

BEFORE THE BOARD OF OUTFITTERS
STATE OF MONTANA

IN THE MATTER OF CASE NO. 2015-OUT-LIC-405 REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 2384-2015
TREATMENT OF THE LICENSE OF)
ROBERT FRISK,)
Outfitter, License No. 22.)
)

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

In this matter, the Business Standards Division of the Department of Labor and Industry alleged that Robert Frisk violated professional standards of conduct contained in Mont. Code Ann. § 37-1-316(5) (providing a misleading, deceptive, false or fraudulent advertisement or other representation in the conduct of the profession or occupation), Mont. Code Ann. § 37-1-316(18) (conduct that does not meet the generally accepted standards of practice), Mont. Code Ann. § 37-47-301(4) (outfitters utilizing lands under the control of the U.S. government shall obtain the proper permits), Mont. Code Ann. § 37-47-301(6) (outfitter shall take reasonable measures to provide services outfitter advertised), Mont. Code Ann. § 37-47-341(3) (fraudulent, untruthful, or misleading advertising), Mont. Code Ann. § 37-47-341(10) (any other rule violation), and Admin. R. Mont. 24.171.2301(1)(b) (failure to obtain written permission to conduct services on private or public land).

On behalf of the Office of Administrative Hearings (“OAH”), Hearing Officer Terry Spear conducted a contested case hearing in this matter on December 16, 2015 in Helena, Montana. The Department (for purposes of prosecuting this disciplinary action, as directed by the Board’s Screening Panel) was represented by Mark Jette, Office of Legal Services. Licensee was represented by James C. Bartlett.

Testimony was received from Jennifer Schofield, Marty Meiser, Kraig Lang, Christopher Wilcox, and Robert Frisk. The designated sworn testimony of Michael Hayes, Ross Drishinski, and Jere Vandebos was received, from Board of Outfitters, In the Matter of Case Nos. 2014-OUT-LIC-1356, 2014-OUT-LIC-1357, 2014-OUT-LIC-1358, 2014-OUT-LIC-1359, 2014-OUT-LIC-1360, and 2014-OUT-LIC-1376 re

the Proposed Disciplinary Treatment of the License of Robert Frisk, Outfitter, License No. 22, Case No. 1331-2015 [Frisk I], Transcript of Proceedings, Vol. II (Jul. 15, 2015).

BSD's Exhibits 1, 2, and 5 were admitted into evidence. Respondent's Exhibit A was also admitted into evidence.

Frisk also seeks relief for the violation of the Hearing Officer's order excluding witnesses pursuant to Rule 615 of the Montana Rules of Evidence, and has requested striking the testimony of Wilcox and dismissing the disciplinary proceeding. That motion or those motions are denied. Pages 23-24.

Based on the evidence submitted, the Hearing Officer finds that Frisk has violated professional standards and recommends to the Board of Outfitters that sanctions should be imposed against his license. The factual basis and legal rationale for this recommendation are set forth below.

II. ISSUE

The issue in this case is whether disciplinary action should be taken against Frisk, pursuant to Mont. Code Ann. § 37-1-136, and if so, the proper discipline to be taken.

III. FINDINGS OF FACT

1. At all times relevant to these facts and circumstances, Robert Frisk was licensed as an Outfitter, holding License 22 and doing business as B & D Outfitters. Frisk's Outfitter's license allows him to guide guests to hunt within the State of Montana at locations where hunting is permitted by the Montana Fish and Wildlife Commission or on lands operated by the Commission under agreement with, or in conjunction with, a federal agency, state agency, or a private land owner.

2. Frisk was authorized by a United States Forest Service (USFS) permit to take and guide guests in restricted hunting areas based out of his back country camp in the Bob Marshall Wilderness (the "Bob"). Only licensed outfitters are qualified to apply for or to hold such permits.

3. For a number of years, Frisk traveled to the Great American Outdoor Show in Harrisburg, Pennsylvania, to advertise the availability of his services for hunting, fishing, and horseback riding trips. On February 8, 2014, Christopher Wilcox (Wilcox) and his father, William Wilcox, met and bargained with Frisk about a hunting trip into the Bob.

4. William Wilcox did not testify. Business Standards Division Compliance Specialist Jennifer Schofield testified that Complainant Christopher Wilcox communicated to the Board of Outfitters that his father as well as Wilcox should be included in the complaint. She also stated that William Wilcox “is older, can’t hear as well.”

5. Wilcox and his father attended the Great American Outdoor Show looking for a Montana outfitter who could lead a one-week hunting trip in the Bob by horseback for big mule deer bucks and bull elk during November 2014. Wilcox and his father wanted to spend time together seeing Montana and hunting. Wilcox is an experienced horseman, owning two horses of his own, and his father was still running the family’s 150 head beef farm in Pennsylvania. William Wilcox walked five miles a day, three days a week to prepare for the trip.

6. The Wilcoxes did not want to road hunt for whitetail deer in “ordinary” landscapes along the roads and they also did not want to do a lot of trudging up steep hills or through deep snow or mud. They could stay home in Pennsylvania and do all of that. Wilcox and his father were willing to pay extra for the experience of hunting big mule bucks and bull elk by horseback in the Bob.

7. Wilcox credibly testified that his father was “in pretty good shape,” and “also ran our beef herd, did all the operations of the farm of about 150 head.” He further testified credibly that his father was “very active” and “in pretty good shape for a 60-some-year-old man.”

8. As a result of the bargaining at the Great American Outdoor Show on February 8, 2014, Frisk agreed to guide Wilcox and his father on a back country hunt on horseback and with pack animals, riding in and using his back country camp in the Bob as their base camp, staying there nights and using the horses each morning to locate promising spots from which to hunt for mule deer bucks and bull elk. The trip would commence from Frisk’s trailhead camp on November 14 and conclude with the return to the trailhead camp on November 21, 2014. According to Frisk’s preprinted contracts, the clients would provide transportation to and from the trailhead, personal gear, and the appropriate hunting licenses. The contracts had almost no information about the pack and riding animals, the camp, the meals, and the selection of bull elk and mule deer bucks as the primary game sought,¹ which meant that all of these matters would be in Frisk’s hands, since none of them were specifically included in the enumeration of the Wilcoxes’ responsibilities. The three men had not entered into any meaningful discussion of possible problems with the

¹ There was a standard provision “Outfitter cannot guarantee any sportsman a successful trip for game or fish or sighting of wildlife.” Exhibit A, 1st page, third paragraph, last sentence.

trip due to weather in the mountains of Montana in November, even though Wilcox and his father knew the temperature could range from -40° to 70° (Fahrenheit). There had been no discussion of possible contingencies if any of the agreed upon conditions (the horseback hunting, using the back country camp as a base camp, the meals, the specification of bull elk and mule deer bucks as the primary game sought) became unworkable.

9. Wilcox believed that a fundamental part of hunting bull elk, and therefore a fundamental part of the hunt being provided, involved riding horses to the high ground early in the morning or last thing before dark, glassing for game (elk in particular), and planning and carrying out hunts of the elk when and if sighted. Since he believed this was fundamental to the hunt, he made no attempt to confirm these details with Frisk.

10. Frisk offered Wilcox and his father what he called a “discount for a father/son package” and Wilcox and his father agreed, each signed a separate contract, and each paid 50% of the total \$9,000.00 charge as a “deposit.” William Wilcox acted on his own behalf and Wilcox acted on his own behalf.

