

# Lawyer

THE STATE BAR OF MONTANA



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for out-of-state legal services  
driving the Montana Bar  
over the edge*

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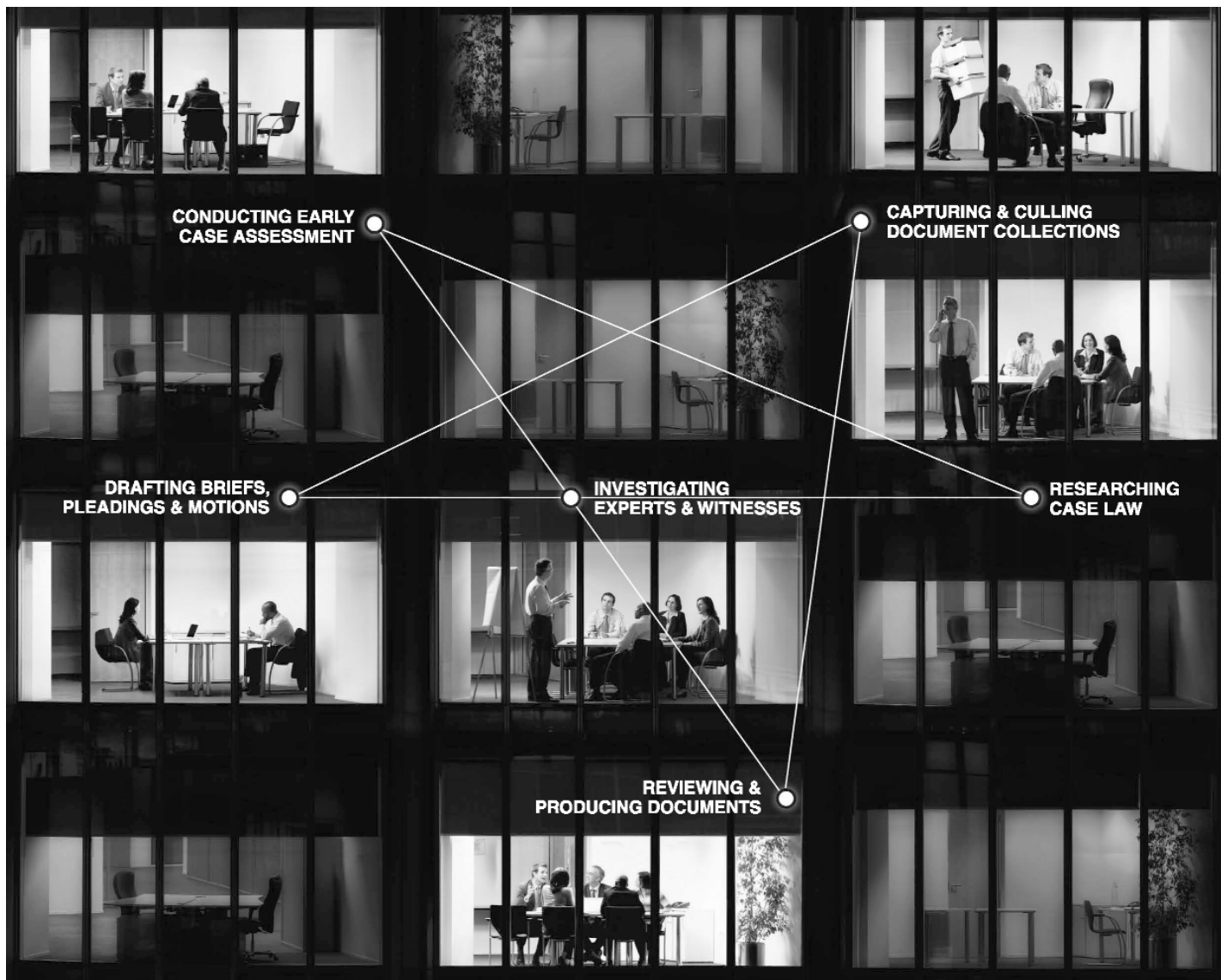
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in our midst



With federal charges in Montana. . .

## The Prisoner's Dilemma becomes a reality show

How to best serve your client



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(406) 442-7660; Fax (406) 442-7763.  
E-mail: [mailbox@montanabar.org](mailto:mailbox@montanabar.org)

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### THE MONTANA LAWYER

#### Publisher

*Christopher L. Manos, Executive Director*

#### Editor

*Charles Wood (406) 447-2200; fax: 442-7763*

*e-mail: [cwood@montanabar.org](mailto:cwood@montanabar.org)*

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## PRESIDENT'S MESSAGE

# A stockingful of energy

*Holiday thanks to lots of dedicated people*

Cynthia Smith

**A**s I sit down to write this December's President's Message, it is a few days before Thanksgiving – the beginning of a season of reflection and gratitude. So I guess it's natural to write about the people for whom I am grateful as president of the State Bar of Montana.

