting the crime within the period alleged. It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-106(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Continuous Conduct, No. 1-106(a), 2009) Source and Comment]

SOURCE: *State v. Weaver*, 290 Mont. 58, 964 P.2d 713 (1998).

COMMENT: If the Defendant is charged with a specific conduct over a period of time it is necessary to give an additional instruction that requires the jury to unanimously find that the Defendant committed the alleged act or acts during the specific time frame. Examples of the format suggested by the Supreme Court in *Weaver* appear above.

INSTRUCTION NO. [1-107]

[Voluntary Act]

A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes and which is physically capable of being performed.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-107 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Voluntary Act, No. 1-107, 2009, Source and Comments]

SOURCE: MCA § 45-2-202 (2007)

COMMENT: In 1987 the legislature revised MCA § 45-2-202 as it applies to felony murder and possession offenses. To reflect the changes, add the following to the general rule stated above: “In this case the State is only required to prove the Defendant acted voluntarily as to the offense of _____.”

In cases involving possession, the following definition, which varies from that in MCA § 45-2-101, should be used: “Possession is a voluntary act if the Defendant knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient time to have been able to terminate his control.

INSTRUCTION NO. [1-108]

[Alternative Charges]

The Defendant is charged in Count ____ with the crime of _____ and in Count ____ with the crime of _____. These charges are made in the alternative and in effect allege that the Defendant committed an unlawful act which constitutes either the crime of _____ or the crime of _____. If you find that the Defendant committed an act or acts constituting one of the crimes so charged, you then must determine which of the offenses so charged was thereby committed.

In order to find the Defendant guilty you must all agree as to the particular offense committed. If you find the Defendant guilty of one of the alternative offenses, you cannot find him guilty of the other.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-108 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Alternative Charges, No. 1-108, 2009, Source and Comment]

SOURCE: CALJIC 17.03.

COMMENT: Cite as MCJI 1-108.

INSTRUCTION NO. [1-109]

[Separate Offenses]

Each count charges a distinct offense. You must decide each count separately. The Defendant may be found guilty or not guilty of **[any or all] [either or both]** of the offenses charged. Your finding as to each count must be stated in a separate verdict.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-109 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Separate Offenses, No. 1-109, 2009, Source and Comment]

SOURCE: CALJIC 17.02.

COMMENT: If the trial includes both alternative charges and separate offenses, Instructions 1-108 and 1-109 must be modified accordingly to avoid jury confusion.

INSTRUCTION NO. [1-110]

In this case, you must decide separately whether each of the [two] [several] Defendants is guilty or not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-110 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Co-Defendants, No. 1-110, 2009, Source]

SOURCE: CALJIC 17.00.

INSTRUCTION NO. [1-111]

[Lesser Included Offenses]

The Defendant is charged with_____.
_____ is a lesser-included offense of
_____. A lesser-included offense is one that is less serious than
the charged offense. The Defendant cannot be convicted of more than one of these
offenses.

Therefore, after considering all of the evidence as it pertains to the charge, and the
lesser included offense, you should first consider the verdict on the greater offense of
_____. In the event you find the Defendant guilty
of_____, you need go no further as you will have reached a
verdict in this case.

If you are unable after reasonable effort to reach a verdict on the greater offense,
you may consider the lesser included offense of_____. You
may find the Defendant guilty or not guilty of the lesser included offense
of_____.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-111 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Lesser Included Offenses, No. 1-111, 2009, Source and Comments]

SOURCE: MCA §§ 46-16-606 and 46-16-607 (2007); *State v. Robbins*, 292 Mont. 23, 971 P. 2d 359 (1998), overruled in part on other grounds in *State v. LaMere*, 298 Mont. 358, 2 P.3d 204 (2000).

COMMENT: This instruction is modified from that found in the 1999 edition of the MCJI since the Commission included a separate instruction, 1-111(a), for multiple lesser included instruction situations.