11. Wilcox and his father timely paid Frisk the remaining balance due on the two contracts. Frisk provided a list of suggested items for the hunt in the back country, as a courtesy. Wilcoxes shopped for and bought approximately \$1,000.00 worth of additional items of equipments and supplies suggested by Frisk’s list. They completed their arrangements for their drive to Montana, including purchasing hunting licenses, taking time off from work, scheduling visits with relatives along the way, and making nonrefundable hotel reservations.

12. Wilcox and his father had no knowledge that 80% of the clients who had contracted with Frisk for trips into the Bob in the Lewis and Clark National Forest, from 2006 through 2014, never actually entered the National Forest at all.

13. Kraig Lang was and is a back country ranger for the USDA Forest Service in Choteau, Montana, working in the Rocky Mountain Ranger District of the Lewis and Clark National Forest. He was a credible and unbiased witness. Part of Lang’s job was field administration of outfitter and guide permits in the district. Lang testified that Frisk held an outfitter permit and maintained his camp in the Bob in Lang’s district from 2006 until his permit expired on April 15, 2015. Lang testified that he had reviewed the proposed itineraries that outfitters with permits are required to file with the Forest Service at the beginning of the year, and the actual use reports those outfitters must file at the end of the year, reporting their actual use of the National Forest land. He specifically looked at Frisk’s proposed itineraries and actual use reports from 2006 through 2014. During that entire time, only 20% of the

clients that had planned trips with Frisk actually made it into the National Forest on a trip. Board of Outfitters, In the Matter of Case No. 2015-OUT-LIC-405 re the Proposed Disciplinary Treatment of the License of Robert Frisk, Outfitter, License No. 22, Case No. 2384-2015, Transcript of Hearing (December 15, 2015) [hereafter “Tr.”], p. 38, line 21 through p. 39, line 9.

14. Looking at his records of Frisk’s proposed itineraries and actual use reports regarding his trips into the National Forest for Fall 2014, Lang testified Frisk reported a planned trip for August 4-8 that was cancelled (no reason given). Frisk reported a planned trip for August 11-14 for three clients that actually occurred. Frisk reported another planned trip from October 25-November 1 that was cancelled due to bad weather. Frisk reported a planned trip for November 4-11 that was cancelled due to bad weather. Frisk reported two overlapping planned trips – November 14-17 for day use only for two clients and November 17-20 for day use hunting for one client. The last two trips, which overlapped on November 17, were bracketed in the report, and a handwritten note at the bottom of the page read, “Physical problems. Mr. Lang gave okay.” Tr., p. 41, line 5 through p. 42, line 13. Those last two trips represented the horseback hunting trip booked by Wilcox and his father.

15. Before the Wilcoxes arrived in Montana, Wilcox and Frisk began a series of telephone calls. The two men disagreed under oath on virtually every particular of the calls, including the dates on which the calls occurred.

16. According to Wilcox, Frisk called before the Wilcoxes left Pennsylvania. Frisk told Wilcox that there had been horrible weather, resulting in a steeper trail to Frisk’s back country camp, with up to 18 inches of mud in places and with more bad weather forecast. Frisk suggested changing the hunt so that it was not in the back country. He professed genuine worry about William Wilcox safely completing the trip. Frisk told Wilcox that he had just come out of a trip into the back country and a “young 30-year-old very physically fit guy” on that trip lay on the ground for half an hour after the trail ride because the trail was so rough and so bad. It seemed to Wilcox that Frisk was trying to get Wilcox and his father to decide to go on an alternate hunt. According to Wilcox, he replied that if Frisk could find something that would be just as successful, so that Wilcox and his father would have camping, horseback hunting, and then hiking (searching out and stalking game animals), all in an area Frisk knew very well, then they could consider it. Wilcox denied ever saying he wanted anything other than the originally bargained for horseback hunt.

17. According to Frisk, Wilcox called him during the trip to Montana and told Frisk that he was “very, very concerned” about his father’s health and condition. He told Frisk that his father’s ankles and knees were swollen and his back was “really,

really” bothering him. According to Frisk, he told Wilcox that William Wilcox’s reported condition would create a horseback riding problem, and asked Wilcox what he wanted Frisk to do. According to Frisk, Wilcox replied, “Well, is there something else that we can do?” Frisk said his response was, “Well, right at this point my permit doesn’t cover it but I can probably get permission from the Forest Service under these circumstances to take you outside the wilderness.” Tr., p. 107, line 18 through p. 108, line 9.

18. Under cross examination, Wilcox admitted that on the day before he met Frisk in Montana, he told Frisk on the telephone that his father “was achy from riding in the truck.” He also agreed that he indicated his concern about his father to Frisk, because Frisk was making it sound like it was going to be an impossible trip, causing aches and pains for any older man. Tr., p. 72, lines 3-15.

19. Lang testified about when and how he learned that Frisk did not want to take clients into the back country during the November 14-21, 2014 trip.

A I would have to say approximately to this because I’m not sure exactly what day it was. I believe that it was either the 6th of November, so 11-6-2014 or 11-12-2014. My time sheet records show that I did not work between the 7th of November and the 11th of November, inclusive of those dates. And prior to that, I believe I was on a back country trip.

So I think that it was likely on the 6th of November. Mr. Frisk came into our office and explained to me that he had a client that had an injury, a leg injury, and it would not be conducive for that client to be able to ride horses into his back country camp and he was wondering if he could get authorization to take those clients on a hunt on a different part of the district where he could basically drive with them with a vehicle and then hike with those hunters into locations on the National Forest that he could access with a vehicle.

My thoughts at that time were that client, you know, had planned this trip and that we could probably accommodate a change in the authorization that we formally have in place for Mr. Frisk to allow that client to have a location where, you know, he could get out and still do his trip and not have to cancel the entire trip due to the leg injury.

So Mr. Frisk and I spent a period of time looking at some maps, talking about some specific locations that I thought might be conducive to that and came to a resolution that that would be okay for him to do that for that one specific hunt.

Tr., pp. 43, line 8 through p. 44, line 14.

20. There is no evidence of record that William Wilcox suffered any injury at any time before he arrived in Montana that had any impact upon his physical capacity to endure the horseback hunting.

21. Frisk did not tell Lang that the trail to his camp was steeper and contained up to 18 inches of mud in places and that there was more bad weather forecasted. The only reason he gave to Lang for seeking approval to guide a drive and walk hunt outside of the back country (wilderness) was the alleged client "leg injury." Frisk did not disclose to Lang the names or number of clients involved in the trip.

22. Wilcox and his father left Pennsylvania on November 8, 2014, to drive to Montana, planning to arrive by November 14th. The November 8th departure date was two days earlier than planned because Frisk described bad weather in front of them and they wanted to see family in Wolf, Wyoming, on the way. Further, they wanted to be available just in case Frisk proposed an alternative hunt that required an earlier start.

23. According to Wilcox, Frisk called again while Wilcox and his father were traveling to Montana. Frisk told Wilcox the back country trails were in such bad shape that Frisk had already pulled half of his back country camp for the season because conditions absolutely prevented hunting in that area. In other words, it was no longer possible to use the back country camp as a base camp for this trip. Frisk told Wilcox that he had spent countless hours at the USFS office to identify an alternative, and would discuss the details after they arrived, but according to Lang's credible testimony, Lang and Frisk met just once, for less than an hour.