First of all, I am so grateful for the staff at the State Bar. They make my job seem effortless. I joke that the president's job is easy – I just do what Executive Director Chris Manos tells me to do. It's not quite that easy, but Chris is incredibly helpful to the president and all of the members of the Bar. Chris has been the executive director for nearly 10 years. He had big shoes to fill after George Bousliman retired. Chris has handled the job with excellence and made us all proud. We are very lucky to have him.

We are also lucky to have Betsy Brandborg. Betsy and the Professionalism Committee have been taking a Professionalism CLE around the state for several years now, in a program aptly called "The Road Show." This past year part of the program has included the recommendation to "Call Betsy!" whenever a lawyer faces a difficult, seemingly unsolvable ethical dilemmas. While the Professionalism Committee recommends "Call Betsy!" partly in jest, the reality is that calling Betsy is what lawyers and clients do every day.

Every day, Betsy fields calls from worried lawyers, most of whom are trying to do the right things for their clients. Betsy is always willing to lend a kind and wise ear to a problem and suggest a solution, or the right place to look for the solution. Betsy also fields calls every day from irate and disgruntled clients who are unhappy with their attorneys, or are unable to find attorneys. With an amazing supply of patience and grace, Betsy listens to the clients and then helps them to the best of her ability to find a way to work with their attorneys or to find different attorneys.

Until just a few years ago, Betsy also had the difficult, heart-breaking job of handling calls from lawyers who were

suicidal or otherwise in crisis, or from the staff of attorneys who had committed suicide. Now that we have a Law Assistance Program coordinator, Mike Larson, Betsy doesn't have to do that job any longer. We are lucky to have Mike, who is perfect for his job – he's a lawyer, a trained counselor, and a recovering alcoholic. In a few short years Mike has developed Montana's LAP program into one that is nationally recognized. I'm thankful for Mike, Betsy, and Chris, and for all of the staff at the State Bar who work so hard to help the members of our profession.

My gratitude as president goes beyond just the State Bar staff. I am also grateful to all of the members of the bench and bar who generously donate their time and energy to State Bar committees and Montana Supreme Court commissions. I'm also grateful to the lawyers who give their time to set up and maintain local bar associations. I am always so impressed at the level of dedication and commitment I see from lawyers and judges who are working to improve our profession.

Most of all, I'm grateful to members of the Bar who donate their time to the indigent and others whose access to justice is limited. This selfless contribution is so important to the people who otherwise would be unable to enforce their rights. This gratitude also extends to lawyers who work for Montana Legal Services and the Public Defender's office, or non-profit organizations that help people who can't afford to pay the market price for representation. Their jobs might not be as glamorous or lucrative as others in the legal profession, but they go out there and fight for their clients every day because they believe so fiercely in what they do.

So, thanks to all of you who donate your time and energy to those in need and to our profession. I wish you all the very best for the holidays and the New Year. ○

**A reminder:** Dec. 1 was the deadline for sending your **IOLTA compliance form** to the State Bar. If you have not done so, go to [www.montanabar.org](http://www.montanabar.org) under "Front Burner" to complete the form online or to download the form to mail in. The annual **Pro Bono Reporting Form** is there, too.

# Bar seeks to change lawyer-advertising playing field

*The State Bar of Montana and its Ethics Committee will file a petition with the Montana Supreme Court to change and clarify rules pertaining to advertising by lawyers.*

*The petition responds to concerns raised about advertising by attorneys unlicensed to practice law in Montana, ads aimed at Montana clients. Such ads are found in Montana via television and the Internet.*

*The Bar will ask the Court to revise and amend three Rules of Professional Conduct that address attorney advertising and solicitation in Montana. The proposed amendments:*

- Clarify Montana disciplinary jurisdiction over attorney advertising.
- Specifically identify types of misleading lawyer communications.
- Recognize that Montana does not have a procedure to “qualify” a lawyer referral service.

*The following memorandum from the petition explains the concerns and the petition’s background:*

## MEMORANDUM IN SUPPORT OF PETITION

### **I. A review of the advertising rules, initiated by Justice Leaphart, resulted in the State Bar Board of Trustees’ approval of three proposed amendments to the Montana Rules of Professional Conduct.**

In September 2005, [Montana Supreme Court] Justice [William] Leaphart wrote to the chair of the Ethics Committee of the State Bar of Montana, Michael Alterowitz, expressing concerns about attorney advertising in Montana:

It has come to the attention of the Court that there may be some attorney advertising over the Internet and/or television in which the source of the advertising funding is not disclosed, nor is the fact that cases will be referred to firms other than the firm appearing in the advertisement.