INSTRUCTION NO. [1-111(a)]

[Multiple Lesser Included Offenses]

The Defendant is charged with_____.
_____ and _____ are lesser included offenses of _____. A lesser-included offense is one that is less serious than the charged offense. The Defendant cannot be convicted of more than one of these offenses.

Therefore, after considering all of the evidence as it pertains to the charge, and the lesser included offenses, you should first consider the verdict on the greater offense of _____. If you are unable after reasonable effort to reach a verdict on the greater offense, you may consider the lesser offenses of _____ and _____.

In the event you find the Defendant guilty of [*charged offense*], you need go no further as you will have reached a verdict in this case and shall contact the bailiff to return you to open court.

In the event you find the Defendant guilty of the lesser included offense of _____, you need go no further as you have reached a verdict in this case and shall contact the bailiff to return you to open court.

In the event you find the Defendant guilty of the lesser included offense of _____, you need go no further as you have reached a verdict in this case and shall contact the bailiff to return you to open court.

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 1- 111(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Multiple Lesser Included Offenses, No. 1-111(a), 2009, Source and Comments]

SOURCE: MCJI 1-111

COMMENT: This is a modified version of MCJI 1-111. It is based on a situation in which there are multiple lesser included offenses. This instruction should be given in conjunction with the multiple lesser included verdict form, and instructs the jury to find the Defendant guilty of **only one** of the potential offenses. This is consistent with the Montana Supreme Court holding in *State v. Scarborough*, 302 Mont. 350, 14 P.3d 1202 (2000).

INSTRUCTION NO. [1-112]

[Witness Legally Accountable]

Testimony has been presented that the witness _____ may be legally accountable for the offense charged in this case. In this respect, you are to be guided by the following rules of law:

1. A person is legally accountable for the conduct of another when:
[Insert the applicable subsection of MCA 45-2-302]
2. It is a question of fact for the jury to determine from the evidence and from the law as given you by me whether or not in this particular case the witness _____ is or is not legally accountable within the meaning of the law.
3. The testimony of one legally accountable ought to be viewed with distrust.
4. A conviction cannot be had on the testimony of one legally accountable unless the testimony is corroborated by other evidence that in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-112 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Witness Legally Accountable, No. 1-112, 2009, Source and Comment]

SOURCE: MCA §§ 45-2-302 and 46-16-213 (2007)

COMMENT: In *State v. Rose*, 292 Mont. 350, 972 P.2d 321 (1998), the Court found ineffective assistance of Counsel, because of a failure to request an instruction on the testimony of an accomplice. The Commission suggests that a record be made of the reasons for not giving this instruction if the evidence warrants it.

INSTRUCTION NO. [1-113]

[Expert Witness]

A witness who by education and experience has become expert in any art, science, profession or calling may be permitted to state an opinion as to a matter in which the witness is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-113 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____

[Expert Witness, No. 1-113, 2009, Comment]

COMMENT: Cite as MCJI 1-113.

INSTRUCTION NO. [1-114]

[Child as Witness]

A child is not disqualified as a witness simply by reason of age. There is no precise age which determines a child's competency. Instead, competency depends upon the child's capacity and intelligence, understanding of the difference between truth and falsehood, and appreciation of his/her duty to tell the truth.

As with other witnesses, you are the sole judge of the credibility of a child who testifies. You may consider not only the child's age but the demeanor on the stand, capacity to observe facts and to recollect them, ability to understand questions put to the child and the ability to answer them intelligently, whether the child impresses you as having an accurate memory and recollection, whether the child impresses you as a truth-telling individual, and any other facts and circumstances which impress you as significant in determining the child's credibility. On the basis of your consideration you may give the child's testimony such weight as you in your judgment think it is entitled.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-114 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Child as Witness, No. 1-114, 2009, Source and Comments]

SOURCE: E. Devitt, C. Blackmar, M. Wolff & K.O'Malley, *Federal Practice & Instruction* 15.13 (4th ed. 1992).

