WHEN THE ATTORNEY-CLIENT PRIVILEGE COLLIDES WITH THE PUBLIC'S "RIGHT TO KNOW"

Presented by Harlan B. Krogh

May 11, 2018

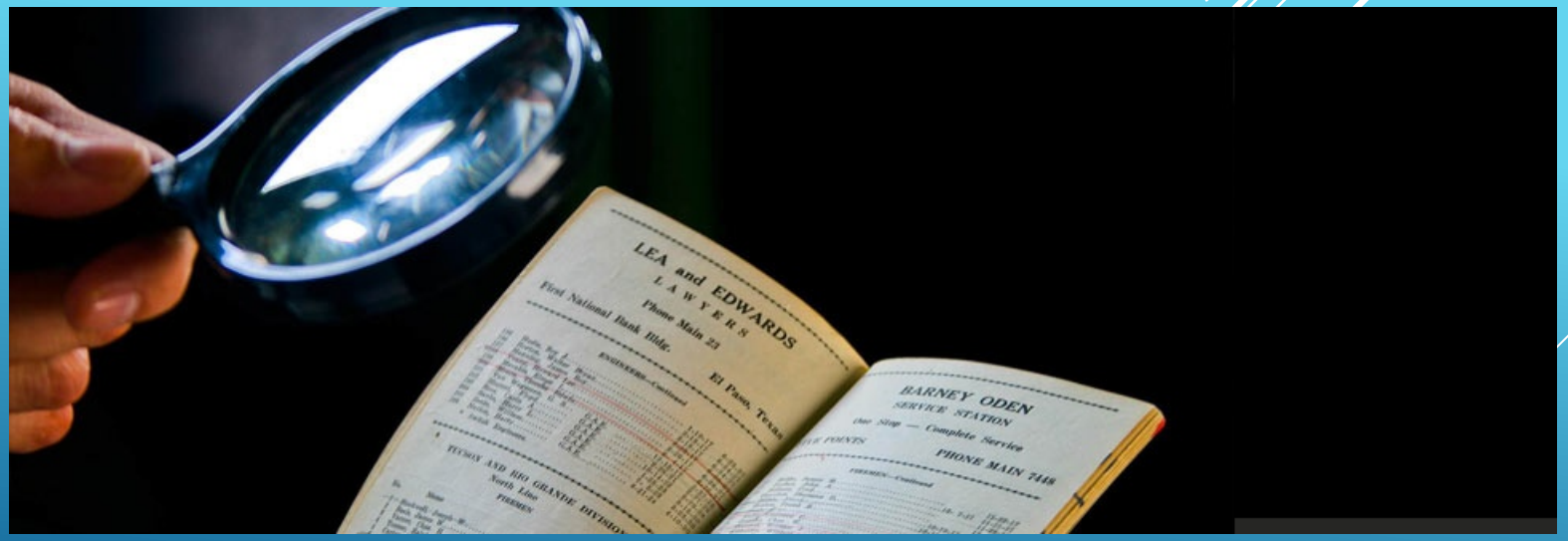
KEVIN NELSON V. MONTANA MUNICIPAL INTERLOCAL AUTHORITY OF HELENA, MONTANA

- Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DV 14-1306
- On Appeal with Montana Supreme Court, Cause No. DA 14-0806
- Unpublished, non-citable decision

- On September 12, 2014, Nelson filed a Petition for Release of Documents (Petition) against the MMIA, requesting the release of documents including but not limited to: electronic, email, faxes, meeting minutes, phone meeting notes, settlement and or mediation reports and recommendations directly or indirectly related to a settlement between the City of Bozeman and the MMIA regarding a lawsuit brought against the City of Bozeman by Delaney and Co., filed in Gallatin County (Cause No. DV 03-345).