The Court would like the Ethics Committee to look into this and determine whether it is a concern in Montana and, if so, what, if any, amendment to the Rules of Professional Conduct would be appropriate. For reference purposes only, I am enclosing a copy of the recent rule amendments adopted by the Supreme Court of Missouri to address similar concerns.

### A. A Panel Was Convened to Examine the Issues and Develop Proposals.

### *A petition to the Montana Supreme Court*

Members of the Ethics Committee, Board of Trustees, former leadership of the Bar and the executive director of the Montana Trial Lawyers met in 2006 to examine the issue.<sup>1</sup> Jay Westermeier, a nationally recognized expert on computer law, information technology,

licensing, and electronic commerce also participated in the meeting. Mr. Westermeier provided a comprehensive overview of how other states are addressing the myriad issues presented with advertising, Internet, technology, and multi-jurisdictional practice issues. Justice Leaphart’s inquiry also presented issues involving confidentiality, conflicts, record keeping, labeling, content restrictions, choice of law, information security, objective consent, and unauthorized practice.

Mr. Westermeier emphasized that the group assembled could not “put a Montana boundary on the Internet.” The objective, he said, was to develop rules that 1) adapt to technological developments; 2) avoid constitutional challenges; and 3) avoid anti-trust complaints. He stated that other state bars’ attempts to accomplish these objectives, including rules adopted by the state bars of Texas, Florida, Louisiana, New Jersey, and New York, have run afoul of the Federal Trade Commission with their advertising rules. The amendments adopted by the Supreme Court of Missouri have not.

A working group<sup>2</sup> was assigned to develop proposed language to address the Court’s concerns within constitutional and anti-trust perimeters. The full Ethics Committee considered the proposals and voted unanimously to submit the proposed amendments to the State Bar Board of Trustees for its consideration. The proposals were initially submitted to the Board of Trustees in December 2007, at which time the trustees requested additional information. The proposals were included on each Board agenda in 2008, but postponements resulted in final Board action in September 2008 at the State Bar’s Annual Meeting in Butte.

### B. The Three Proposed Amendments 1) Clarify Montana’s Jurisdiction Over Advertisement and Solicitation; 2) Refine and Provide Examples of Misleading Communication; and 3) Bring Montana’s Lawyer Referral Provision Into Line With Current Montana Resources.

*1. The first proposed amendment establishes Montana disciplinary jurisdiction over attorneys who advertise, solicit, or offer legal services in Montana.*

Rule 8.5 of the Rules of Professional Conduct is titled “Jurisdiction and Certification.” The proposed amendment,

interlineated, reads:

A lawyer who is not an active member in good standing of the State Bar of Montana and who seeks to practice in any state or federal court located in this state pro hac vice, by motion, or before being otherwise admitted to the practice of law in this state, shall, prior to engaging in the practice of law in this state, certify in writing and under oath to this Court that, except as to Rules 6.1 through 6.4 [the rules on public service and pro bono], he or she will be bound by these Rules of Professional Conduct in his or her practice of law in this state and will be subject to the disciplinary authority of this state. A copy of said certification shall be mailed, contemporaneously, to the business offices of the State Bar of Montana in Helena, Montana.

A lawyer not admitted to practice in this state is subject to the disciplinary authority of this state for conduct that constitutes a violation of these rules and that: (1) involves the practice of law in this state by that lawyer; or (2) involves that lawyer holding himself or herself out as practicing law in this state; ~~or~~ (3) advertises, solicits, or offers legal services in this state; or (4) involves the practice of law in this state by another lawyer over whom this lawyer has the obligation of supervision or control.

2. *The second proposed amendment identifies with specificity what constitutes misleading lawyer communication.*

Rule 7.1 is titled “Communications Concerning a Lawyer’s Services.” The proposed amendments to the relatively short current Rule include 11 specific categories of misleading communications:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false ~~or misleading~~ if it contains a material misrepresentation of fact or law. Misleading communications include, but are not limited to, those that

(a) omit a fact as a result of which necessary to make the statement considered as a whole not is materially misleading; -

(b) are likely to create an unjustified expectation about results the lawyer can achieve;

(c) proclaim results obtained on behalf of clients, such as the amount of a damage award or the lawyer’s record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;

(d) state or imply that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(e) compare the quality of a lawyer’s or a law firm’s services with other lawyers’ services, unless the comparison can be factually substantiated;

(f) advertise for a specific type of case concerning which the lawyer has neither experience nor competence;

(g) indicate an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such fact;

(h) contain any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payment has been made for the testimonial or endorsement;

## Buxom nurses, ambulance chasers

From the **Chicago Tribune**

Boca Raton, Fla.-based firm **WhoCanISue.com** has scores of billboards and bus-shelter signs dominating the local landscape. The service matches website visitors with lawyers. Choose your complaint from a drop-down menu — nursing home abuse, for example — and then a sub-category, such as bedsores, dehydration, or falls and fractures. Plug in your ZIP Code and a page or more of lawyers appears.