24. During his single meeting with Lang, Frisk was pursuing an alternative to the horseback hunting trip Wilcox and his father had purchased. Frisk certainly knew that having a horseback hunt for bull elk and big mule deer bucks was an integral part of what the Wilcoxes had paid to experience. According to Frisk's testimony, Wilcox had authorized an alternative to riding horses in the back country, because it would be too dangerous for his father. According to Lang, Frisk came to that one meeting that he had with Lang looking for permission to take his clients for a hunt on Forest Service lands, away from Frisk's drainage, traveling by car or truck and stopping to walk and to hunt. Frisk did not tell Lang that the clients had agreed with or authorized this alternative road and walk hunt.

25. During the morning of the one-day hearing, Frisk was present while Lang testified. Lang specifically said that Frisk had not asked during their meeting about his clients riding horses on the alternative hunts Lang covered with Frisk, but that he could probably have allowed horseback riding on the alternative hunts if Frisk had asked. Tr., p. 52, 17-21.

26. Later in the hearing, after Lang had been excused, Frisk was asked the following question and gave the following answer:

Q So what's your recollection then when you got to talk face-to-face with Mr. Lang about this predicament?

A Him and I chatted about it to start with and I told him what the circumstances were, what I had been told, and asked him if there was some alternative that I could do. And Mr. Lang told me that there were areas outside the wilderness that I could take these gentlemen on a walk-in basis. Now, he said that to me at least three different times. So I didn't question it.

Tr., p. 108, line 20 through p. 109, line 5.

27. Immediately after that testimony, Frisk and his attorney had the following exchanges.

Q Now, what day [was the conversation with Lang], to your recollection?

A My guess would be it was probably around the 12th –

Q Okay.

A – of November. Somewhere close to that.

Q Wilcoxes show up the evening of the 12th.

A Right.

Q So would you have talked to Lang earlier that day before you knew that they were showing up in the evening?

A It was in the – whatever day that it actually was, it was in the morning that I talked to him, because I spent quite a while in the office with him.

Tr., p. 109, lines 6-19. This is not entirely inconsistent with Lang's testimony, and the Hearing Officer accepts that Frisk could have had his one conversation with Lang on November 12, 2014.

28. On the morning of November 13, 2014, Frisk drove to Choteau and met with his clients. Frisk testified that he laid out a map and explained where the hunts might be and what time it would be necessary to leave to get there – he “went through the whole scenario with them.” Wilcox testified that from their conversation with Frisk on November 13th, it was apparent to Wilcox and his father that Frisk was unprepared. Frisk could not tell them where they were hunting and he only had “one kind of idea” he was thinking about. Tr. p. 63. Wilcox suggested that even though Frisk had not done any scouting that they should go out and scout locations the evening of November 13th, and take their guns just in case they found something. According to Wilcox, Frisk reluctantly agreed to Wilcox's plan and they all drove to Frisk's trailhead. Id.

29. Frisk testified that after he went through the whole hunting scenario with them, he informed them that they needed to come out and look at the trailhead base camp and trailer and make up their own minds whether they wanted to stay there or not. Tr., p. 111. Wilcox's testimony about the previous telephone conversations indicated that Frisk had already made it clear that the back country camp was no longer a potential base camp, having been half taken down already.

30. After one or the other, or perhaps both of these alleged conversations, the threesome proceeded to Frisk's trailhead base camp. It was bitterly cold at the trailhead camp that day, perhaps -30°. Frisk showed them the trailer, with an outhouse and no shower or bath facilities. From a distance of 65 to 70 yards, they saw horses in the corral. They would not see Frisk's horses again. Frisk reported that William Wilcox said "If I start to get sore and everything, I'm going to need a place where I can soak in a hot tub or something. So I think I'd be better off staying in a motel." Tr., p. 111, lines 12-19.

31. This statement, as Frisk reported it, happened within a day or two after the telephone concern Frisk testified that Wilcox had expressed that his father, still traveling toward Montana, was suffering swollen ankles and knees and had serious back pain. William Wilcox's statement on November 13, 2014 that if he started to get sore he would need a place to soak in a hot tub indicated that he was not sore the day after his arrival at Choteau. Frisk's testimony about what William Wilcox said about his own condition was thus inconsistent with Frisk's testimony about what Wilcox told him about his father's all but crippling problems while merely traveling toward Montana.

32. Wilcox testified that while at the trailhead camp on November 13, 2014, he looked over the horses that were in the corral and that they "did not look in good shape at all," "were skin and bones," and "just looked horrible." Tr., p. 64, lines 5-8. Wilcox testified he had "walked right up the fence and looked at them [the horses], because I love horses" and then repeated his description of the horses in almost identical terms. "They had sway backs. They were all skin and bone, heads down. They looked horrible." Tr., p. 75, lines 2-15.

33. Oddly, when asked whether he and his father ever rode horses during the hunt, Wilcox testified about constantly asking to ride the horses he had described in such negative terms.

Q Did you ever ride horses on the trip?

A I never saw the horses again after the 13th when he got ready.

Q Did you see anybody else riding horses, any other hunters riding horses in your area?

A Yes. There was people riding horses. There was horse trailers. We constantly asked him, “Why can’t we ride your horses into the mountains? There is all these other people riding. We signed up for a horseback ride. It’s easier on my father.”

Tr., p. 66, lines 15-24. Wilcox’s testimony about how suspect Frisk’s horses were and yet how insistent he was about riding those horses is reminiscent of the joke about the tourist complaining about the dude ranch food. “The food here is just poison – and the portions are so small!” Pleading with Frisk to put William Wilcox on a sway back, skin and bones, head down, horrible looking horse seems unfilial.

34. Frisk testified that despite William Wilcox’s alleged comment about the trailer, Wilcox and his father did not decide about staying at the trailhead trailer until later that day, during an exploratory trip to look for game. He also testified that the “Amendment to B&D Outfitter Contract” that Wilcox denied he and his father had ever signed was signed during that same exploratory trip, on November 13, 2014.

Q This Exhibit 2 that they say they didn’t sign, does that come about on that particular visit when you’re out at the trailer?

A No, it didn’t happen at the trailer.

Q Okay.

A It happened later that day.

Q All right. So nothing’s talked about what they are going to do or what the –

A No, the discussion was – part of the discussion was held at the trailer, yes.

Q And then how long are you at the trailhead?

A I would get half an hour, 45 minutes at the most.

Q And this is the day before the hunt is supposed to begin?

A Yes.

Q Did you discuss how to use the rest of the day then after they decided they didn’t want to stay up there?

A Yes. They asked me if there was any possibility that we could go out and hunt that evening.

Q And what did you say?

A I said the only place that I knew of that was close enough that we wouldn’t be spending a lot of time driving, yeah, we could do that.

Q And where was that area?

A It’s – I don’t even know that it has a designation, to be honest with you. I don’t know of any name that it actually has. There is a piece of state land that sits up on top of a ridge. You go into Dupuyer and you turn towards the north fork of Dupuyer

Creek and then you branch off a road from there. And I don't even know what the name of that road is, to be honest with you. I never have known it. But you drive on top of the ridge and there is a big block of state land that borders Forest Service land.

Q And you're not guiding them yet because your contract is not in place, right?

A Right. Exactly.

Q Is there any discussion that you're not working as a guide when they go look at the state land?

A Yes. I was very adamant about it because I don't have a permit to hunt on the State. I don't have a permit to outfitter on the state land.

Q So you accompanied them by riding in the same pickup or what?

A No. I drove my pickup. They drove their pickup. They pulled in behind me. And I had forgotten to ask them for their licenses, because I have to have that in my record book, so I asked them to get their licenses out. And it was cold, extremely cold. So they got them out. I wrote the license numbers down real quick. I brought the agreement out, they signed it on the hood of my truck, and we took off and we skirted around –

Q That's Exhibit 2 you're talking about, the agreement?