- The Court found that Nelson had standing to request the documents. In so finding, the Court relied on Mont. Const. Art. II, § 9, "Right to know," which states:

> [n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

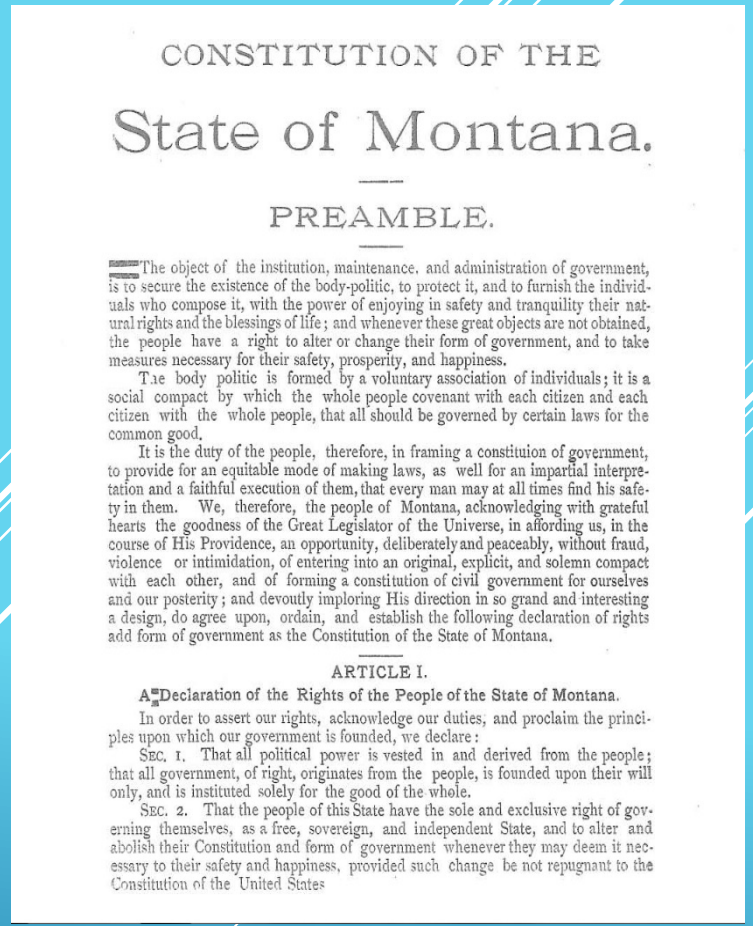


- The right to know "is not unfettered and the attorney-client privilege will prohibit the disclosure of certain documents, as such a document covered by the privilege would not be considered 'public' under the Montana Constitution or statutory provisions."
- Instead of ordering the MMIA to release privileged documents, the order required the MMIA to produce a privilege log describing each document and detailing the privilege to which each document was subject.

- In reviewing a claim under Article II, Section 9 of the Montana Constitution, we undertake a three-step process:

  > [f]irst, we consider whether the provision applies to the particular political subdivision against whom enforcement is sought. Second, we determine whether the documents in question are "documents of public bodies" subject to public inspection. Finally, if the first two requirements are satisfied, we decide whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure.

Becky v. Butte-Silver Bow Sch. Dist. No. 1, 274 Mont. 131, 136, 906 P.2d 193, 196 (1995).



CONSTITUTION OF THE

State of Montana.

PREAMBLE.

The object of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it, with the power of enjoying in safety and tranquility their natural rights and the blessings of life; and whenever these great objects are not obtained, the people have a right to alter or change their form of government, and to take measures necessary for their safety, prosperity, and happiness.

The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenant with each citizen and each citizen with the whole people, that all should be governed by certain laws for the common good.

It is the duty of the people, therefore, in framing a constituion of government, to provide for an equitable mode of making laws, as well for an impartial interpretation and a faithful execution of them, that every man may at all times find his safety in them. We, therefore, the people of Montana, acknowledging with grateful hearts the goodness of the Great Legislator of the Universe, in affording us, in the course of His Providence, an opportunity, deliberately and peaceably, without fraud, violence or intimidation, of entering into an original, explicit, and solemn compact with each other, and of forming a constitution of civil government for ourselves and our posterity; and devoutly imploring His direction in so grand and interesting a design, do agree upon, ordain, and establish the following declaration of rights add form of government as the Constitution of the State of Montana.

ARTICLE I.

A Declaration of the Rights of the People of the State of Montana.