But critics say **WhoCanISue** degrades the legal profession and often steers the public to lawyers who operate under a business model of “bring in as many cases as you can and settle them.”

Others, including those who advertise there, say it’s just another way to attract

clients.

“I’m getting probably twice as many phone calls,” said Martin Saenz, a Miami labor and employment lawyer who has been advertising on the site for just more than a month.

But other lawyers object to the concept. **WhoCanISue**’s tactics are “egregious” and “directly appealing to people who want to be litigious,” said West Palm Beach personal injury attorney Gary Lesser. “There are real people who are hurt, who need lawyers,” he said. “**WhoCanISue.com** is part of an emerging trend. They are not a law firm, but a referral agency.”

Lesser is vice chairman of the Florida Bar’s advertising committee, which governs lawyer advertising by reviewing and monitoring ads. Complicating matters is

that the bar only regulates lawyers, not referral services such as **WhoCanISue.com**. If a lawyer who advertises on it

breaks a bar rule — for instance, promising a client a specific outcome such as a monetary judgment — he can be fined, reprimanded or even suspended.

**WhoCanISue** was launched in 2008 by Curtis Wolfe, 46, a former in-house counsel at a large Miami firm. He’s well aware that his site’s name might offend. “It’s definitely meant to be edgy,” he said.

The site also advertises in other states, including California, and is projected to do \$10 million-plus business in 2010. TV spots feature buxom nurses and a pack of lawyers chasing an ambulance.

Wolfe says the site makes it very clear: “**WhoCanISue** doesn’t represent you. You’re represented by whoever you hire as an attorney.” ○

(i) contain any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation;

(j) provide an office address for an office staffed only part-time or by appointment only, without conspicuous identification of such fact; or

(k) state that legal services are available on a contingent or no-recovery-no-fee basis without stating conspicuously that the client may be responsible for costs or expenses, if that is the case.

This language adopts in large part Missouri Rule 7.1, excepting the Missouri rules on advertising and solicitation, which contain additional regulatory mandates within Rule 7.2 [Advertising] and Rule 7.3 [Direct Contact with Prospective Clients] that are not included in the State Bar's proposal. The State Bar specifically chose to limit the regulatory mandates to those in this petition, believing its recommendations address the challenges presented in Justice Leaphart's letter.

3. *By eliminating language, the third proposed amendment recognizes that Montana does not have a procedure to "qualify" a lawyer referral service.*

A number of more densely populated states have for-profit "qualified lawyer referral services" that are managed by businesses, churches, and other entities. The State Bar of Montana has no resources to develop a qualification procedure and oversight mechanism for for-profit entities, nor does it want current rule language to be misread to require it to accept another state's qualification of a for-profit lawyer referral system.

The State Bar currently operates its own not-for-profit Lawyer Referral & Information Service (LRIS). The State Bar's LRIS responds to more than 5,500 calls from clients a year. Approximately 100 lawyers are available for referrals. Attorneys on the State Bar's referral service must be active members of the State Bar of Montana and carry malpractice liability insurance. This referral service is free to attorneys in their first year of practice, \$125 for attorneys in practice for less than five years and \$225 for those in practice longer than five years. Most state bars charge a percentage of the fee earned by the attorney for the referral. Montana State Bar does not take a percentage of the fee earned, reasoning that to do so would have a dampening effect on attorney participation. Also, profits typically do not exceed the increased costs of administering such a system (as experienced by the State Bar when it previously used the percentage system).

The State Bar proposes to eliminate from current Rule 7.2, titled "Advertising," the language incorporating qualified lawyer referral services. The Montana Rule 7.2 currently is

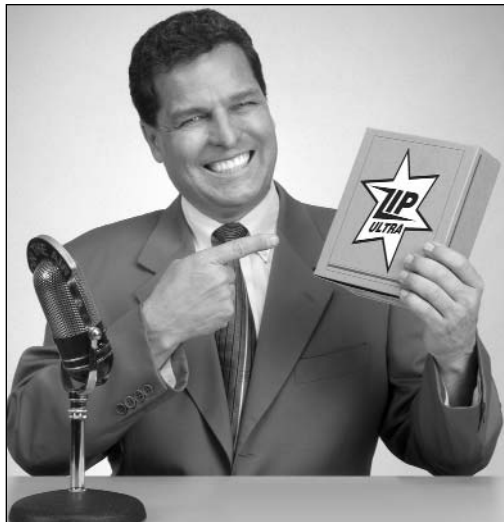
not identical to the ABA's Model Rule<sup>3</sup>, which allows other referral fees in certain situations. The State Bar proposal intends to clearly establish that for-profit referral fees are simply not permitted:

(a) Subject to the requirements of Rules 7.1 [Communication Concerning a Lawyer's Services] and 7.3 [Direct Contact with Prospective Clients], a lawyer may

advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this rule; (2) pay the usual charges of a legal service plan or a not-for-profit ~~or qualified~~ lawyer referral service. ~~A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;~~ and (3) pay for a law practice in accordance with Rule 1.19 [Sale of a Law Practice].