A Yes. We skirted around the end of the state land to cut down into where the forest, where we could actually onto the Forest Service. Because beyond the Forest Service line, it's open for bull elk. On that side of the line it was only open for cows and they didn't want to hunt cows. And I understood that. And I also told them they could hunt whitetails there because whitetails were open. And we did see some deer but they didn't see anything big enough that they wanted to shoot them.

Q And since you weren't engaged on that particular day to be an outfitter, you certainly can be a friend and talk to them about this scouting they did that day, right?

A Yes. It's completely legal.

Q Then the decision was for them to stay in town. And the discussion you had earlier in town about here is the map and here is what we can do and we can drive and walk in this area, that was decided to do; is that correct?

A Correct.

Tr., p. 112, line 12 through p. 115, line 18.

35. Exhibit 2, handwritten, contains Frisk's account of the communications leading up to November 13, 2014. As written, it favors Frisk in every respect, indemnifying him in some respects, formalizing the informal hunting trip the day prior to the beginning of the horseback hunting trip (which is identified as "today," the date the agreement was being signed). Inconsistent with the contentions Wilcox has made throughout this case, this handwritten two-page document purports to bear the signatures of "William M Wilcox" and "Chris Wilcox." Wilcox denied under oath that he or his father ever signed the document. Frisk testified under oath that they all three signed it, in each others' presence, on November 13, 2014. The document three times bears the date (one for each signature) of "11/10/14." Frisk testified under oath that this was just a mistake on his part. He never even attempted to explain how he could possibly make a mistake about that very day's date while obtaining signatures that day on a legal document resolving disputes with his current clients. According to Frisk, when he wrote in the document that it was being signed "today" but then dated it three days in the past, it was just a mistake. Wilcox signed two other documents – his contract (part of Exhibit 1) and the handwritten refund agreement. It is impossible for this Hearing Officer to determine whether or not the signatures are the same on all three documents. However, it is not credible that Wilcox and his father signed Exhibit 2, despite the concerns and problems already confronting them on November 13, 2014, and despite the one-sided language favoring Frisk in essentially every provision of that document. Therefore, the Hearing Officer rejects Exhibit 2 as a valid amendment to the contracts between Wilcox and Frisk, in one instance, and William Wilcox and Frisk in the other instance. To put it bluntly, it is much more likely, and certainly more likely than not, that Frisk wrote the document and forged the signatures of Wilcox and his father at some later date. It is far less likely, and certainly not proved, that Wilcox and William Wilcox signed it on November 13, 2014, having read and agreed upon its contents.

36. On the morning of November 14, 2014, Wilcox and his father left their hotel in Choteau and met Frisk at approximately 7:30 a.m. At that time, Frisk informed Wilcox and his father that the location they walked the night before was not open to the public. Because the location was not open, Wilcox and his father followed Frisk to a new location, which took awhile because Frisk seemed to be lost.

37. Frisk was at best improvising what to do to guide Wilcox and his father. Frisk was not ready or willing to give them the trip they bargained and paid for. He insisted upon asking Wilcox to decide what they should be doing. Rather than use his experience as an outfitter to guide their hunting excursions, perhaps because of his unfamiliarity with the alternate locations, Frisk continually deferred to the clients about where and how they wanted to hunt. As Wilcox stated, in describing what they did on November 14, 2014:

A Basically we walked in a trail; we walked back out the same trail. We got to where it got short in the canyon and we turned around, we went up on the top of the mountain, sat and ate lunch next to a barbed-wire fence, tracking elk at that point. We sat there. Like I say, we saw a few mule deer does at that point. We followed the elk trails back down and got back on the trail and walked out.

The only reason we really went that direction was because he was constantly asking me “What do you think we should do? Where do you think we should go?” And I would tell him, “I’ve hunted whitetail. I’ve never hunted mule deer. I’ve never hunted elk. I don’t know. You’re my guide.” But eventually we went that way because he kept asking. We had no plan. We were just walking aimlessly, hiking, taking our guns for a walk.

Tr. p. 64, line 23 through p. 54, line 14.

38. Frisk failed to provide Wilcox and his father even the basic services such as lodging and meals. At the show, in his contract, and in his promotional materials, Frisk promised that meals and lodging at his camp were included for the advertised price. But when Wilcox and his father arrived, Frisk gave them the option of either staying in his trailer at the trailhead with outhouse toilet facilities and no shower or bath, or renting a room in Choteau at their own expense. Instead of providing all food and drink fireside at his camp as advertised, Frisk recommended to them the “free” breakfast at the hotel (included in the price they were paying for their own lodging), offered them white bread sandwiches in the field for lunch, and gave them the “option” of driving an hour and a half round trip from the motel, again at their own expense, to eat dinner at his house.

39. With no horseback hunting and no entry into Frisk’s permit area, despite the original agreement the three men had made, Frisk attempted to use his pickup truck and road hunt, leaving the vehicle and road on foot on public lands open to all legal hunters to seek game. On the first full day of the trip, Frisk’s truck had a flat tire. Frisk spent much of that day and the next day fixing it. Wilcox used his own truck and his own fuel.

40. Frisk told his clients that he had not hunted the proposed alternative lands in years, or even scouted them recently, because they are not in his outfitters operations plan. Frisk reminded them at several points that he did not have a permit to guide on state land, and drove his truck in front of theirs but claimed not to be guiding them.

41. On the fourth day of the trip, Wilcox and his father raised the possibility of a refund after they saw some groups of hunters on horseback on trails that led to Frisk's back country camp. Frisk resisted the refund as unnecessary but agreed to a partial refund. He also told Wilcox and his father that he had no money for a refund because all the money was tied up in their trip. Wilcox testified to the agreement being for a partial refund of \$3,000.00.

42. On day five, the parties found a blood trail. Wilcox offered to reduce the \$3,000.00 refund to \$2,500.00 if Frisk was willing to help Wilcox track the injured elk. Frisk denied signing a handwritten document purporting to be an IOU stating:

I, Bob Frisk of B&D Outfitters, agree to pay William Wilcox
\$2,500.00 for a partial refund on an uncompleted hunt scheduled
for 11-14-14 to 11-21-14. Payment shall be made by 12/30/15.

Signed and dated on 11-19-14

Robert Frisk – 11/19/14

William Wilcox

Witness:

Chris Wilcox

Although he denied signing the document, Frisk admitted that he agreed to pay William Wilcox \$2,500.00 as a partial refund. There is no record he has done so, and it is now beyond the year and 11 days the written document gave Frisk to make the payment.

43. The evidence in this case indicates that Frisk has failed to complete not only this trip, but approximately four out of five preplanned trips into the Bob with clients over the entire term of his federal permit (80% not completed). This increases the seriousness of Frisk twice in 2014 telling clients seeking a refund that he spent the money paid in advance to pay the expenses for the trip, and could not refund any money.

44. The other time in 2014 that Frisk responded to a refund request with the assertion that he spent the money paid in advance to pay expenses on that trip was the trip in which Marty Meiser participated. However, the rest of her testimony in this case is irrelevant. Her testimony and the testimony offered by Frisk in response (designated testimony of Michael Hayes, Ross Drishinski, and Jere Vandebos from Frisk I) are all of no other utility herein and have not been used.

45. The substantial and credible evidence of record is that Frisk has failed to honor the promises he made as a professional outfitter to his clients Christopher Wilcox and William Wilcox. He attempted to manipulate his clients into accepting much less than what he had promised and received payment from them to deliver, was dishonest, and attempted to take advantage of his clients.