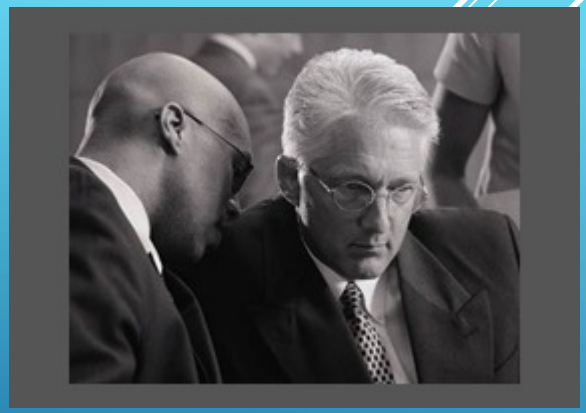
In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare:

SEC. 1. That all political power is vested in and derived from the people; that all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

SEC. 2. That the people of this State have the sole and exclusive right of governing themselves, as a free, sovereign, and independent State, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the Constitution of the United States

- Documents protected from disclosure by attorney-client privilege are not "documents of public bodies" subject to release under the public right to know. We have stated that Article II, § 9 of the Montana Constitution does not require release of information "where the data is protected from disclosure elsewhere in the federal or state constitutions or by statute." *Great Falls Tribune v. Mont. PSC*, 2003 MT 359, ¶ 39, 319 Mont. 38, 82 P.3d 876. Privileged documents fit squarely within this category.

- "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate." Section 26-1-801, MCA. The relation between attorney and client is one such relation. Section 26-1-803, MCA. "[T]he fundamental purpose of the attorney-client privilege is to enable the attorney to provide the best possible legal advice and encourage clients to act within the law. The privilege furthers this purpose by freeing clients from the consequences or the apprehension of disclosing confidential information, thus encouraging them to be open and forthright with their attorneys." *Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 106, 861 P.2d 895, 904 (1993).