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.



## II. This Court has authority to revise the Rules of Professional Conduct.

The current Rules of Professional Conduct were amended by this Court in February 2004, citing Article VII, Section 2(3) of the 1972 Montana Constitution giving the Supreme Court the authority to make rules governing "admission to the bar and the conduct of the members." *In Re: Revising the Montana Rules of Professional Conduct*, No. 03-264. The Rules of Professional Conduct are the core of attorney regulation and fall squarely within the purposes described in the Court's order unifying the Bar:

The purposes of the Unified Bar of Montana shall be to aid the courts in maintaining and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high standards of integrity, learning, competence, public service, and conduct; to safeguard proper professional interests of members of the bar; to encourage the formation, maintenance and activities of local bar associations; to provide a forum for the discussion of and effective action concerning subjects pertaining to the practice of law, the science and jurisprudence and law reform and relations of the bar to the public; and to

**More ADVERTISING, Page 27**

# The Prisoner's Dilemma becomes the Lawyer's Dilemma

To be a zealous advocate or a Judas goat?

By **Daniel Donovan** and **John Rhodes**  
Montana attorneys

In law school we were taught that federal courts are “courts of limited jurisdiction.”<sup>1</sup> However, with the so-called War on Drugs<sup>2</sup> and decisions such as *Gonzales v. Raich*,<sup>3</sup> most, if not all felony drug cases in Montana can be prosecuted in federal court as well as in state court. Over the years, various presidents, senators, congressmen, and attorney generals have escalated the War on Drugs.<sup>4</sup>

Until the mid-1990s, most methamphetamine (“meth”) cases were brought in federal court in Montana.<sup>5</sup> Later, after the use and distribution of meth spread to epidemic levels, the federal courts could not handle the volume, and a significant number of meth and other drug cases (e.g., cocaine and marijuana) began to be prosecuted in the Montana state courts.<sup>6</sup>

As a result, there is a real possibility, if not a good probability, that a drug case initially prosecuted in Montana state court in 2009 will end up, sooner or later, in federal court. Under the dual sovereignty doctrine,<sup>7</sup> there is no double jeopardy protection for a case going from state court to federal court – thus a state prosecution could become a federal prosecution at any time, including after the entry of judgment in state court. There is, however, statutory double jeopardy protection that prevents a case from going from federal court to a Montana

state court.<sup>8</sup> The only “prohibition” in federal court is the toothless “Petite Policy,” which leaves the federal prosecution decision to the subjective determination of the federal prosecutors,<sup>9</sup> free from judicial review.<sup>10</sup>

Because of mandatory minimum sentences, punishment in a federal drug case is much more severe than the penalty imposed in a state case.<sup>11</sup> While a first-time, non-violent drug offender might get probation in state court or even a deferred imposition of sentence, the same person in federal court is likely to be sentenced to at least five years in prison with no parole.<sup>12</sup>

The federal drug sentences are codified at 21 U.S.C. § 841 and contain a series of graduated mandatory minimum sentences.<sup>13</sup> Pursuant to 18 U.S.C. § 3624(b), a federal prisoner receives good-time credit of 54 days per year beginning at the end of the first year. Thus, a federal inmate is not released from the custody of the Bureau of Prisons until he or she has served at least 85 percent of the sentence. Because the Bureau of Prisons calculates good-time credit based on “time served” rather than on the “term of imprisonment,” it effectively reduces the potential credit of 54 days per year to 47 days per year.<sup>14</sup>

When triggered by specified drug quantities, federal sentencing statutes require federal judges to impose mandatory minimum sentences.<sup>15</sup> Mandatory minimums came out of the

Anti-Drug Abuse Act of 1986, which was pushed by the then-House Speaker Thomas P. “Tip” O’Neill (D-Mass.) as Bostonians reeled over the cocaine overdose death of Len Bias, the University of Maryland basketball star who had been the Number 1 draft choice of the Boston Celtics.<sup>16</sup> No hearings were held on this idea.<sup>17</sup> No experts on the relevant issues, no judges, no one from the Bureau of Prisons or from any other office in the government provided advice on

## ABOUT THE AUTHORS

**DANIEL DONOVAN** (U.C. Berkeley, BS '71; Hastings College of the Law, JD '76) of Great Falls, has been defending the citizen, as well as non-citizen, accused of crime in the state and federal courts as public defender, court-appointed counsel, and retained counsel for more than 33 years. He successfully briefed and argued a case before the U.S. Supreme Court, *Old Chief v. United States*, 519 U.S. 172 (1997). Mr. Donovan was awarded the Charles F. (Timer) Moses Award by the State Bar of Montana in 1997 in recognition of his practice of criminal defense law in Montana.

