OP 17-0677

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 95

SHANNON LEIGH SWEENEY,

Petitioner,

v.

MONTANA THIRD JUDICIAL DISTRICT COURT,
HONORABLE RAY J. DAYTON, District Judge,

Respondent.

ORIGINAL PROCEEDING: Petition for Writ of Supervisory Control
In and For the County of Anaconda-Deer Lodge
Cause No. DC-16-96
Honorable Ray J. Dayton, Presiding Judge

COUNSEL OF RECORD:

For Petitioner:

Brian C. Smith (argued), Smith Law, PLLC, Missoula, Montana

For Respondent:

Michelle Sievers (argued), Deputy County Attorney, Anaconda-Deer Lodge County, Anaconda, Montana

For Amicus Curiae:

Peter F. Lacny, Datsopoulos, MacDonald & Lind, P.C., Missoula, Montana

For Defendant Dakota James McClanahan:

Ed Sheehy, Office of the State Public Defender, Butte, Montana

Argued and Submitted: January 31, 2018

Decided: April 24, 2018

Filed: 

Clerk

OPINION AND ORDER

Chief Justice Mike McGrath delivered the Opinion and Order of the Court.

¶1 Petitioner seeks a writ of supervisory control concerning the Third Judicial District Court's order granting the State's motion in limine that compels Shannon Sweeney (Sweeney), an attorney, to testify against her client, Dakota James McClanahan (McClanahan), on a bail jumping charge.

¶2 We restate the issue as follows:

> *Whether the District Court erred when it denied the motion to quash a subpoena compelling an attorney to testify regarding communications she may have had with her client.*

PROCEDURAL AND FACTUAL BACKGROUND

¶3 In May 2016, Sweeney was appointed to represent McClanahan, who was charged with possession of dangerous drugs with intent to distribute. McClanahan pled not guilty and was ultimately released after he signed the District Court's Release Order and Conditions of Release. McClanahan did not show up to the final pretrial conference on November 16, 2016, and was subsequently charged with bail jumping.

¶4 Ed Sheehy was appointed to represent McClanahan on the bail jumping charge, and he moved to dismiss. Sheehy argued McClanahan did not have notice of the November 16, 2016 hearing. Knowledge of the final pretrial conference is a necessary element of the bail jumping charge. The District Court denied McClanahan's motion to dismiss, concluding that the State should be allowed to introduce evidence at trial as to what, if anything, Sweeney told McClanahan about appearing at the final pretrial conference on November 16, 2016. Shortly thereafter, Sweeney sent a letter notifying the

State that she would assert attorney-client privilege for any line of questioning about communications with McClanahan and the preparation of his defense.

¶5 The State filed a motion in limine and the District Court determined that Sweeney would have to testify as to whether she told McClanahan about the final pretrial conference. The State issued a subpoena directing Sweeney to appear and testify at trial. Sweeney made a motion to quash the subpoena, which was denied by the District Court. Sweeney filed a Petition for a Writ of Supervisory Control with this Court, alleging that she should not be required to testify against McClanahan based on the attorney-client privilege. We granted the writ on November 20, 2017, and heard oral argument on the merits of the issues raised on January 31, 2018.

STANDARD OF REVIEW

¶6 This Court has supervisory control over all other courts and may, on a case-by-case basis, supervise a district court by way of a writ of supervisory control. Mont. Const. art. VII, § 2(2); M. R. App. P. 14(3). Supervisory control is appropriate when the normal appeal process is inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist: (1) the other court is proceeding under a mistake of law and is causing a gross injustice; (2) constitutional issues of state-wide importance are involved; or (3) the other court has granted or denied a motion for substitution of a judge in a criminal case. *State v. Spady*, 2015 MT 218, ¶ 11, 380 Mont. 179, 354 P.3d 590; M. R. App. P. 14(3). We review questions of statutory interpretation de novo. *Sartain v. State*, 2017 MT 216, ¶ 9, 388 Mont. 421, 401 P.3d 701.