COMMENT: This instruction addresses two issues: a child witness's competency, and his/her credibility. With regard to the first issue, there is no age requirement before a person is considered competent to testify. The District Court has no obligation to question a child concerning his or her competency unless counsel raised the issue of competency or the court had some concerns in that regard. If the Court finds it necessary to inquire into a child witness's competency, the Court should do so before the child testifies, and outside the presence of the jury. *State v. Kelly*, 265 Mont. 298, 876 P.2d 641 (1994).

Generally, an expert witness may not comment on the credibility of an alleged victim. However, an expert witness may testify on the credibility of a child in a sexual abuse prosecution, if the child victim testifies, the credibility of the child is attacked, and the expert is properly qualified. See: *State v. Riggs*, 327 Mont. 196, 113 P.3d 281(2005) and *State v. Scheffelman*, 250 Mont. 334, 820 P.2d 1293 (1991).

INSTRUCTION NO. [1-115]

[Evidence – Deposition]

During the trial of this case, some testimony has been read to you from depositions. That testimony was taken before this trial from witnesses who were sworn in the same manner as witnesses who testified in Court. Insofar as possible, deposition testimony is entitled to the same consideration, and is to be judged by you as to credibility, weighed, and otherwise considered in the same way as if the witness had been present, and had testified from the witness stand.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-115 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Evidence – Depositions, No. 1-115, 2009, Comment]

COMMENT: Cite as MCJI 1-115

INSTRUCTION NO. [1-116]

[Evidence – Videotaped Deposition]

During the trial of this case, some testimony will be presented to you by a videotaped deposition. The testimony was taken before this trial from a witness who was sworn in the same manner as witnesses who testified in Court. Deposition testimony is entitled to the same consideration, and is to be judged by you as to credibility, weighed, and otherwise considered in the same way as if the witness had been present, and had testified from the witness stand.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-116 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Evidence- Videotaped Deposition, No. 1-116, 2009, Comment]

COMMENT: Cite as MCJI 1-116

INSTRUCTION NO. [1-116(a)]

[Evidence – Videotaped Deposition Presented]

During the trial of this case, some testimony was presented to you by a videotaped deposition. The testimony was taken before this trial from a witness who was sworn in the same manner as witnesses who testified in Court. Deposition testimony is entitled to the same consideration, and is to be judged by you as to credibility, weighed, and otherwise considered in the same way as if the witness had been present, and had testified from the witness stand.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-116(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Evidence – Videotaped Deposition Presented, No. 1-116(a), 2009, Comment]

COMMENT: Cite as MCJI 1-016(a).

INSTRUCTION NO. [1-117]

[Evidence: Direct and Circumstantial]

There are two kinds of evidence: direct and circumstantial.

Direct evidence is when a witness testifies directly of his/her knowledge of the main fact or facts to be proven.

Circumstantial evidence is proof from which the Jury may infer other and connective facts which follow according to common experience.

Both direct evidence and circumstantial evidence are acceptable as means of proof. Neither is entitled to greater weight than the other.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-117 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Evidence: Direct and Circumstantial, No. 1-117, 2009, Comment]

COMMENT: Cite as MCJI 1-117

INSTRUCTION NO. [1-117(a)]

[Evidence: Solely Circumstantial]

When circumstantial evidence is susceptible to two interpretations, one that supports guilt and the other that supports innocence, the jury determines which is most reasonable.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-117(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Evidence: Solely Circumstantial, No. 1-117(a), 2009, Source and Comments]

SOURCE: *State v. Hill*, 328 Mont. 253, 119 P.3d 1210 (2005).

COMMENT: In *State v. Bowman*, 321 Mont. 176, 89 P.3d 986 (2004), the Supreme Court overruled its earlier holding in *State v. Ryan*, 229 Mont. 7, 744 P.2d 1242 (1987), upon which the 1999 MCJI version of this instruction was based. Thus, the Court held that the 1999 version of MCJI 1-117(a) was not a correct statement of the law, and cautioned “practitioners” not to use it. In keeping with the *Bowman* case, the Commission has removed from the instruction, the language “the facts and circumstances must not only be entirely consistent with the theory of guilty, but must be inconsistent with any other rational theory or conclusion.”