**JOHN RHODES** graduated from DePauw University (summa cum laude) and Harvard Law School (cum laude). He has worked as an assistant federal defender with the Federal Defenders of Montana for more than a decade. During that time, he has spoken at seminars across the country, served as special counsel for the U.S. Sentencing Commission, and testified at hearings before the Sentencing Commission and Congress.



the idea before it was rushed through committees and into law.<sup>18</sup>

For federal defense attorneys, your client, particularly if he is a first-time offender, typically reacts to this news of multi-year, perhaps decades-long, sentences in federal court with shock and disbelief and frequently distrusts you.<sup>19</sup> Your client's parents and family members are heartbroken upon hearing this information.

What can the family do? There is one organization – Families Against Mandatory Minimums – which has been lobbying in Washington, D.C. for the repeal of the mandatory minimum sentencing statutes.<sup>20</sup>

When firearms are combined with drugs, the consequences are even more dire. At a minimum, if your client possessed one or more firearms at the time of the offense, the Guidelines' sentencing range will be higher.<sup>21</sup> Worse yet, the government is likely to add a count of "using or carrying a firearm in commission of a drug-trafficking crime,"<sup>22</sup> which adds, at a minimum, a mandatory five-year sentence consecutive to the sentence for the drugs, and, like the statutory framework for drugs, mandates a series (beginning with five years) of graduated mandatory minimums, for using or carrying a firearm during a drug-trafficking offense.<sup>23</sup>

Thus, the Montana state court criminal defense practitioner, including full-time public defenders and contract counsel, must have some understanding of the federal practice, procedures, and sentencing regime relating to drug offenses. It is no longer acceptable to tell your client, "well, I just do not practice in federal court," or "just keep your mouth shut."<sup>24</sup> If you do nothing, give your client no advice, or simply tell your client not to talk with law enforcement, your client could suffer adverse consequences.

The harsh consequences of federal narcotics prosecutions demand aggressive, proactive representation from all attorneys assisting defendants with drug cases (or even potential cases). This standard applies whether the client is subject to an investigation (or even thinks that may occur), has been arrested, or has been charged by the state or the federal government. In these circumstances, the attorney must familiarize himself with the applicable law reviewed in this article, particularly conspiracy charges, prosecutorial policies, mandatory minimum sentences, cooperation, sentencing statutes, and the United States Sentencing Guidelines. Without an understanding of this law, the lawyer cannot effectively represent the client.

Often, even effective representation cannot prevent severe sentences for the client. Complacent representation exacerbates the result, however. An individual and his family, and arguably communities and our country, pay the long-term price.

That price reflects that criminal prosecutions are a human endeavor with dramatic consequences on individuals. Human decisions, collectively by the government, the courts, the defense counsel, and the defendant dictate those consequences. And, of course, legislative decisions frame the decisions that play out in individual cases.

The Prisoner's Dilemma is an academically developed game theory that systemizes the cooperation decision faced by defendants. In short, The Prisoner's Dilemma objectively

demonstrates that the best decision is for no one to cooperate – every defendant should exercise his right to remain silent and not assist the government with prosecuting other individuals. In the aggregate, such individual decisions would result in fewer prosecutions and ultimately reduced aggregate sentences.

Of course, defendants do not make aggregate decisions. They decide based on their circumstances. As previewed above, in federal court, those circumstances include strict mandatory minimum sentences, and only one way to receive a non-mandatory minimum sentence – cooperation. That is the dilemma. This article explores the interplay between the law surrounding Montana federal drug prosecutions and The Prisoner's Dilemma.

## **Conspiracy: the darling of the federal prosecutor's nursery**

Every federal criminal defense lawyer soon learns what most civil practitioners and many state criminal defense lawyers do not know: a federal conspiracy is the easiest crime for the government to charge and an even easier crime for the government to prove. The government need only prove two elements: (1) that there was an agreement between two or more persons to commit a crime; and (2) that the defendant became a member of the conspiracy knowing at least one of its objectives and intending to accomplish it.<sup>25</sup> In a drug conspiracy, the government is no longer required to prove an overt act.<sup>26</sup> Not surprisingly, the crime of conspiracy has long been called the "darling of the modern prosecutor's nursery."<sup>27</sup>

Although often criticized,<sup>28</sup> the crime of conspiracy has survived the test of time. The U.S. Supreme Court has re-emphasized that:

[T]he essence of a conspiracy is "an agreement to commit an unlawful act." That agreement is "a distinct evil," which "may exist and be punished whether or not the substantive crime ensues." The conspiracy poses a "threat to the public" over and above the threat of the commission of the relevant substantive crime – both because the "[c]ombination in crime makes more likely the commission of [other] crimes" and because it "decreases the probability that the individuals involved will depart from their path of criminality."<sup>29</sup>