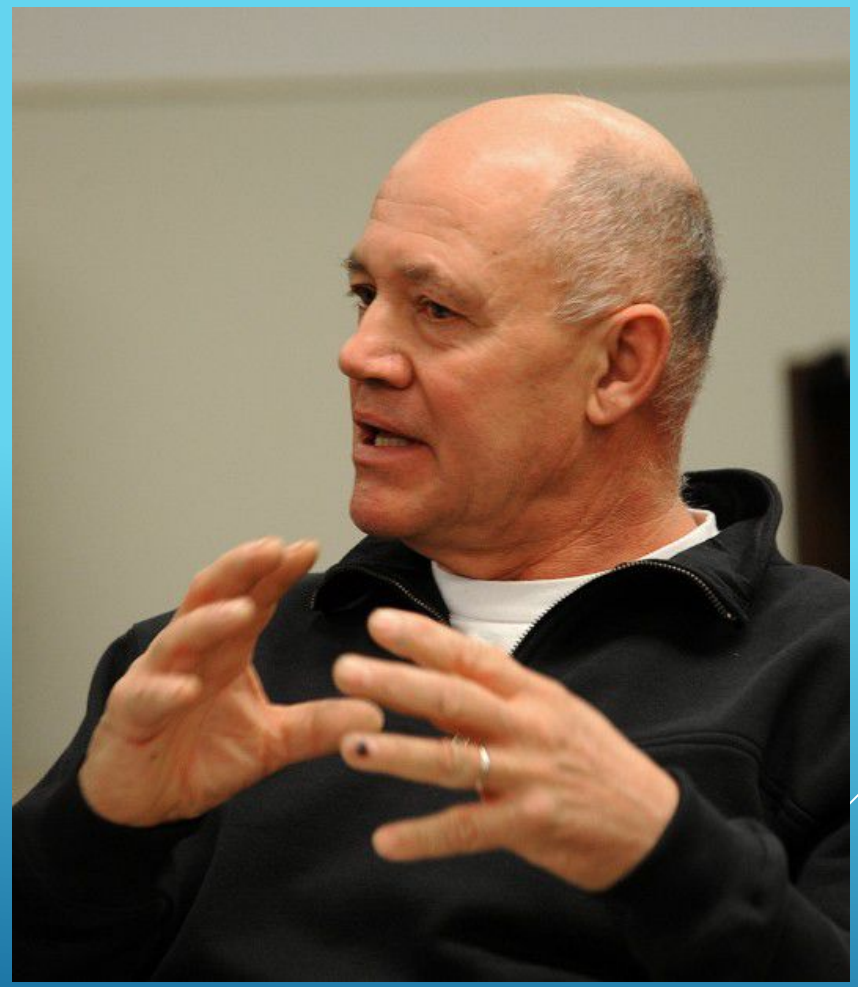


- Subjecting attorney-client communications – even in situations where the client is a municipal authority – to disclosure under the public right to know would be antithetical to that purpose. Such a rule would create situations where an individual involved in civil or criminal litigation against a government entity could obtain records of that entity's communications with its attorney by simply filing a petition under the public right to know, rendering the attorney-client privilege meaningless. The same rationale applies to the work-product privilege and other evidentiary privileges. The MMIA is a corporate entity created by member municipalities and, like other corporate entities (including municipalities) it enjoys the same privilege protections as individuals.

- Documents covered by such privileges cannot be considered “documents of public bodies” for the purposes of the public right to know. The District Court did not err when it limited the release of documents to those not covered by privilege.

KEVIN NELSON V. CITY OF BILLINGS, MONTANA, AND MONTANA MUNICIPAL INTERLOCAL AUTHORITY OF HELENA, MONTANA

- Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DV 14-1028
- On Appeal with Montana Supreme Court, Cause No. DA 17-0074



Pursuant to the state open records law, Mont. Code. Ann. Secs. 2-6-101 to 2-6-112; 2-6-201 to 2-6-405 and Article II, Section 9 of the Montana Constitution , I write to request access to and a copy of in the matter of MMIA/City of Billings/Feuerstein, all communication, such as but not limited to

1. e-mail, written, and all other correspondence between all parties including City of Billings employees, Billings City Council Members, MMIA employees, MMIA Board Members, Martovich, Keller &Murphy P.C. Billings Mt., Browning, Kaleczkc, Berry, & Hoven P.C. Helena Mt.
2. E-mail, Written, Invoices and all other correspondence of the Settlement Maste
3. Please exclude all documents already in the public domain

I would still ask that if this request exceeds $50.00 please let me know I may choose to review the documents and then decide what I may need a copy of.

- Montana Constitution Article II, Section 9, provides: "No person shall be deprived of the right to examine documents . . . of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." We have held that the language of Article II, Section 9, is unique, clear, unambiguous, and speaks for itself without requirement for "extrinsic aids or rules of construction." *Great Falls Tribune Co. v. Great Falls Pub. Sch.*, 255 Mont. 125, 129, 841 P.2d 502, 504 (1992) (*Tribune II*); *Associated Press v. Bd. of Pub. Educ.*, 246 Mont. 386, 391-92, 804 P.2d 376, 379 (1991); *Great Falls Tribune v. Dist. Court of the Eighth Judicial Dist*, 186 Mont. 433, 437-38, 608 P.2d 116, 119 (1980) (*Tribune I*).

- Pursuant to the plain meaning of the language of Article II, Section 9, we have construed the term “documents . . . of . . . public bodies or agencies” to mean documents “generated or maintained” by the bodies or agencies in relation to their “function and duties.” *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 274 Mont. 131, 138, 906 P.2d 193, 197 (1995).

- In construing constitutional provisions, we apply the same rules used in construing statutes. *Grossman v. Mont. Dep't of Natural Res.*, 209 Mont. 427, 451, 682 P.2d 1319, 1331 (1984). The intent of the Framers controls the Court's interpretation of a constitutional provision. *Cross*, ¶ 10; *Butte-Silver Bow Local Gov't v. State*, 235 Mont. 398, 403, 768 P.2d 327, 330 (1989).

- We must discern the Framers' intent from the plain meaning of the language used and may resort to extrinsic aids only if the express language is vague or ambiguous. *See, e.g.*, *Cross*, ¶¶ 10, 21-28; *State ex rel. Racicot v. Dist. Court of the First Judicial Dist.*, 243 Mont. 379, 386-88, 794 P.2d 1180, 1184-86 (1990).

- “In determining the meaning of the constitution, the Court must keep in mind that it is not the beginning of law for the state, but a constitution assumes the existence of a well understood system of law which is still to remain in force and to be administered, but under constitutional limitation.” *Grossman*, 209 Mont. at 451-52, 682 P.2d at 1332.