INSTRUCTION NO. [1-117(b)]

[Circumstantial – Inference of Mental State]

You are instructed that circumstantial evidence may be used to determine the existence of a particular mental state. You may infer mental state from what the Defendant does and says and from all the facts and circumstances involved.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-117(b) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Circumstantial – Inference of Mental State, No. 1-117(b), 2009, Source and Comments]

SOURCE: *State v. Pierce*, 199 Mont. 57, 647 P.2d 847 (1982), overruled in part on other grounds in *State v. Tadewaldt*, 277 Mont. 261, 922 P.2d 463 (1996).

COMMENT: This instruction may be considered in lieu of the inference instruction in lieu of the inference instruction in Chapter Two, MCJI 2-108.

INSTRUCTION NO. [1-118]

[Evidence - Weight]

In deciding the believability and weight to be given the testimony of a witness, you may consider evidence of any other statement or statements made by the witness which is inconsistent with the witness's testimony at this trial.

This evidence may be considered by you for the purposes of testing the believability and weight of the witness's testimony or to establish the truth of these statements as the jury shall determine.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-118 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Evidence - Weight, No. 1-118, 2009, Source and Comments]

SOURCE: Rule 801 (d), Montana Rules of Evidence.

COMMENT: This instruction should only be given in cases where there is evidence that a witness has made inconsistent statements. Note that in *State v. White Water*, 194 Mont. 85, 634 P.2d 636 (1981), the Montana Supreme Court held that convictions cannot rest solely on inconsistent statements. See also *State v. Giant*, 307 Mont. 74, 37 P.3d 49 (2001), overruled in part on other grounds in *State v. Swann* 307 Mont. 74, 37 P.3d 49 (2001).

INSTRUCTION NO. [1-119]

[Admissions or Confessions]

A statement made by a Defendant other than at this trial may be an admission or a confession.

A confession, as applied in criminal law, is a statement by a person made after the offense was committed that he/she committed or participated in the commission of a crime. An admission is a statement made by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his/her guilt. A conviction cannot be based on an admission or confession alone.

The circumstances under which the statement was made may be considered in determining its credibility or weight. You are the exclusive judges as to whether an admission or a confession was made by the Defendant, and if so, whether such statement is true in whole or in part. If you should find that any such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true.

Evidence of an unrecorded oral admission or oral confession of the Defendant should be viewed with caution.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-119 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Admissions or Confessions, No. 1-119, 2009, Source and Comments]

SOURCE: MCA § 46-13-301 (2007).

COMMENT: In *State v. Grey*, 274 Mont. 206, 907 P.2d 951 (1995), the Court noted that the failure of an officer to preserve some tangible record of the giving of the Miranda warnings, and knowing, intelligent waiver by the detainee will be viewed with distrust. See also MCA §§ 46-13-301 and 46-16-215 relating to the admissibility of a confession.

INSTRUCTION NO. [1-120]

[Evidence of Other Acts]

The State [**will now offer**] [**has offered**] evidence that the Defendant at another time engaged in [**other crimes**] [**wrongs**] or [**acts**]. That evidence was not admitted to prove the character of the Defendant or to show he acted in conformity therewith. The only purpose of admitting that evidence was to show [**proof of motive**] [**opportunity**] [**plan**] [**knowledge**] [**identity**] [**absence of mistake or accident**]. You may not use that evidence for any other purpose.

The Defendant is not being tried for that other [**crime**] [**wrong**] or [**act**]. He may not be convicted for any other offense than that charged in this case. For the jury to convict the Defendant of any other offense than that charged in this case may result in unjust double punishment of the Defendant.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-120 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Evidence of Other Acts, No. 1-120, 2009, Source and Comments]

SOURCE: Rule 404(b), Montana Rules of Evidence.