In the typical Montana federal drug conspiracy, Dick and Jane are local meth users who agree to distribute meth to support their habits. From the moment of agreement, they can be found guilty of conspiracy, even if they never sell the drug.<sup>30</sup> Circumstantial evidence alone can prove a conspiracy.<sup>31</sup> Uncorroborated testimony from a supposed co-conspirator alone can prove a conspiracy.<sup>32</sup> Relatedly, even if they never acquire any meth, they can be liable for the conspiracy, because "impossibility" is not a defense.<sup>33</sup> Relatedly, Jane can be liable for other crimes that Dick commits to further the conspiracy's objective, such as using a firearm.<sup>34</sup> Jane cannot evade liability by staying home on the day of the drug deal because a conspirator must take an affirmative step to prove "withdraw."<sup>35</sup> Even if she was not present and knew nothing

about the particulars of what Dick might have done, Jane’s sentence can be increased based on Dick’s activities under the relevant-conduct section of the Sentencing Guidelines.<sup>36</sup>

More often than not, more than two people are charged in a Montana drug conspiracy – from the out-of-state supplier at the top, to the lower-level addict/delivery person (“mule”) at the bottom.<sup>37</sup>

**The lawyer’s call to action**

Sometimes, a lawyer will get a call from a potential client who has been contacted by law enforcement and asked to “cooperate” with law enforcement.<sup>38</sup> More often than not, you get a call from someone already arrested and in custody. If the initial charges are filed in Montana state court, or if the client has not already cooperated with law enforcement, the lawyer will, at some point, need to advise the client as to whether he or she should cooperate.

Quite simply, when Dick conspires with Jane, Dick can turn around and “flip,” or implicate, Jane to law enforcement in the hope of receiving some benefit or reward. The federal mandatory minimums are an effective persuader because (almost) the only way to be sentenced below a statutory mandatory minimum sentence is to cooperate with the government.<sup>39</sup>

The possible benefits to Dick include a reduced sentence, no filing of federal or state charges, or no filing of certain federal charges, particularly the mandatory minimum drug or gun charges. Although Dick may not benefit by cooperating, or if Dick decides not to cooperate, Dick may suffer the consequences if Jane or someone else cooperates and Dick does not cooperate. What decision should Dick make? What advice should the lawyer give Dick?

**The Prisoner’s Dilemma**

The Prisoner’s Dilemma is a game that was invented at Princeton’s Institute of Advanced Science in the 1950s.<sup>40</sup> Part of the so-called “game theory,” Prisoner’s Dilemma is a game studied by academics in a variety of disciplines, including mathematics, physics, biology, sociology, political science, and law.<sup>41</sup>

In short, Prisoner’s Dilemma is a type of “non-zero-sum game”<sup>42</sup> in which two players may each cooperate with or betray the other player. From the participants’ perspective, it has been shown there is no predictable outcome – the outcome from each player’s decision depends on the decision adopted by the other player.<sup>43</sup> However, no matter what the other player does, one player will usually get a greater benefit by betraying or defecting. That is the best under isolated selfishness.<sup>44</sup> Yet, the best outcome for everyone requires that no one defect.<sup>45</sup> That is the dilemma.<sup>46</sup>

The name of this game was derived from the following situation: Dick and Jane are arrested under suspicion of having committed a crime together. However, the police do not have sufficient proof to convict either of them. Dick and Jane are kept isolated from each other in the jail. The officers visit each one individually and offer a deal: the one who is willing to provide evidence against the other will go free or get a lighter sentence.

If neither accepts the offer, Dick and Jane are cooperating

with each other against law enforcement and both will receive less punishment because of a lack of proof. Thus, they both receive light sentences. However, if Dick betrays Jane by confessing to the police and implicating Jane, Dick, as the defector, will gain more since he is freed sooner. On the other hand, Jane, as the one who remained silent, will receive the full punishment, since she did not help the police, and there is sufficient proof against her based on Dick’s cooperation.

If both Dick and Jane betray each other, both will be punished but the punishment will be less severe than the punishment received if one had betrayed and the other had remained silent. Each prisoner has a choice between only two options – talk or keep quiet. Neither can make the best decision without knowing what the other will do.

The following chart illustrates the Prisoner’s Dilemma:

	Jane stays silent	Jane betrays
Dick stays silent	Each serves 6 mos.	Dick serves 10 yrs. Jane goes free
Dick betrays	Dick goes free Jane serves 10 yrs.	Each serves 5 yrs.

So, from the point of view of Dick and Jane, the choices are:

- 1. If I snitch on you, but you don’t snitch on me, I win very big and you lose very big; I go free and you serve 10 years in prison.
- 2. If you snitch on me and I don’t snitch on you, I lose very big and you win very big; I serve 10 years in prison and you go free.
- 3. If we do not snitch on each other, we both suffer very mild punishment; we serve 6 months in jail.
- 4. If we both snitch on each other, we both suffer medium punishment; we serve 5 years in prison.