46. Frisk entered into an agreement with both of his clients to refund \$2,500.00 to William Wilcox, whether or not Frisk signed the written version of that agreement. Wilcox drafted and witnessed that agreement between Frisk and his father, as well as participating in the agreement as an agent for his father, with at least ostensible if not actual authority. Frisk therefore was duty-bound, as a professional outfitter, to honor that bargain and make that payment by December 15, 2015. If he has done so, and William Wilcox has accepted that payment, then both William Wilcox and Wilcox (who signed the agreement as a witness) have received the consideration specified by the oral or written agreement in resolution of all claims they otherwise may have against Frisk.

47. If Frisk has not made the payment, the agreement has not been performed and is of no effect. The Board should order Frisk to refund the entirety of the money Wilcox and William Wilcox paid for the horseback hunt in the Bob that Frisk agreed to provide, by paying \$9,000.00, by money orders or certified checks, to the Board's agent, payable half to Wilcox and half to William Wilcox within 30 calendar days of the issuance of the Board's decision herein, with immediate revocation for an indefinite period of his license upon failure timely to comply.

48. Frisk has been an outfitter since shortly after the inception of licensing for outfitters in this state. At this point, the Board should offer him the courtesy of voluntarily retiring and surrendering his license. Should he accept that offer, also within 30 calendar days of the issuance of the Board's decision herein, the Board will deem this matter closed upon timely receipt of the \$9,000.00 payment ordered, if it is ordered. Should Frisk thereafter apply for restoration of his license or new licensure from the Board, he will be required to meet all current requirements at that time for such licensure, and in addition post with the Board, as a part of his application, a surety bond of \$25,000.00 that must remain current, as a means to satisfy any valid claims of failure to perform his obligations to one or more clients as a licensed professional outfitter. Should he post said bond and ultimately not obtain a new license, the bond will be released and returned to him, unencumbered. Should he post said bond and obtain a new license, the Board in its discretion can decide to release and return the bond when and if it decides that this security is no longer required for Frisk's practice as a licensed outfitter.

49. Should Frisk elect not to retire, and his license is not already revoked for failure to comply with other provisions of the Board's order, then his license should be suspended immediately upon notification of said election or upon the expiration of the time for his election without his retirement (unless his license is revoked for other reasons). To end the suspension, Frisk must accept a mentor outfitter appointed by the Board, meet weekly with that mentor to discuss methods of

financing outfitting trips, revisions to the preprinted contracts, back-up planning for weather and other contingencies, as well as ethical and legal requirements of outfitting. Frisk must also allow his mentor to visit and inspect his animals, his trailhead camp, and his back country camp. Frisk must also submit to a complete physical examination by a doctor or doctors selected by the Board. While it does not by itself establish unprofessional conduct, it is a justifiable basis for serious Board concern that over the past eight years only approximately 20% of the clients with preplanned trips to Frisk's back country camp in the Bob have actually traveled with Frisk far enough to get into the Bob. Around four out of five of Frisk's preplanned trips never got as far the National Forest land containing the preplanned destination. This lack of delivery of services shows a disturbing pattern. Under these circumstances, the Board, for rehabilitation of the license, should screen and if necessary require improvements to Frisk's professional fitness and health, to assure that if he is to return to outfitting, he is capable of honestly delivering the services he sells. Upon notification to the Board that Frisk has complied with these conditions, and with the approval of his mentor and his physician, Frisk may file a request for the Board to reinstate his license. Upon receipt of such a request, if Frisk has met all conditions required under the entire Board order in this case, the Board can, in its discretion, (1) Require Frisk to attend a Board meeting to answer questions and discuss with the Board his request, and then decide thereafter; (2) Notify Frisk of additional specific conditions he must meet for reinstatement; or (3) Reinstate his license, with or without a probationary period, as the Board may see fit, and with or without conditions Frisk must meet during his initial year of reinstatement.

50. Should Frisk fail to comply with any term of the Board's order, immediate indefinite revocation of his license should be ordered.

IV. DISCUSSION²

A. Credibility.

A witness false in one part of his testimony is to be distrusted in others. Mont. Code Ann. § 26-1-303(3). Wilcox testified falsely, either about seeing Frisk's horses closely and noticing that they looked horrible, or about both his father and him pleading with Frisk to let them ride his horses, or both. Frisk testified falsely about raising a question in February 2014 about William Wilcox's physical capacity to make the horseback trip into the Bob. Frisk testified falsely about Lang instructing him, or at least leading him to believe, that horses were not permitted on the alternative hunt. Frisk testified falsely about his two clients agreeing to and

² Statements of fact in contained in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

signing Exhibit 2 on November 13, 2014. These two primary witnesses were both untrustworthy, and most of the rest of their testimony could be considered dubious and doubtful, and in some instances was, for each.

(i) Wilcox's False Testimony: Horrible Horses But Let Us Ride

On November 13, 2014, Frisk took Wilcox and his father to the trailhead camp. Frisk's horses were in a corral. Wilcox testified the horses looked horrible.

A The horses did not look in good shape at all. They were skin and bones. I mean, they just looked horrible. Nothing even comparable to my horses and the way they looked. I mean, I was definitely concerned about the shape, but at the same token, we never got to see them anyways after that.

Tr., p. 64, lines 5-11.

Frisk testified that neither Wilcox nor his father got closer to the horses than 65 to 70 yards. Wilcox had testified earlier, "I walked right up the fence and looked at them, because I love horses so I walked over to see them." Tr., p. 75, lines 10-12. He was then asked to describe the horses a second time. His description became slightly more detailed, but otherwise unchanged.

Q Describe them to me.

A They had sway backs. They were all skin and bone, heads down. They looked horrible.

Tr., p. 75, lines 13-15.

During the alternative hunt, Wilcox testified that he and his father saw other people riding horses, saw horse trailers, and were constantly asking Frisk, "Why can't we ride your horses into the mountains? There is all these other people riding. We signed up for a horseback ride. It's easier on my father."

Wilcox's testimony indicated that he did not trust Frisk's horses. Yet he also testified that he and his father kept demanding to ride Frisk's horses, those sway backed, skin and bone, heads down, horrible looking horses. His father may not have seen the horses up close, but Wilcox testified that he had. In light of what he testified he saw, trying to convince Frisk to allow Wilcox's father to ride on sway back, skin and bone, heads down, horrible horses would be unfilial. Patently inconsistent testimony, such as Wilcox's testimony here, must in one instance or the other be false.

(ii) Frisk's False Testimony: (a) William Wilcox's Physical Capacity

Frisk testified that when he first met the Wilcoxes in February 2014 and discussed the November horseback hunting trip into the Bob for big mule deer bucks and bull elk, he believed that Wilcox was physically capable of undertaking the hunt, but was "hesitant" about William Wilcox's capacity to participate in the specified hunt, and "told him so." Tr., p. 105, lines 11-12.

Uncertainty about William Wilcox's ability safely to walk distances in uneven terrain in the back country was one of the reasons that Wilcox and his father wanted a horseback hunt. Had Frisk actually raised this concern about the elder Wilcox, it seems very plausible that the Wilcoxes would have explained their plan to rely upon the horses to relieve William Wilcox of the requirement to walk through rough and treacherous uneven winter ground. Since there was no testimony about any discussion between Wilcox and Frisk about such a plan to rely upon the horses, it seems unlikely that Frisk actually did mention his hesitance about William Wilcox's physical condition in February 2014.