COMMENT: The above instruction must be given twice. **First** before the evidence of other acts is presented and **second**, as part of the general charge to the jury. Current case law should be carefully considered before attempting to introduce this type of evidence, beginning with the seminal cases of *State v Just*, 184 Mont. 262, 602 P.2d 957 (1979), and *State v. Matt*, 249 Mont. 136, 814 P.2d 52 (1991).

INSTRUCTION NO. [1-121]

[Cautionary Instruction for Potentially Hung Jury]

The judicial process assigns tasks to the various units. It is the task of the witnesses to testify truthfully as they recall the facts. It is the task of the lawyers to prepare the case for final submission to the trier of the facts, the jury. It is the task of the Judge to preside, instruct you as to the law and to rule on the admissibility of the evidence. It is the task of the jury to decide the case. The ultimate responsibility of the jury is to render a verdict in this cause. You are not partisan nor are you advocates in this matter but you are the judges; you are the judges of the facts; it is you and you alone that can render a verdict in this cause. There is no reason to believe that any other 12 men and women would possess any more ability, intelligence and courage to do the ultimate task assigned to a jury under the American system of justice.

The final test of the quality of your service will be in the verdict which you return to this Court. It is only by rendering a verdict in this cause that you can make a definite contribution to efficient judicial administration as you arrive at a just and possible verdict. We have never asked, as a matter of fact we have instructed you, that you should not surrender your honest convictions in this matter for the mere purpose of returning a verdict or solely because of the opinion of other jurors, but this does not mean that you should avoid a task assigned to you of rendering a verdict in this cause.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-121 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Cautionary Instruction for Potentially Hung Jury, No. 1-121, 2009, Source and Comment]

SOURCE: *State v. Cline*, 170 Mont. 520, 555 P.2d 724 (1976); *State v. Bell*, 225 Mont. 83, 731 P.2d 336 (1987).

COMMENT: This instruction is virtually the identical language the Montana Supreme Court approved in *State v. Cline*, which is still the recognized version of the so-called “dynamite” instruction. In *Cline*, the Court noted that the “Allen” instruction, articulated by the United States Supreme Court in *Allen v. United States*, 164 U.S. 492, tends to be more coercive to a dissenting juror than that set forth in *Cline*.

INSTRUCTION NO. [1-122]

[Constitutional Right of Defendant Not to Testify]

In deciding whether or not to testify, the Defendant may choose to rely on the state of the evidence and upon the failure, if any, of the State to prove beyond a reasonable doubt every essential element of the charge against him.

A Defendant in a criminal trial has a constitutional right not to testify. You must not draw any inference from the fact that a Defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-122 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Constitutional Right of Defendant Not to Testify, No. 1-122, 2009, Source and Comment]

SOURCE: Fifth Amendment, United States Constitution; Article II § 25, Montana Constitution.

COMMENT: This instruction should be given at the option of the Defendant

INSTRUCTION NO. [1-123]

[Enhancement]

The State has alleged that in committing the offense[s] of _____, the Defendant acted **[with] [by] [here insert appropriate enhancement language]**. Whether the Defendant **[insert enhancement language]** in the commission of the offense[s] for which the Defendant is being tried, must be proved by the State by proof beyond a reasonable doubt. This is a separate finding by you, independent of the issue of whether the Defendant is guilty of the offense[s] of _____. Nevertheless, you cannot find the Defendant acted **[with] [by] [insert appropriate enhancement language]** unless you first determine beyond a reasonable doubt that the Defendant committed the offense[s] of _____.

Your finding with respect to [appropriate enhancement language] must be separately stated on the verdict form.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 1-123 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Enhancement, No. 1-123, 2009, Source and Comment]

SOURCE: MCA § 46-1-401 (2007).

COMMENT: MCA § 46-1-401 was enacted by the Montana Legislature in 2003 to address the mandate of the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).