

PsychRights[®]
Law Project for
Psychiatric Rights, Inc.

February 28, 2005

Chief Justice Karla M. Gray
Montana Supreme Court
Room 323, Justice Building
PO Box 203003
Helena, MT 59620-3003

Re: Query re: Unauthorized Practice of Law

Dear Chief Justice Gray:

Background & Summary

I am an attorney licensed to practice law in Alaska and the Ninth U.S. Circuit Court of Appeals since 1978 and before the United States Supreme Court since 1994. I am writing to you about both an issue your Court has indicated is of importance in the administration of justice in the Montana courts and an issue of potentially substantial and serious negative personal impact on me. These issues are the level of representation afforded respondents in involuntary commitment and forced medication proceedings in Montana and to what extent may I advocate for such persons without running afoul of the prohibition against the unauthorized practice of law. These issues arise because a state attorney, Ms. Paulette Kohman, recently wrote me a letter contending I had engaged in the unlawful practice of law in Montana¹ by "advocating" with hospital staff for a psychiatric inmate.² This is important to me professionally because if I were to be found to have engaged in the unauthorized practice of law in Montana it jeopardizes my license to practice law in Alaska. I have looked at the Rules of the [Montana] Commission on Unauthorized Practice of Law and they do not seem to be invoked other than through a complaint and I do not wish for things to get that far. I have also looked at the Operating Rules of the Ethics Committee of the Montana Bar Association and only members in good standing of the State Bar of Montana may ask ethics questions. Therefore, I am writing you.

By way of background, about two years ago I put my private law practice substantially on hold and formed the Law Project for Psychiatric Rights (PsychRights). PsychRights' mission is to bring fairness and reason into the administration of legal aspects of the mental health system, particularly unwarranted court ordered psychiatric drugging. Since then I have devoted the bulk of my time to this effort on an unpaid basis because, frankly, I am outraged by the way people's rights are pervasively violated in this area of the law, resulting in great harm.

Representation of Psychiatric Respondents

In *In re Mental Health of K.G.F.*, 2001 MT 140, 306 Mont. 1, 29 P.3d 485, your Court addressed this issue, saying:

¹ Her letter is enclosed as Exhibit 1 and my response as Exhibit 2.

² The American Heritage Dictionary, Fourth Edition, defines inmate as follows: "A resident of a dwelling that houses a number of occupants, especially a person confined to an institution, such as a prison or hospital." (emphasis added)

"reasonable professional assistance" cannot be presumed in a proceeding that routinely accepts--and even requires--an unreasonably low standard of legal assistance and generally disdains zealous, adversarial confrontation

* * *

--our legal system of judges, lawyers, and clinicians has seemingly lost its way in vigilantly protecting the fundamental rights of such individuals.

(paragraphs 35 & 42, respectively).

In fact, as noted mental health disability scholar, Michael Perlin, whom your Court cited in *K.G.F.*, has observed, this problem is endemic throughout the country:

Traditionally, lawyers assigned to represent state hospital patients have failed miserably in their mission.³

This, in my view, totally unacceptable situation with respect to the representation of people facing involuntary commitment and forced drugging both propels my efforts and is the context within which I work. In trying to improve this situation around the country, I have to be cognizant of the issues surrounding the unauthorized practice of law and stay on the right side of the line, but at the same time, efforts that do not constitute the unauthorized practice of law should not be discouraged.⁴ The mental disability law system erects barriers to the vindication of people's rights and an improper charge of the unauthorized practice of law can be an element of this. That is clearly the case here with Ms. Kohman's letter, which is an attempt to improperly chill advocacy efforts on behalf of psychiatric inmates.

Definition of the Practice of Law in Montana

Ms. Kohman asserts that "direct advocacy" (to the hospital) "constitutes the practice of law in Montana as it is defined in §37-61-201, MCA." This appears clearly incorrect, but there are some other issues which perhaps present closer questions.

§37-61-201, MCA, provides:

Any person who shall hold himself out or advertise as an attorney or counselor at law or who shall appear in any court of record or before a judicial body, referee, commissioner, or other officer appointed to determine any question of law or fact by a court or who shall engage in the business and duties and perform such acts, matters, and things as are usually done or performed by an attorney at law in the practice of his profession for the purposes of parts 1 through 3 of this chapter shall be deemed practicing law.

In *Pulse v. North American Land Title Company of Montana*, 218 Mont. 275, 281-2, 707 P.2d 1105, 1109 (Montana 1985), your Court held:

³ *Competency, Deinstitutionalization, And Homelessness: A Story Of Marginalization*, 28 Hous. L. Rev. 63, 126 (1991).