In addition, Frisk testified that in selecting clients, "myself, I try to make sure that the people that I'm taking are in the kind of physical condition they need to be to do this safely." Tr., p. 104, lines 8-15. Yet, after concluding his transaction with Wilcox and his father at the Great American Outdoor Show, the only genuine information Frisk obtained that day about William Wilcox's physical capacity was that William Wilcox was on blood thinners, was more than 60, and was unsure about handling a lot of walking. Tr., p. 105, lines 13-20. It was downright incredible that Frisk would entertain doubts about William Wilcox's fitness, but go ahead and agree to the horseback hunt as well as enter into the contracts, without obtaining some meaningful information addressing the elder Wilcox's fitness. Failure to obtain that information would be inconsistent with making sure the people he was going to take into the wilderness were "in the kind of physical condition they need to be to do this safely." In short, Frisk's testimony about having and expressing actual concerns about William Wilcox's fitness in February 2014 was also false.

(ii) Frisk's False Testimony: (b) Blaming Lang for Walk-in Requirement on the Alternative Hunt

Frisk justified not making his horses available during the alternative hunt by saying that the Forest Service forbade him from using his horses.

A "When I was at the forestry, they said I could take you to these places but I was not allowed to bring my horses unless I was going to pack an animal out. Other than that, we have to walk."

Tr., p. 66, line 15 through p. 67, line 3.

The above testimony was what Wilcox testified that Frisk said. Frisk himself confirmed that his justification for putting away the horses and having his clients drive and walk on the alternative hunt was that Lang forbade him from using his horses. Lang directly contradicted this testimony.

Q Would he still be able to take his clients horseback riding on some of the alternatives that you just suggested?

A That question wasn't asked, but we probably could have accommodated that.

Tr., p. 52, lines 17-21.

When Lang testified that Frisk never asked about using horses, but that had he asked, Lang probably could have accommodated him, Frisk, as the respondent licensee, was present. Later in the day, after Lang had been excused and had left the hearing site, Frisk testified that when he went to Lang and asked about an alternative hunt, Lang gave him permission to change where the hunt would take place but directed that it became a "walk-in" hunt. Frisk testified that Lang said it three times, so Frisk did not question it.

. . . . And Mr. Lang told me that there were areas outside the wilderness that I could take these gentlemen on a walk-in basis. Now, he said that to me at least three different times. So I didn't question it.

Tr., p. 109, 1-5.

The Hearing Officer found Lang to be a careful and accurate witness, and neither heard nor observed any indications that Lang had any bias against Frisk or animosity toward him. When testifying about the expiration of Frisk's permit in April 2015, Lang noted that he was not a decision maker relative to Forest Service actions regarding Frisk's permit. The Hearing Officer took Lang's testimony about use of horses at face value, i.e., Lang would probably have permitted use of horses on the alternative hunt if Frisk had asked. There was no evidence and no basis for any presumption that Lang intended to lead Frisk to believe horses were forbidden on the alternative hunt. Therefore, Frisk's testimony about "walk-in" hunting being required on the alternative hunt was false.

(ii) Frisk's False Testimony: (c) Exhibit 2

As noted in the findings, Wilcox denied under oath that he or his father ever signed Exhibit 2. Frisk testified under oath that they all three signed it, in each others' presence, on the hood of his truck, on November 13, 2014. The Hearing Officer has found, in this particular instance, that Wilcox was more credible in denying the Wilcoxes signed Exhibit 2. This severely damages Frisk's already shaky credibility. It does not require an expert to find that writing a self-serving

“amendment” to two client contracts and forging one’s clients’ signatures upon it is unprofessional conduct.

(iii) Choosing Between the Two Witnesses in Particular Instances

With both primary witnesses suspect, the Hearing Officer has been cautious in relying upon either’s testimony, but where the character of one or the other’s testimony made sense and during that testimony the witness displayed a demeanor that inspired trust, some portions of each primary witness’s testimony have been used in the findings. When either witness established by testimony that his opportunity to observe and his capacity accurately to recall that observation seemed unimpaired by his obvious interest in the outcome of the litigation, some portions of each’s testimony were reliable, although much of both witness’s testimony was too dubious and doubtful to trust.

The Hearing Officer’s concerns about both primary witnesses made Kraig Lang the key witness for many aspects of this case. Lang was not a decision maker regarding renewal of Frisk’s permit. Lang displayed no bias for or against either the clients or the outfitter. Lang was consistent in responding carefully and credibly to the questions he was asked. During his testimony, he agreed with many suggestions made by each attorney, and did not become unduly defensive or hostile with either attorney. Lang’s testimony impeached Frisk’s testimony in some respects, which further damaged Frisk’s credibility, but Lang did so with no apparent animus toward Frisk. Finally, Lang never even met either Wilcox or his father.

B. The Board Has Jurisdiction over Frisk’s Outfitter License.

The Board has subject matter jurisdiction and legal authority to bring the disciplinary action under Mont. Code Ann. §§ 37-1-131, 37-1-136, 37-1-307, 37-1-309, and Title 37, Chapter 47. This matter belonged before the OAH for a contested case hearing. Mont. Code Ann. §§ 37-1-131(1)(b); 37-1-121(1). It is a licensing disciplinary case subject to the Montana Administrative Procedure Act, which has been properly applied. Mont. Code Ann. §§ 37-1-136(2), 37-1-310.

The Department has the burden to show by a preponderance of the evidence that Frisk engaged in unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126. The Department must also show that any sanction which it seeks is appropriate under the circumstances of the case.

The Board of Outfitters is charged with the responsibility to “establish outfitter standards and guide standards” by assuring that outfitters and guides are

properly qualified. Mont. Code Ann. § 37-47-201. Further, the Board has a responsibility to protect public health and safety by regulating the use of licenses it issues. Mont. Code Ann. § 37-1-131.

A regulatory board may impose any sanction provided for by Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Mont. Code Ann. § 37-1-312 provides that a regulatory board may impose probation, remedial education requirements, a suspension, and restitution.

C. Frisk’s Conduct in this Case Falls below the Statutory Standard of Care for an Outfitter Set Forth in Mont. Code Ann. § 37-1-316(18).

Mont. Code Ann. § 37-1-316 provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

. . . .

(18) conduct that does not meet the generally accepted standards of practice.

To prove Frisk’s conduct did not meet professional standards requires proof of the proper standard of care and the manner in which the licensee deviated from that standard of care. Cf. *Montana Deaconess Hosp. v. Gratton*, 169 Mont. 185, 545 P.2d 670 (1976) (holding that in a medical malpractice case, the medical standard of care must be established by expert medical testimony unless the conduct complained of is readily ascertainable by a layman, citing *Evans v. Bernhard*, 23 Ariz. App. 413, 533 P.2d 721 (1975)). See also, *Webb v. Board of Medical Ex.*, 202 Ariz. 555, 48 P.3d 505 (App. 2002) (holding that due process in an administrative licensing proceeding requires that both the standard of care and the deviation from that standard must be established in the record).