DISCUSSION

¶7 *Whether the District Court erred when it denied the motion to quash a subpoena compelling an attorney to testify regarding communications she may have had with her client.*

¶8 This case satisfies the criteria for supervisory control. The normal appeal process would be inadequate here, as the issue before us is whether an attorney may be required by the District Court to testify against her client on a different charge. This case also involves a purely legal question. We hold the District Court is proceeding under a mistake of law and may cause a gross injustice by compelling Sweeney to testify against McClanahan.

¶9 The Sixth Amendment of the United States Constitution and Article II of the Montana Constitution grant a criminal defendant the right to counsel. U.S. Const. amend. VI; Mont. Const. art. II, § 24. Effective counsel relies heavily upon open communication with clients. To facilitate trust, certain communications between an attorney and her client are protected. By compelling Sweeney to testify against McClanahan on his bail jumping charge, the District Court potentially impeded on McClanahan's right to counsel.

¶10 This case presents an issue of first impression in Montana. Other courts, including the Ninth Circuit Court of Appeals, have addressed whether an attorney informing a client of a court date is considered confidential communication within the scope of the attorney-client privilege. In *United States v. Freeman*, 519 F.2d 67, 68 (9th Cir. 1975), the Ninth Circuit held that the district court did not err when it required counsel to testify against his client because the evidence sought was not confidential in nature and

therefore not protected by attorney-client privilege. The Ninth Circuit based its decision on a Second Circuit Court of Appeals case, *United States v. Hall*, 346 F.2d 875, 882 (2d Cir. 1965), which relies upon an evidence treatise and a United States District Court for the District of Massachusetts case for the proposition that communication of a trial date is not protected by the attorney-client relationship.[1] *Hall* and *Freeman* focused on the kind of information sought from the attorney and whether it was confidential. *See also In re Grand Jury Proc., Des Moines, Iowa*, 568 F.2d 555, 557 (8th Cir. 1977); *United States v. Bourassa*, 411 F.2d 69, 74 (10th Cir. 1969); *United States v. Woodruff*, 383 F. Supp. 696, 698 (E.D. Pa. 1974); *Downie v. Superior Court*, 888 P.2d 1306, 1308 (Alaska Ct. App. 1995); *In re Adoption of A.S.S.*, 907 P.2d 913 (Kan. Ct. App. 1995); *Austin v. Texas*, 934 S.W.2d 672, 674-75 (Tex. Crim. App. 1996); *Oregon v. Ogle*, 682 P.2d 267, 269 (Or. 1984).

¶11 This Court has held that the party asserting privilege has the burden to prove eight essential elements for the attorney-client privilege to apply. *State ex rel. U.S. Fidelity & Guar. Co. v. Mont. Second Judicial Dist. Court*, 240 Mont. 5, 11, 788 P.2d 911, 914-15 (1989). However, it is not necessary to address these elements here, as we resolve this issue by interpretation of statutory law.

¶12 Montana, by statute, provides that an "attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or the advice given to the client in the course of professional employment." Section

[1] We concur with *Freeman* that an attorney voluntarily advising the Court about discussions of public matters, such as the date of a hearing, are not precluded by the privilege.

26-1-803(1), MCA. We construe statutes according to the plain meaning of the language used. *Comm'r of Political Practices for Mont. v. Wittich*, 2017 MT 210, ¶ 19, 388 Mont. 347, 400 P.3d 735 (citing *Fellows v. Saylor*, 2016 MT 45, ¶ 21, 382 Mont. 298, 367 P.3d 732); *State v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 12, 385 Mont. 282, 384 P.3d 1035; *MM&I, LLC v. Bd. of Cnty. Comm'rs of Gallatin Cnty.*, 2010 MT 274, ¶ 44, 358 Mont. 420, 246 P.3d 1029; *State v. Trull*, 2006 MT 119, ¶ 32, 332 Mont. 233, 136 P.3d 551; *Dunphy v. Anaconda Co.*, 151 Mont. 76, 80, 438 P.2d 660, 662 (1968)). A statute must be read as a whole, and its terms should not be isolated from the context in which they were used by the Legislature. *Fellows*, ¶ 21 (citing *State v. Price*, 2002 MT 229, ¶ 47, 311 Mont. 439, 57 P.3d 42). This Court gives a term its plain and ordinary meaning if it was not defined by the Legislature. *Alpine Aviation Inc.*, ¶ 11 (citing *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666; *accord Bates v. Neva*, 2014 MT 336, ¶ 15, 377 Mont. 350, 339 P.3d 1265).