⁴ I reviewed MCA 37-61-201, as well as your Court's decisional law, regarding what constitutes the practice of law before making any non-trivial efforts on behalf of the psychiatric inmate in question.

What constitutes the practice of law is not easily defined. In *Cowern v. Nelson* (1940), 207 Minn. 642, 290 N.W. 795, 797, the Minnesota Court stated:

The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyer's field.

Your Court then went on to hold that filling in the blanks on pre-printed real estate forms such as deeds, mortgages and notes was not the practice of law where there is no charge for such service.⁵

Under the express language of §37-61-201, MCA, unless one holds oneself out as an attorney in Montana or appears before a court or other tribunal in Montana on behalf of someone else, someone is not practicing law in Montana if no charge for the services is made. This is because the statute requires someone to "engage in the business," which necessarily implies charging. Certainly, *Pulse*, which does not cite §37-61-201, MCA,⁶ does not go this far, but it seems to me a literal interpretation of the statute results in this interpretation. *Pulse* does clearly hold that not charging converted an activity that would have been the unauthorized practice of law if there had been a charge to an activity that is not the unauthorized practice of law.

Montana Board of Governors Refuses to Discharge Its Legal Duty to Its Clients

In *K.G.F.* your Court set down the minimum standards for the adequate representation of people facing involuntary commitment, noting that "our legal system of judges, lawyers, and clinicians has seemingly lost its way in vigilantly protecting the fundamental rights of such individuals." Your Court's instructions on this have clearly been defied as illustrated by the events transpiring around the psychiatric inmate in question.

First, and probably most importantly from a systemic point of view, Gene Haire, the Executive Director of the Montana Mental Disabilities Board of Visitors (Board of Visitors), which is responsible for the representation of all inmates at Montana State Hospital has clearly indicated he does not consider it his agency's job to vigorously represent his agency's clients under the standards laid down by your Court in *K.G.F.* This admission was flushed out as he was dealing with a number of contacts from around the country responding to complaints from inmates at Montana State Hospital that their rights were being violated through improper involuntary commitment and forced psychiatric drugging. These contacts were made as a result

⁵ 218 Mont at 282, 707 P.2d at 1109-10.

⁶ Article VII, Section 2(3), provides that your Court may "make rules governing . . . admission to the bar and the conduct of its members," and Rule One (b) of the Rules of the Commission on the Unauthorized Practice of Law cites to Article VII, Section 2 for the authority of your Court to regulate the unauthorized practice of law. Rule 2(h) defines the unauthorized practice of law as follows: "'Unauthorized Practice of Law' means the practice of law without being first duly qualified, as prohibited by statute, court rule, or case law of the State." Thus, it is totally unclear (1) whether §37-61-201, MCA even defines the practice of law in Montana, and whether it does or not, (2) what is prohibited.

of an alert sent out by MindFreedom/Support Coalition International (MindFreedom), which is a grassroots human rights non-profit uniting over 100 sponsor groups in 15 countries, including PsychRights, working for human rights and alternatives in mental health, including accreditation by the United Nations.⁷ MindFreedom was ultimately contacted by eight inmates at Montana State Hospital and as a member, I e-mailed Mr. Haire about people's rights and the apparent failure of the attorneys representing them to do so properly. This e-mail included a rather detailed discussion of counsel's obligation under *K.G.F.*, but did not address any particular person's situation⁸

In response to one of the contacts, and after my e-mail to him, Mr. Haire stated that the (Board of Visitors) "has been a leader for 30 years in rational advocacy for people with mental illnesses in Montana" and recommended that the writer look at the psychlaws.org website for "a more rational perspective" on forced drugging.⁹ Psychlaws.org is the website of the Treatment Advocacy Center (TAC),¹⁰ which is probably the biggest advocate for involuntary commitment and forced drugging in the country. One of their complaints is that people's civil rights get in the way of the "treatment" TAC believes they should be forced to undergo.¹¹ Of course, the TAC is entitled to its opinion and advocate for it, but it is totally improper for the Montana Board of Visitors to engage in what Mr. Haire describes as "rational advocacy," meaning working for the other side, instead of the vigorous representation required by your Court in *K.G.F.*

Specific Activities

A few days later, after one of the inmates at Montana State Hospital called me¹² and asked me to help her, I began advocating for her to Mr. Amberg and her Board of Visitors attorney. I also spoke briefly with her treating psychiatrist.¹³ At no time did I attempt to represent the inmate before any court and the allegation that I engaged in the unauthorized practice of law is based solely on the contention that advocacy for the inmate with hospital staff

⁷ Attached as Exhibits 3, 4 & 5 are copies of e-mails between Mr. David Oaks and Ed Amberg, the Administrator of Montana State Hospital and Mr. Haire. Frankly, I don't have any particular problem with the way Mr. Amberg has conducted himself. My view is he has been completely professional and reasonable in light of his role in the system. My complaint is with the agency and people who are supposed to represent the inmates at Montana State Hospital in involuntary commitment and forced drugging proceedings.