In this case, it is clear that Frisk promised a horseback hunting trip, with a base camp in the back country in the Bob, and then did not deliver one. In February, he did not discuss with his clients the prospects for weather problems in November in Montana, and what might arise out of such problems. Of greater concern, he attempted to manipulate his clients by telling them things that were not true about the status of his back country camp (he told his clients that because of weather he had closed down the camp and removed part of it and told them it was impossible to go into the trails to his camp, when he later admitted he had not removed part of his back country camp and his clients saw other people on horseback entering into some of those trails). Of greatest concern, Frisk reneged on multiple material promises to perform as a professional outfitter – he promised lodging, food, and horses. The

Wilcoxes got none of those things, and, having paid Frisk for that trip, had to pay again for their own lodging, food (except for “white bread sandwich” lunches), and transportation. It requires no expert testimony to find that the preponderance of the evidence established that Frisk’s failure to provide either the trip promised or to offer in a timely fashion a reasonable alternative did not meet the generally accepted standards of outfitter practice.

It is beyond cavil that a licensed professional (including an outfitter) has an obligation to deliver what was promised, or tender an acceptable and reasonable alternative. Frisk did not do so. Among his egregious acts is that Frisk admittedly agreed to a refund of \$2,500.00 (a concession by the clients in order to get Frisk to act in the capacity for which they paid him and guide one of them along a blood trail) and apparently has not paid that refund, which he had over a year to pay after the agreement to make it. Almost equally outrageous were his attempts to use his leverage as their outfitter to limit his responsibilities and his liabilities in every fashion that he could. It requires no expert to find that all such conduct is per se unprofessional and inconsistent with a minimal standard of care for a licensed professional (including an outfitter).

Additionally, Frisk forged his clients’ signatures on a false amendment of the contracts. It requires no expert to find that fabrication of an amendment to the contracts with two clients is unprofessional and inconsistent with a minimal standard of care for a licensed professional (including an outfitter).

The trip proposed by Frisk was a one week hunting adventure by horseback into the Bob Marshall Wilderness. However, even before Wilcox and his father left home in Pennsylvania, Frisk was attempting to cancel or modify the trip Wilcox and his father had already purchased. Frisk blamed this on the conditions of his camp due to severe weather. As an outfitter with long experience, Frisk should know Montana weather conditions in November, and he should have been ready to proceed in such conditions if possible. With Frisk’s knowledge and experience it was inappropriate and unprofessional to sell such a trip without discussing with the clients the difficult and adverse conditions that might attend embarking upon what was promised. Wilcox and his father were traveling from and then back to Pennsylvania. Leaving his clients counting on the trip as planned, without notice that weather might interfere, encouraged them to make expensive arrangements, for some of which refunds might not be available. In the context of such a situation, Frisk should also have made arrangements for financing his preparation costs for the trip without using the advance payments from his clients, or at the very least he should have given them written notice that he would be spending their advance payments, and would not be able to refund their money immediately should they be entitled to it. Once again, it requires no expert to find that these failures are

unprofessional and inconsistent with a minimal standard of care for a licensed professional (including an outfitter).

Even after hearing about the weather, Wilcox and his father decided to proceed with their trip, due to the investment of time and money, neither of which could be completely recovered. Frisk was patently unprepared for their arrival. He had hastily made sketchy alternative plans, which were based upon foisting a good deal of the expense of the trip (food and meals and even some transportation) onto his clients, one piece after another (first no base camp, then no reasonable quarters at his trailhead camp, then no meals, then inadequate transportation). His clients arrived with reasonable expectations that they would be taking the trip they had bargained for and paid for, and that Frisk had and would place at their disposal the experience, knowledge, requisite help, and equipment to undertake and complete that trip. Once again, it requires no expert to find that Frisk's failure to meet his clients' reasonable expectations for their trip are unprofessional and inconsistent with a minimal standard of care for a licensed outfitter.

D. Frisk's Requests for Relief for Violation of the Hearing Officer's Order Excluding Witnesses under Rule 615 of the Montana Rules of Evidence is Denied.

Frisk argued unfair prejudice because Wilcox, who was testifying in this matter via GoToMeeting, violated the Hearing Officer's pre-hearing order excluding witnesses by listening to the testimony of witness Marty Meiser, who was also testifying via GoToMeeting. Frisk asserted that this error by the Department of allowing Wilcox to hear Meiser's testimony unduly prejudiced his case because Meiser's testimony shaped Wilcox's testimony with respect to the condition of the horses. Frisk argued and moved for the testimony of both Meiser and Wilcox should be excluded.

Licensee's attorney and the Hearing Officer were aware that GoToMeeting was relatively new technology for the Office of Legal Services to use. At the beginning of the hearing, Department staff connected Marty Meiser and Christopher Wilcox, witnesses to be called to testify, to GoToMeeting, and put them on standby mode. The Hearing Officer notes that Department staff, as was stated during the informal inquiry at the time, believed that the witnesses, although connected, could neither see nor hear the proceedings. Apparently, unless one of the participants in the GoToMeeting conference takes an affirmative action to mute some participants, all connected people – participants – had the ability to listen. The Hearing Officer is satisfied that there was no malicious intent and that neither witness was aware of the exclusion of witnesses (which was announced before the GoToMeeting connections were made). The graver question is whether there was unfair prejudice.

The testimony of Marty Meiser has not proved useful in deciding this case, because there are no issues in this case that actually required her testimony. Therefore, her testimony has been disregarded in fact finding, legal analysis, and recommendations (aside from the fact that her trip was one of the 2014 trips that did not get into the wilderness area). The testimony of Michael Hayes, Ross Drishinski, and Jere Vandebos, as designated from the transcription of Frisk I, has likewise not proved useful in this case and has also been disregarded. Christopher Wilcox's testimony about horses has also been disregarded, as internally inconsistent. This ruling removes any possibility that Christopher Wilcox's unknowing violation of the exclusion order could unfairly prejudice Frisk's interests herein, because Meiser's testimony eventually did not assist in deciding issues about horses or any other contested matters. The recommended decision in that case has some peripheral bearing on this case, as another instance in which, at the hearing level, Frisk was found to have engaged in unprofessional conduct, but that does not change the absence of any basis to strike Wilcox's testimony as unfairly prejudicial due to his listening to testimony of Meiser before he testified.

The Hearing Officer also rejects Frisk's arguments that the presence of an off-camera person in the same room as the witness during video testimony, requires, without more, disregarding the testimony of the on-camera witness. The Hearing Officer, all counsel (and such support staff as were present), and licensee were able to observe as well as listen to the witnesses during their testimony. The Hearing Officer did not detect any indication of coaching or otherwise influencing of the witness by any off-camera person present in the room from which the witnesses testified, such as the witness pausing and looking in a particular direction after some of the questions were asked, or a second voice faintly heard on the audio, or the witness nodding her or his head or otherwise reacting to a communication other than the questions coming to that witness from the GoToMeeting connection. There were no indications that the witnesses were reading from cue cards. Counsel had every opportunity to question the witness about presence of other persons and who they were and what they were doing. There have been no improprieties of any kind, aside from the inadvertent violation of the exclusion order already discussed and ruled upon. Thus, there is no unfair prejudice to Frisk in denying in its entirety his motion (or motions) regarding the violation of the exclusion order.

V. CONCLUSIONS OF LAW

1. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

2. Robert Frisk failed and refused to provide his clients with the week-long horseback hunting of elk and bull mule deer that he agreed to provide and was paid to provide, without either refunding the entirety of his clients' payments to him for the trip or timely offering a reasonable alternative trip. Under the facts of this case, this was unprofessional conduct.

3. Robert Frisk apparently has failed and refused timely to refund (as he agreed to do) to William Wilcox \$2,500.00 of money paid by his clients Christopher Wilcox and William Wilcox, after he failed to provide the services he committed to provide them for a horseback hunting excursion into Montana's Bob Marshall Wilderness Area, under his 10-year federal permit that required him to be a licensed Montana outfitter. Under the facts of this case, this was unprofessional conduct. Mont. Code Ann. § 37-1-316(18).