- We have not considered previously whether any privileges protected by statute or common law at the time of adoption survived enactment of the 1972 Constitution. Nelson's appeal presents that question.

- The Framers drafted Article II, Section 9, in broad and general terms. In its report to the whole convention, the Bill of Rights Committee explained that the purpose of the provision was to "presume the openness of government documents and operations" to combat "government's sheer bigness[, which] threatens the effective exercise of citizenship." Montana Constitutional Convention, Committee Proposals, February 22, 1972, p. 631. The Bill of Rights Committee of the 1972 Constitutional Convention clearly modeled the language of Article II, Section 9, on Montana's 1963 open meeting law, which applied to "[a]ll meetings of *public or governmental bodies*, boards, bureaus, commissions [and] *agencies of the state or any political subdivision*." *See* § 82-3402, RCM (1947) (emphasis added).

- We thus have construed Article II, Section 9, as creating “a constitutional presumption that every document within the possession of public officials is subject to inspection.” (Differs from Nelson 1)
- The Bill of Rights Committee cautioned, however, that the right to know is not absolute.

- Delegate Dahood:

"…we are not trying to upset any traditional rule of procedure with respect to anything within the judiciary…I just do not think that that problem would arise."

- Consistent with the Framers' manifest intent that Article II, Section 9, would not affect preexisting legal privileges against public disclosure, the 1972 Constitution included a Transition Schedule that, in pertinent part, provided:

  > All laws . . . and rules of court not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution.

- The attorney-client privilege has deep roots in the American legal system. *See Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165, 131 S. Ct. 2313, 2318 (2011) ("The attorney-client privilege ranks among the oldest and most established evidentiary privileges known to our law.").
- The attorney-client privilege protects confidential communications between an attorney and client during the course of the professional relationship. Section 26-1-803, MCA; *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Court*, 2012 MT 61, ¶ 9, 364 Mont. 299, 280 P.3d 240.

- The purpose of this privilege is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy depends upon the lawyer’s being fully informed by the client.” *State ex rel. U.S. Fid. & Guar. Co. v. Mont. Second Judicial Dist. Court*, 240 Mont. 5, 10, 783 P.2d 911, 914 (1989) (quoting *Upjohn Co.*, 449 U.S. at 389, 101 S. Ct. at 682).

- Likewise, the attorney-work-product privilege, although articulated as such only in the twentieth century, has a long history in this country. *See Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 393 (1947).

- This opinion work-product privilege "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Diacon ex rel. Palmer v. Farmers Ins. Exch.*, 261 Mont. 91, 116, 861 P.2d 895, 910 (1993) (quoting *United States v. Nobles*, 422 U.S. 225, 238, 95 S. Ct. 2160, 2170 (1975)). The privilege "serves the adversarial process directly by enabling attorneys to prepare cases without fear that their work product will be used against their clients." *Am. Zurich Ins. Co.*, ¶ 24 (internal quotation omitted).

- The inviolate nature of these privileges is a cornerstone of our judicial system, reflecting “the policy of the law to encourage confidence and to preserve it inviolate.” Section 26-1-801, MCA; *see Hickman*, 329 U.S. at 511, 67 S. Ct. at 393.

- Both privileges were ingrained in Montana's legal landscape at the time the 1972 Montana Constitution was drafted and ratified. The attorney-client privilege was first adopted in Montana in 1867—twenty-two years before statehood. *See* 1867 Mont. Laws §§ 373-77, pp. 210-11.
- Montana adopted the Federal Rules of Civil Procedure in 1961, which the United States Supreme Court had interpreted fourteen years earlier to include an attorney-work-product privilege. *See* 1961 Mont. Laws ch. 13; *Hickman*, 329 U.S. at 511, 67 S. Ct. at 393.

- It is not reasonable to conclude that the Framers intended to eliminate these privileges for public bodies in Montana without a single acknowledgment of such an intention during the convention debates.

- We conclude that the Framers' intent is manifest that the preexisting attorney-client and work-product privileges would carry forward inviolate as essential components of the preexisting legal system regardless of the broad, clear, and unambiguous language of Article II, Section 9.3 Therefore, we hold that documents protected by the attorney-client or attorney-work-product privileges are not subject to disclosure under Article II, Section 9.