⁸ See, Exhibit 6.

⁹ See, Exhibit 7.

¹⁰ The TAC was founded and is still run by psychiatrist E. Fuller Torrey who is cited in my e-mail to Mr. Haire for his advocating that psychiatrists commit perjury so their patients will be court ordered to undergo "treatment" the psychiatrist thinks the person should have under circumstances that do not meet the legal criteria for obtaining such orders.

¹¹ For example, the TAC's Fact Sheet on its website includes the (untrue) statement, " Civil rights advocates have changed state laws and practices to such an extent that it is now virtually impossible to treat such individuals unless they first commit a violent act."

<http://www.psychlaws.org/GeneralResources/fact8.htm>, accessed February 15, 2005. Another example is an article posted on their website, "Involuntary Hospitalization in the Modern Era:

Is "Dangerousness" Ambiguous or Obsolete?" <http://psychlaws.org/GeneralResources/article219.htm>, accessed on February 15, 2005.

¹² This is not the person identified in Mr. Oaks' e-mail.

¹³ This is no doubt one of the concerns of Ms. Kohman because I caught the psychiatrist being untruthful.

consists of the practice of law. This seems clearly untenable. As I stated in my response to Ms. Kohman, the other people who advocated on behalf of inmates at Montana State Hospital were not engaged in the practice of law and neither was I. As your Court noted in *Pulse* there are many things that lay people do that attorneys also do and advocating for inmates in psychiatric hospitals by non-lawyers happens all the time. It doesn't seem there is any question but that Ms. Kohman is wrong that advocating for inmates with staff is the practice of law. If I am incorrect on this, however, it would be extremely helpful to know this. There are types of activities that perhaps present closer calls.

1. Discussing my view of a psychiatric respondent's rights with him or her.
2. Assisting a psychiatric respondent to prepare a presentation to the court to exercise his or her right to obtain alternate counsel under the *K.G.F.* case.
3. Helping a psychiatric respondent prepare an ethics complaint against an attorney.

I think it is important to consider that these issues arise because your Court's directives regarding representation of psychiatric respondents are not being followed. With respect to all of the specific activities addressed, no charge would be made.

Discussing My View Of A Psychiatric Respondent's Rights With Him Or Her. It is absolutely clear that psychiatric respondents are not being advised of many of their rights. For example, under §53-21-125, MCA, psychiatric respondents are entitled to a jury trial.¹⁴ It is my impression that jury trials are virtually never requested, if ever, yet psychiatric respondents lose the vast majority of the time in judge tried cases. As a matter of simple strategy, if an attorney, or for that matter, the respondent, believes it is likely the judge in a judge tried case will rule against the respondent, a jury trial should probably be requested. Certainly, the psychiatric respondent should be advised of his or her right to a jury trial. Would it be the unauthorized practice of law for me to inform a psychiatric respondent that he or she has a right to a jury trial? Would it be the unauthorized practice of law to simply read the statute that provides that right? Similarly, would it be the unauthorized practice of law to inform a psychiatric respondent that he or she has the right to ask that I, or someone else of his or her choosing, be appointed his or her "Friend of the Respondent" under §53-21-122(2), MCA?¹⁵ It is clear under the current representation regime, neither of these things would be told to a psychiatric respondent.¹⁶

Assisting A Psychiatric Respondent To Prepare A Presentation To The Court To Exercise His Or Her Right To Obtain Alternate Counsel Under The *K.G.F.* Case. In the *K.G.F.* case, your Court clearly ruled that a psychiatric respondent may, "for good cause shown and based on compelling reasons request the appointment of different counsel."¹⁷ This right, granted by your Court, is completely illusory if the psychiatric respondent has no means of

¹⁴ This right does not apply to extensions of commitments under §53-21-128(1)(c), which is the situation most Montana State Hospital inmates find themselves in.

¹⁵ See §53-21-102(8), MCA, for the definition of "Friend of Respondent."

¹⁶ I am informed that the Board of Visitors' paralegal is uniformly appointed the Friend of the Respondent for Montana State Hospital inmates.