4. Frisk has failed to complete 80% of his preplanned client trips in the Bob Marshall Wilderness Area over the entire term of his federal permit, for which an outfitter's license is required. This is not an acceptable level of professional performance for a licensed outfitter. Under the facts of this case, this was unprofessional conduct. Mont. Code Ann. § 37-1-316(18).

5. Frisk forged the signatures of his clients on an "amendment" to the two contracts he had with them, with the terms of the "amendment" substantially favoring Frisk, to his clients' detriment, as well as attempted to use his position of trust as an outfitter to his advantage and his clients' disadvantage throughout the business relationship they formed with him as a licensed outfitter. Under the facts of this case, this was unprofessional conduct. Mont. Code Ann. § 37-1-316(18).

6. Pursuant to all of the following subsections, for the protection of the public, and, pursuant to subsections 6.c., 6.d. and 6.e., for the rehabilitation of his license:

a. If Frisk paid the \$2,500.00 due to William Wilcox by December 15, 2015, and presents evidence of same to the Board before issuance of its order herein, then he has satisfactorily dealt with the refund claims of both clients. If not, the Board should order him to refund the entire \$9,000.00 paid by the clients (half to each) by money orders or cashier's checks payable to his clients and provided to the Board within 30 days after its order for such payment.

b. If Frisk has not timely paid that \$2,500.00, and does not comply with any Board refund order, his license (if not already suspended or revoked) should be suspended immediately and surrendered to the Board, to be reinstated only upon satisfaction of all conditions of his discipline, under the

above order, and subject to his satisfaction of the conditions applicable under 6.c., 6.d. or 6.e., whichever are operative at the time.

c. Frisk should be offered the courtesy of voluntarily retiring and surrendering his license, within 30 days of issuance of the Board's order, and upon his timely retirement and surrender of license, the Board will deem this matter closed (except for the refund required in (6.a.)). Should Frisk thereafter apply for a new Montana outfitter's license he will be required to meet all then current requirements, and post and maintain a \$25,000.00 surety bond to satisfy any valid claims by clients of failure to perform his obligations as a licensed professional outfitter. The Board reserves the right to require Frisk, should it be deemed appropriate, also to take and successfully complete the Board's "Advanced Outfitter" course. The bond should be released and returned if he ultimately does not obtain a new license.

d. If Frisk elects not to retire, his license should be immediately suspended and he be ordered to turn it in to the Board within 14 days after expiration of the time for his retirement. The Board should then appoint a mentor to Frisk, to work with him as described in Finding of Fact No. 49, and direct Frisk to a physician, to examine him as described in Finding of Fact No. 49, with the process by which he can end his suspension described in Finding of Fact No. 49. The Board reserves the right to require Frisk, should it be deemed appropriate, to take and successfully complete the Board's "Advanced Outfitter" course, with the assistance of his mentor.

e. Should Frisk fail fully to perform any requirement of the options he chooses and of whichever other options may be applicable at the time, but is making an effort to do so, the Board may, in its discretion, maintain his suspension and retain his license, which thereafter shall only be subject to reinstatement upon a petition by Frisk to the Board showing that he has now performed each and every requirement of his chosen path to reinstatement up through the date of his petition. The Board reserves the right to require Frisk, should it be deemed appropriate, to take and successfully complete the Board's "Advanced Outfitter" course, with the assistance of his mentor if he has one.

f. The Board should provide in its order that if Frisk fails or refuses to comply with any requirement of the Board order in this case, his license shall immediately be revoked indefinitely.

VI. RECOMMENDED ORDER

Based on the foregoing, the Montana Board of Outfitters now orders, with regard to licensee Robert Frisk, Outfitter, License No. 22:

1. For the protection of the public:

- (a) Having failed to present evidence that he timely paid \$2,500.00 to William Wilcox, Robert Frisk is hereby ordered to refund, by submitting cashier checks or money orders in the amount of \$4,500.00 each to William Wilcox and to Christopher Wilcox and deliver same to: **Montana Board of Outfitters, c/o Jennifer Schofield, Compliance Specialist, P.O. Box 200514, Helena, MT 59620-0514.** These cashier checks or money orders must be received by the Board within thirty (30) calendar days of entry of this Final Order. Should Frisk fail timely to make these refunds, his outfitter's license shall, effective the date the refunds were due to the Board, be suspended and the Board shall require his immediate surrender of his license, unless his outfitter's license is already suspended or revoked. This basis for suspension or revocation of Frisk's license can be cured by submission of the directed refunds to the Board thereafter.
- (b) It is hereby further ordered that, as an experienced outfitter of many years, Frisk can elect voluntary retirement and surrender of his license, within thirty (30) days of issuance of this order, and upon his timely retirement and surrender of license, the Board will deem this matter closed except for any required refunds under 1.a. above.

2. For the rehabilitation of the license as well as the protection of the public, should Frisk thereafter apply for reinstatement or a new Montana outfitter's license, he will be required to:

- (a) Meet all then current requirements;
- (b) Post and maintain a \$25,000.00 surety bond to satisfy any valid claims by clients of failure to perform his obligations as a licensed professional outfitter. The Board shall determine how long the bond must remain in place without any claims against it before it is released and returned. The bond should be released and returned should he ultimately not obtain a new license.

- (c) The Board reserves the right to require Frisk, should it be deemed appropriate, also to take and successfully complete the Board's "Advanced Outfitter" course.

3. It is hereby further ordered, for the rehabilitation of the license as well as the protection of the public, that if Frisk elects not to retire, his license shall be suspended and he shall be ordered to turn it in to the Board within fourteen (14) days after the deadline for his retirement. The Board shall then

- (a) Appoint a mentor to Frisk, to work with him as described in Finding of Fact No. 49;
- (b) Direct Frisk to a physician, to examine him as described in Finding of Fact No. 49.

4. Upon notification to the Board that Frisk has complied with these conditions, and with the approval of both his mentor and his physician, Frisk may file a request for the Board to reinstate his license. For the rehabilitation of the license as well as the protection of the public, upon receipt of such a request, if satisfied that all the conditions required have been met, the Board can, as it sees fit,

- (a) Require Frisk to attend a Board meeting to answer questions and discuss with the Board his request;
- (b) Notify Frisk of additional specific conditions he must meet for reinstatement; or
- (c) Reinstate his license, with or without a probationary period, as the Board may see fit, and with or without conditions Frisk must meet during his initial year of reinstatement.
- (d) The Board reserves the right to require Frisk, should it be deemed appropriate, to take and successfully complete the Board's "Advanced Outfitter" course, with the assistance of his mentor.

5. It is hereby further ordered that should Frisk fail fully to perform each and every requirement of the options he chooses and of whichever other options may be applicable at the time, the Board may, in its discretion, maintain his suspension and retain his license, which thereafter shall only be subject to reinstatement upon a petition by Frisk to the Board showing that he has now performed each and every requirement of his chosen path to reinstatement up through the date of his petition. The Board reserves the right to require Frisk, should it be deemed appropriate, to take and successfully complete the Board's "Advanced Outfitter" course, with the assistance of his mentor if he has one.

6. Should Frisk fail or refuse to complete any requirements imposed by the Board, now or hereafter, as a result of this Board decision, the Board reserves the right immediately to revoke indefinitely his license, whether suspended or not.

DATED this 3rd day of March, 2016.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ TERRY SPEAR
TERRY SPEAR
Hearing Officer

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.