¶13 The plain language of § 26-1-803(1), MCA, is clear and unambiguous. An attorney cannot be examined as to any advice given to the client. Courts have struggled with defining legal "advice" in this context, particularly where it is not possible to ascertain whether the substance of a communication from attorney to client constituted legal "advice given to the client" for purposes of the attorney-client privilege. Nonetheless, in the context of representing a client in a criminal case, advising a client of a hearing date, the disregard of which could result in additional criminal liability, is inseparably intertwined with the concept of legal advice. Here, the Montana statute provides another avenue for interpretation.

¶14 Significantly, the statute precludes an attorney from being examined. The District Court is compelling Sweeney to take the stand and be examined against her wishes regarding communications with her own client to prove that he committed a new offense. An examination is the "questioning of a witness under oath." *Black's Law Dictionary* 680 (Bryan A. Garner ed., 10th ed. 2014). That is precisely what the State proposed to do by issuing the subpoena to Sweeney. Here, the attorney's compelled testimony would violate her duty of undivided loyalty to her current client, McClanahan. Independent of the attorney-client privilege, an attorney has a legal duty of undivided loyalty to a client, a duty which we have held to be inviolate and fundamental to the attorney-client relationship and the proper functioning of our adversarial system of justice. *Krutzfeldt Ranch, LLC v. Pinnacle Bank*, 2012 MT 15, ¶ 31, 363 Mont. 366, 272 P.3d 635. Regardless of whether the subject statements from counsel to client in this case constituted "advice given" for purposes of § 26-1-803(1), MCA, compelling counsel to testify under these circumstances would violate her duty of undivided loyalty to McClanahan.

¶15 Given that advising a client of a hearing date in a criminal case is inseparably intertwined with the concept of legal advice and that compelled inquiry of counsel to distinguish between advice and non-advice would vitiate counsel's duty of undivided loyalty to the client, we hold that the District Court erred when it denied the motion to quash the subpoena compelling Sweeney to submit to examination on whether she advised her client of the fate of his final pretrial conference. Furthermore, § 26-1-803(1), MCA, prohibits the District Court from compelling Sweeney to testify about

communications made with McClanahan without his consent when her testimony would prove the elements of a new charge against McClanahan. We expressly limit this holding to the unique facts and circumstances of this case.

¶16 THEREFORE, IT IS ORDERED:

¶17 The District Court's order is REVERSED and the subpoena compelling Sweeney to testify on the State's behalf is quashed. This matter is remanded to the District Court for further proceedings consistent with this Opinion.

DATED this 24th day of April, 2018.

/S/ MIKE McGRATH

We Concur:

/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA

Justice Jim Rice, concurring.

¶18 I concur in the outcome the Court has reached but not in all of its reasoning.

¶19 The Court states § 26-1-803(1), MCA, "precludes an attorney from being examined." Opinion, ¶ 14. This is an overbroad rendering of the statute, which does not stop after the word "examined." Rather, it precludes an attorney from being examined only about certain subjects, namely, "as to any communication made by the client to the attorney or the advice given to the client in the course of professional employment." Section 26-1-803(1), MCA. Thus, the statute may not foreclose an attorney from being questioned, for example, about a life-and-death emergency involving the client, because

the attorney may be able to provide helpful information that does not conflict with the statute.