¹⁷ *K.G.F. at ¶ 72.* In that same paragraph, the district court is required to "provide the patient-respondent with clear and concise information describing the attorney's name and qualifications in order for the patient to then make an informed decision as to whether to accept appointed counsel," yet it is almost certain this does not happen.

exercising it. My initial goal when I first started attempting to help the inmate who called me was to try to arrange for local *pro bono* counsel. To that end, I joined MontanaProBono.Net and inquired about how to try and recruit a *pro bono* attorney through it, as well as contacted the Montana Bar Association about otherwise recruiting *pro bono* attorneys. At that time, I had not focused on the right of a psychiatric respondent under *K.G.F.* to "request the appointment of different counsel." Whether I could inform a psychiatric respondent of the right to make an informed choice of counsel falls under Question 1., but the question here is whether, when it appears there is good cause for the appointment of alternate counsel, is assisting a psychiatric respondent to make such a showing the unauthorized practice of law? In my view, this right to alternate counsel is a hugely important component in turning around the system's defiance of your Court's directive to provide psychiatric respondents with vigorous representation. However, unless there is a mechanism for psychiatric respondents to exercise their rights in this regard, they are meaningless.¹⁸

Helping A Psychiatric Respondent Prepare An Ethics Complaint Against An Attorney. It is apparent that despite your Court's directives in *K.G.F.*, psychiatric respondents' rights to adequate counsel are being systematically violated. A theoretical approach is, of course, to appeal on this basis, but this too is illusory because there are no lawyers to take the appeals in the vast majority of the cases. However, it seems clear the attorneys who are failing to adequately represent psychiatric respondents are violating their ethical responsibilities. A very practical way to deal with the situation is for psychiatric respondents to lodge ethics complaints against their attorney for violating their ethical requirements as attorneys. Is assisting them to do so the unauthorized practice of law?

My view is that my engaging in any of these activities does not constitute the unauthorized practice of law under the express language of §37-61-201, MCA, because I am not engaged in the "business of" doing so. It is also my view your Court should view these activities positively. First and foremost, something needs to be done so that psychiatric respondents have a chance to receive at least some of the rights guaranteed by your Court, the Montana and United States constitutions, and Montana Statutes. The current system systematically denies these rights in blatant defiance of your Court's decisions. Ms. Kohman's letter is nothing short of a blatant attempt to preserve the ability to continue this defiance and chill efforts to vindicate rights of Montana State Hospital inmates. The main problem which the rules against the unauthorized practice of law are designed to address, which really boils down to people being taken advantage of by non-lawyers and given poor advice/representation, is not implicated here. My preference by far, would be for the Montana bar to adequately represent psychiatric respondents, but in the face of the pervasive failure to do so, my limited efforts to help people assert their rights themselves should be viewed positively, not negatively.¹⁹ Since no charge is or will be made for any such efforts, there is no reason to think that any abuses will occur.

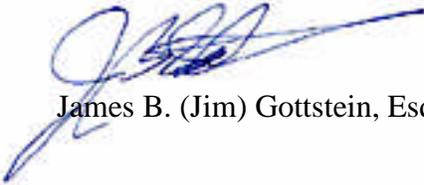
¹⁸ Ms. Kohman asserts that I should be required to move for admission *pro hac vice* to even advocate to staff on behalf of a psychiatric inmate. This seems ludicrous with respect to advocating to staff, but seems a more reasonable statement with regard to this question. However, the *pro hac vice* option is illusory because it is not feasible; local counsel must be obtained and there are no funds for that and the time frame for these proceedings is usually too short for this to be a viable option.

¹⁹ I have no problem with the *pro hac vice* process for actual representation in court, although it would rarely be feasible and for that reason relatively unlikely to be invoked.

Since I face severe sanctions should I be found to have engaged in the unauthorized practice of law in Montana, clarification would be very helpful.²⁰ It certainly seems unjust for me to be facing such severe sanctions when it is not possible to determine in advance whether the conduct is prohibited.

From my perspective, though, and in conclusion I would like to emphasize that far more important in my view is to find a way to ensure appropriate representation of Psychiatric Respondents in Montana as required in your Court's decisions. I am very willing to work on such an effort.²¹

Yours truly,

A handwritten signature in blue ink, appearing to read "J. B. Gottstein", with a long horizontal flourish extending to the right.

James B. (Jim) Gottstein, Esq.

cc: Paulette Coleman
David Oaks
Ed Amberg
Gene Haire
Stephen J. Van Goor

²⁰ It seems to me your Court has the inherent authority to provide such clarification under Article VII, Section 7 of the Montana Constitution.

²¹ One thing that is obvious is Mr. Haire should not be the Executive Director of the Montana Board of Visitors.