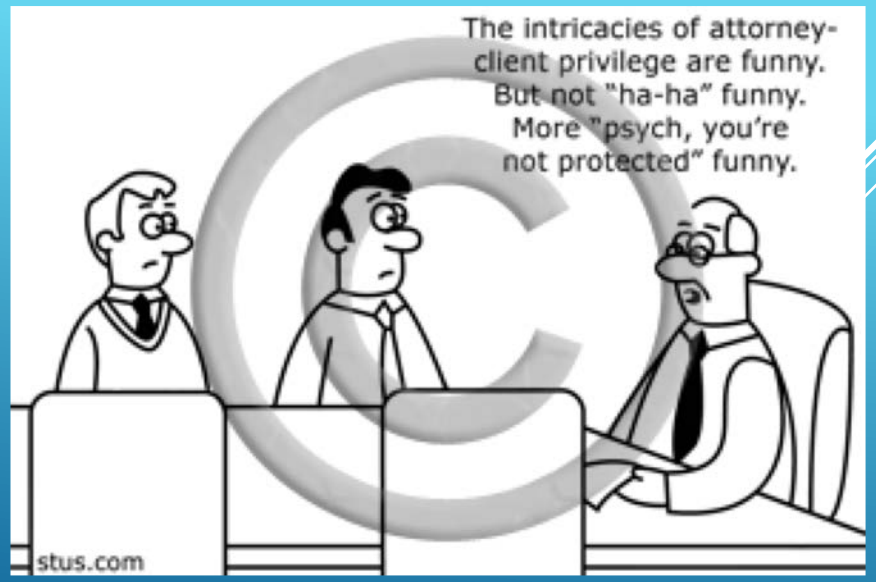
- Pointedly, just as the fundamental right to know is not absolute, neither are these privileges.

- And just as the right to know is not a tool for private litigation interests, *see Friedel, LLC v. Lindeen*, 2017 MT 65, 387 Mont. 102, 392 P.3d 141, neither are these privileges a means for public bodies and government agencies to impede transparency. We construe the attorney-client privilege narrowly because it obstructs the truth-finding process. *Am. Zurich Ins. Co.*, ¶ 10. As such, "the [attorney-client] privilege protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Am. Zurich Ins. Co.*, ¶ 10 (internal quotation omitted). Too, the attorney-work-product privilege does not grant absolute protection.

- For attorney-client privilege the court should determine whether the communications . . . were made for the ultimate purpose of seeking legal advice. Because of its "presumption" of disclosure, *Bryan*, ¶ 39, Article II, Section 9, embodies the principle that "the agency would be the one which would have to prove the burden" that a privilege applies. Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, p. 2489.

- Though the attorney-client and work-product privileges apply equally to government entities as well as private entities, *see Inter-Fluve v. Mont. Eighteenth Judicial Dist. Court*, 2005 MT 103, ¶¶ 32-34, 327 Mont. 14, 112 P.3d 258 (attorney-client privilege), we must recognize the peculiar nature of government entities vis-à-vis the privileges and the public's right to know. As a threshold matter, the attorney-client and work-product privileges belong to, and benefit, their public sector clients, not the lawyers.

- Consequently, because they obstruct "the truth-finding process" and—as applied to government agencies and public bodies—collide with the public's fundamental right to know under Article II, Section 9, the attorney-client and work-product privileges must be narrowly construed to effect their limited purposes. *See Draggin' Y*, ¶ 41. The attorney-client "privilege protects only those disclosures" made by the client "to obtain informed legal advice" and the legal advice given. *Draggin' Y*, ¶ 41 (quoting *Am. Zurich Ins. Co.*, ¶ 10).



- Upon a demand for public documents under Article II, Section 9, the government entity asserting the attorney-client or work-product privilege has the burden of proving the application and the scope of the asserted privilege to the court upon *in camera* inspection. *Cf. Bryan*, ¶ 39. Upon finding privileged material, the reviewing court must—as possible based on the nature and substance of the documents—give effect to both the subject privilege and the public's right to know by ordering appropriate redaction of the privileged information and disclosure of the unprivileged balance of the document, if any.