¶20 My concern in this case is the statute's prohibition on examination of an attorney about "the advice given to the client." During oral argument, the State indicated that it wanted to ask Sweeney two questions. The first question was whether she had communicated the date of the final pretrial conference to McClanahan. I do not believe this to be legal advice. Our judicial system requires lawyers, as part of their duty of representation, to convey notice of court proceedings to their clients. If courts could not depend on this, service of notice would be required to be made personally upon all clients for all matters in every case. Consequently, it would be appropriate to ask McClanahan whether she had fulfilled this judicial function. Thus, I disagree with the Court's conclusion that all the "statements from counsel to client in this case constituted 'advice given' for purposes of § 26-1-803(1), MCA." Opinion, ¶ 14. In my view, this was a permissible inquiry.

¶21 However, at oral argument the State indicated it wanted to go further, and ask a second question—whether Sweeney had told McClanahan that he needed to attend the final pre-trial conference. An attorney's communication about a client's attendance at a proceeding, including whether, for whatever reason, the client should risk violating a release condition, falls into the realm of legal advice. For that reason, I believe the State's proposed inquiry here was prohibited by the statute.

¶22 I concur.

/S/ JIM RICE

Justice Laurie McKinnon, dissenting.

¶23 I dissent from the Court's conclusion that the plain language of § 26-1-803(1), MCA, "prohibits the District Court from compelling Sweeney to testify about communications made with McClanahan without his consent when her testimony would prove the elements of a new charge against McClanahan." Opinion, ¶ 15. To reach its conclusion, the Court oversimplifies the statute by focusing on one word, "examined," and fails to consider the rest of the statute. The attorney-client privilege is supposed to be construed narrowly, but the Court does the opposite, inexplicably broadening the privilege's scope. Considering the statute as a whole, I conclude that the attorney-client privilege does not preclude the District Court from compelling Sweeney's testimony regarding whether she notified McClanahan of the final pretrial conference date.

¶24 Section 26-1-803(1), MCA, provides, "An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or the advice given to the client in the course of professional employment." The Court's role in construing a statute "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. We consistently acknowledge a "well-established rule" that when "construing a statute, it must be read as a whole, and its terms should not be isolated from the context in which they were used by the Legislature." *Fellows*, ¶ 21 (quoting *Price*, ¶ 47); *accord State v. Nye*, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997); *State v. Lilburn*, 265 Mont. 258, 266, 875 P.2d 1036, 1041 (1994). While recognizing that a statute must be read as a whole and that its terms should not be isolated from their

context, the Court does precisely the opposite, isolating the word "examined" and omitting the remainder of § 26-1-803(1), MCA. Opinion, ¶¶ 12, 14.

¶25 The plain language of § 26-1-803(1), MCA, in its entirety, provides that an attorney, absent client consent, cannot be examined as to (1) communication made by the client to the attorney; or (2) advice given to the client in the course of professional employment. The statute, read without omitting language that the Legislature explicitly included, does not completely preclude an attorney from being examined, as the Court concludes. Opinion, ¶ 14. Instead, the statute provides that an attorney cannot be examined as to two distinct types of information. In this case, the issue is whether, absent client consent, the District Court can compel Sweeney to testify regarding whether she notified McClanahan of the hearing date. Thus, the question before the Court is whether requiring an attorney to testify about publicly available information she provided her client constitutes requiring an attorney to be "examined *as to* . . . advice given to the client in the course of professional employment." *See* § 26-1-803(1), MCA (emphasis added). I would find that, based on the plain language of the statute, the purpose of the attorney-client privilege, and guidance from a significant number of other jurisdictions that have addressed the same issue, Sweeney informing McClanahan of the hearing date is not "advice given to the client in the course of professional employment" and therefore the attorney-client privilege does not protect Sweeney from testifying about such information.

¶26 The "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."

Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Court, 2012 MT 61, ¶ 9, 364 Mont. 299, 280 P.3d 240 (quoting *Inter-Fluve v. Mont. Eighteenth Judicial Dist. Court*, 2005 MT 103, ¶ 22, 327 Mont. 14, 112 P.3d 258). The privilege furthers its purpose by protecting confidential information a client shares with his attorney, which frees "clients from the consequences or the apprehension of disclosing confidential information, thus encouraging them to be open and forthright with their attorneys." *Am. Zurich Ins. Co.*, ¶ 9 (quoting *Inter-Fluve*, ¶ 22). The privilege also protects legal advice an attorney provides to her client, as the attorney's advice in response to the client's confidential communication will likely reveal the substance of the client's communication. *Diacon ex rel. Palmer v. Farmers Ins. Exch.*, 261 Mont. 91, 107, 861 P.2d 895, 905 (1993); *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977). The privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] 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." *U.S. Fid. & Guar. Co.*, 240 Mont. at 10, 738 P.2d at 914 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981)).

¶27 The attorney-client privilege does not, however, protect every piece of information shared between an attorney and her client. We continuously construe the attorney-client privilege narrowly, as it "obstructs the truth-finding process." *Am. Zurich Ins. Co.*, ¶ 10; *Nelson v. City of Billings*, 2018 MT 36, ¶ 31, 390 Mont. 290, 412 P.3d 1058. Thus, the 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 (quoting *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 1577 (1976)); *Draggin' Y Cattle Co. v. Addink*, 2013 MT 319, ¶ 41, 372 Mont. 334, 312 P.3d 451. The Court isolates § 26-1-803(1), MCA, from the attorney-client privilege's eight essential elements we enumerated in *U.S. Fidelity and Guaranty Company v. Montana Second Judicial District Court* on the basis that the statute's language resolves the issue. Opinion, ¶ 11. This Court, however, consistently interprets the statutory and common law attorney-client privileges, and the policy choices behind them, together. *See*, *e.g.*, *U.S. Fidelity & Guar. Co.*, 240 Mont. at 11, 783 P.2d at 914-15 (citing both the statutory and common law privileges and then applying both to the facts). The eight elements, like the statutory privilege, differentiate between whether the client or the attorney conveyed the information:

> (1) Where legal advice of any kind is sought
> (2) from a professional legal advis[e]r in his capacity as such,
> (3) the communications relating to that purpose,
> (4) made in confidence
> (5) *by the client*,
> (6) are at this instance permanently protected
> (7) from disclosure by himself or by the legal adviser,
> (8) unless the protection be waived.

U.S. Fid. & Guar. Co., 240 Mont. at 11, 738 P.2d at 914-15 (quoting *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1492 (9th Cir. 1989), and originally found in 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2292, 554 (John T. McNaughton ed. 1961)) (emphasis added).

¶28 The Ninth Circuit, when adopting the same common law attorney-client privilege, clarified that the eight elements create a privilege that is limited to communications made by the client in confidence and advice given by the attorney in response thereto. *In re*

Fischel, 557 F.2d at 211. The limitation is based on furthering the privilege's purpose of "protect[ing] and foster[ing] the client's freedom of expression," as the privilege was never intended "to permit an attorney to conduct his client's business affairs in secret." *In re Fischel*, 557 F.2d at 211. While the privilege protects the confidential information a client shares with his attorney and the legal advice an attorney shares with her client, the privilege does "not conceal everything said and done in connection with an attorney's legal representation of a client in a matter." *In re Fischel*, 557 F.2d at 212.

¶29 In this case, we must determine whether a communication from an attorney to her client regarding the date of a hearing is "advice given to the client in the course of professional employment" and thus protected by the attorney-client privilege. The Ninth Circuit and other jurisdictions have analyzed the same issue and consistently hold that such communication is not privileged. *Freeman*, 519 F.2d at 68-69 (stating that requiring an attorney to relay whether he advised his client of the court's order to appear "was not of a confidential nature and hence was not protected by the attorney-client privilege").[1]

[1] *See also*, *e.g.*, *United States v. Uptain*, 552 F.2d 1108, 1109 (5th Cir. 1977) (holding that counsel's "message to his client concerning the date of trial was not a privileged communication"), *cert. denied*, 434 U.S. 866, 98 S. Ct. 202 (1977); *In re Grand Jury Proc.*, 568 F.2d at 557 (holding that "communications by a defense counsel to the client . . . regarding the time and place of trial are not confidential and therefore are not protected by the attorney-client privilege), *cert denied*, *Black Horse v. United States*, 435 U.S. 999, 98 S. Ct. 1656 (1978); *Bourassa*, 411 F.2d at 74 (holding that former counsel's testimony that he told the defendant to be present at trial was not within the attorney-client privilege because "[r]elating such notice to the client was counsel's duty as an officer of the court"), *cert. denied*, 396 U.S. 915, 90 S. Ct. 235 (1969); *Hall*, 346 F.2d at 882 (holding that counsel relaying the court's order to the defendant was not "in the nature of a confidential communication" and emphasizing that counsel has "a duty to relay the instructions to his client in his capacity as an officer of the court"), *cert. denied*, 382 U.S. 910, 86 S. Ct. 250 (1965); *Woodruff*, 383 F. Supp. at 698; *Austin*, 934 S.W.2d at 674-75; *Downie*, 888 P.2d at 1308; *In re Adoption of A.S.S.*, 907 P.2d at 917; *People v. Williamson*, 839 P.2d 519, 520 (Colo. Ct. App. 1992); *Korff v. Indiana*, 567 N.E.2d 1146, 1148

The rationale behind those decisions is that, in passing along the information, the attorney simply acts as an agent—a "mere conduit"—for the court. *Austin*, 934 S.W.2d at 675. Those courts reason that a hearing date is not confidential information encompassing the client's legal issues. *Woodruff*, 383 F. Supp. at 698. Accordingly, they hold that the attorney-client privilege does not protect an attorney's testimony regarding whether she told a defendant about a hearing. *Ogle*, 682 P.2d at 269.

¶30 I agree with the rationale employed by those courts and would hold that an attorney conveying the date of a hearing to her client is not "advice" protected by the attorney-client privilege. It is common practice for the court to notify counsel of a hearing and expect counsel to, in turn, notify her client of the proceeding. The date of a hearing is publicly available information that the attorney receives from the court, a third party. The date of a hearing does not encompass a client's confidential information or an attorney's advice in response thereto. Prohibiting disclosure of such information by precluding an attorney from ever being "examined" is contrary to the plain language of § 26-1-803(1), MCA. Colorado has a similar statute, providing that, "An attorney shall not be *examined* without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment . . . ." Colo. Rev. Stat. § 13-90-107(1)(b) (emphasis added). In *People v. Williamson*, 839 P.2d at 520, the Colorado Court of Appeals analyzed the statutory attorney-client privilege and permitted an attorney's testimony regarding whether he advised his client of the court's

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(Ind. 1991), *cert. denied*, 502 U.S. 871, 112 S. Ct. 206 (1991); *Watkins v. Florida*, 516 So. 2d 1043, 1046 (Fla. Dist. Ct. App. 1987), *cert. denied*, 523 So. 2d 579 (Fla. 1988); *Ogle*, 682 P.2d at 269.

order to appear at trial. The court reasoned that such communications were not confidential in nature and that in relaying the court's order, the attorney served "merely as a conduit for transmission of a message." *Williamson*, 839 P.2d at 520 (quoting *Hall*, 346 F.2d at 882). That court did not place undue emphasis on the term "examined," and neither should we. In Montana, under § 26-1-803(1), MCA, an attorney cannot be "examined" as to two distinct types of information, neither of which encompass an attorney notifying her client of the date of a hearing.

¶31 In this case, Sweeney represented McClanahan in a drug charge. The District Court released McClanahan pending trial, provided he would appear at all hearings. The District Court scheduled McClanahan's final pretrial conference for October 19, 2016. One day before the scheduled hearing, on October 18, 2016, Sweeney filed an unopposed motion to continue the final pretrial conference and trial, on the grounds that she needed additional time to prepare for trial and/or complete plea negotiations. The District Court granted Sweeney's motion and rescheduled McClanahan's final pretrial conference for November 16, 2016. The District Court did not personally notify McClanahan of the new date; the court does not require defendants to be personally present when hearing dates are set nor does it require defendants to acknowledge that they received notice of hearing dates.

¶32 McClanahan failed to appear at his final pretrial conference on November 16, 2016. The State subsequently charged McClanahan with bail-jumping and the District Court appointed attorney Sheehy to represent him in that proceeding. A necessary element of bail-jumping is whether McClanahan had notice of the date of the final

pretrial conference. To prove that element, the State seeks to examine Sweeney, who does not represent McClanahan in the bail-jumping charge, about whether she told McClanahan about the final pretrial conference.[2] The District Court concluded, "Ms. Sweeney is only required to testify as to whether she told the Defendant about the hearing on November 16, 2016." Asking Sweeney to testify as to whether she conveyed the date of the final pretrial conference to McClanahan is not asking her to divulge any "advice" she provided to McClanahan. The District Court is only requiring her to testify as to whether she, acting as a mere conduit, conveyed publicly available information, provided by the court, to her client. The limited nature of the permitted inquiry ensures that Sweeney will not be compelled to testify as to any privileged information. Sweeney's testimony regarding whether she told McClanahan the date of the final pretrial conference is not protected by the attorney-client privilege and I would hold that the District Court correctly interpreted the law.

¶33 I am mindful of the Court's concern that the State is utilizing Sweeney, McClanahan's attorney in the drug charge, to prove an essential element of the bail-jumping charge. Opinion, ¶¶ 14-15. I do not commend the practice of calling a defendant's prior counsel as a witness in a bail-jumping trial. The State should make all attempts to avoid the need for such testimony. However, I can find no authority

[2] I believe it is significant that the court appointed Sheehy as counsel in the bail-jumping proceeding and that Sweeney did not represent McClanahan in both the underlying drug charge and the bail-jumping charge. While not raised or argued by Sweeney, the advocate-witness rule prohibits an attorney from appearing as both a witness and an advocate in the same litigation. *See United States v. Prantil*, 764 F.2d 548, 552-53 (9th Cir. 1984). Sweeney has not argued that the advocate-witness rule applies to these proceedings or that the provisions of M. R. Pro. Cond. 3.7, concerning a lawyer called as a witness, are implicated.

supporting the Court's conclusion that requiring Sweeney to testify would violate her duty of loyalty to her client, and therefore cannot agree. Opinion, ¶ 14 (citing *Krutzfeldt Ranch*, ¶ 31). While *Krutzfeldt Ranch* emphasizes the importance of an attorney's duty of loyalty to her current client in assessing conflicts of interest, it does not address the situation at hand. Compelling Sweeney's testimony in the separate bail-jumping proceeding, in which she does not represent McClanahan, does not materially interfere with her function as an advocate in the drug proceeding nor does it deprive McClanahan of a fair trial in either proceeding. Requiring Sweeney to testify as to whether she informed McClanahan of the November 16, 2016, final pretrial conference places her in an uncomfortable and admittedly unfortunate position, but I cannot find a way in which it illegally infringes upon the duties she owes to McClanahan as his attorney in the drug charge.

¶34 Considering § 26-1-803(1), MCA, in its entirety, I conclude that the attorney-client privilege does not protect an attorney's statements to her client regarding the date, time, and place of a hearing. I would hold that the District Court appropriately ordered Sweeney to testify "only . . . as to whether she told the Defendant about the hearing on November 16, 2016."

/S/ LAURIE McKINNON

Justice Beth Baker joins in the dissenting Opinion of Justice McKinnon.

/S/ BETH BAKER