The dilemma arises because both defendants selfishly care about one thing – minimizing their own prison terms. Yet, the best possible outcome requires that neither defendant snitch. And each individual must choose without knowing what the other has chosen. One commentator has stated that “[h]uman nature being what it is . . . both parties will always defect, thus [getting a] worse result than they would if they always cooperated.”<sup>47</sup>

Normally, Dick and Jane would want to know or at least predict what the other will do. However, as is usually the case in the real world, each must decide whether to cooperate without knowing what the other has decided to do. Obviously, if Dick knew that Jane would stay silent, Dick would stay silent to get the minimum prison time. But Dick takes a big risk if he stays silent and Jane cooperates. Thus, betraying, i.e., “snitching on the other guy,” becomes the winning or “dominant strategy.”<sup>48</sup> Few would want to risk the longer prison sentence

of 10 years. But, by selfishly playing the odds, Dick and Jane are worse off than if they had both remained silent.<sup>49</sup>

What happens if the game is played again and again against the same person? “Snitch on the other guy” does not continue to be the best strategy. The best strategy for a repeating game (called the “Iterated” Prisoner’s Dilemma) is not “snitch on the other guy” and is not “always cooperate with the other guy,” either.<sup>50</sup> The dominant or winning strategy is “Tit-for-Tat:” you do to your opponent what he did to you on the previous turn.<sup>51</sup> If he cooperated, you cooperate. If he snitched on you, you snitch on him back. Over millions of computer runs, Tit-for-Tat “wins” every time – that is, it results in the least prison time for the player who uses it.<sup>52</sup> If Dick and Jane are repeat offenders, they may experience the Iterated Prisoner’s Dilemma.

What if others join the conspiracy? Certain friends and acquaintances of Dick and Jane – such as Sally, Zeke, and Puff – may become involved. With more than two conspirators, the two-person Prisoner’s Dilemma no longer applies. Fortunately, in 1973, researchers developed a prisoner’s dilemma game involving multiple players.<sup>53</sup>

The “N-person Prisoners’ Dilemma” is an interactive decision involving three or more players who each face a choice between a cooperative strategy and a non-cooperative or defecting strategy.<sup>54</sup> Cooperative games involve binding commitments; non-cooperative games do not permit binding commitments.<sup>55</sup> Each one gains a greater benefit by choosing defection no matter what choices other individuals may take. Thus, taking defection is a rational behavior of each individual. If all individuals take defection, however, all are worse off than in the case where they all cooperate.<sup>56</sup> Therefore, the N-person Prisoners’ Dilemma demonstrates that individuals’ rational behavior, i.e., “snitch on the other guy,” can induce a mutually undesirable outcome, i.e., longer prison sentences for everybody.

Applying the lessons learned from the Prisoner’s Dilemma game to the real life context of the drug scene and the federal courts in Montana, we conclude what experience teaches: most of our clients will choose to cooperate (with the government) rather than remain silent to help their co-conspirators. Remaining silent exposes our clients to longer prison terms but prevents betrayal by the government if the government refuses to ask the courts to reward the cooperation. Those who snitch might save themselves some time in prison if both the government and the court honor the cooperation. Those who keep quiet will likely serve longer prison sentences. Mandatory minimum sentences ensure such long sentences.

Defendants rarely think in the abstract, let alone consider that the Prisoner’s Dilemma demonstrates that cooperation leads to more prosecutions and higher aggregated sentences. Instead, they think about themselves and their families. Experience teaches us – the defense bar, prosecutors, and the court – that faced with the Prisoner’s Dilemma, defendants cooperate in the hope of receiving a reduced but still stiff sentence. The Prisoner’s Dilemma mirrors reality.

## The minefield of federal laws, rules, procedures, and guidelines

With all the federal laws, rules, procedures, and guidelines, is there any longer an opportunity for creative and effective lawyering in the defense of federal narcotics cases in Montana? And how does The Prisoner’s Dilemma play out in Montana federal prosecutions?

The typical federal narcotics case in Montana involves methamphetamine.<sup>57</sup> These cases typically involve the following commonalities. The quantity usually triggers a five-year or ten-year mandatory minimum sentence, unless the client has a prior conviction for a felony drug offense that has become final, which enhances the mandatory minimum.<sup>58</sup>

Your client has confessed, or, at a minimum given an inculpatory statement without a lawyer. So your client has no immunity protection and no protection from application of the Sentencing Guidelines’ provisions.<sup>59</sup> One or more co-defendants or cooperating witnesses have given statements against your client (as in The Prisoner’s Dilemma). There are recordings of drug transactions and/or telephone conversations between your client and a confidential informant. There are one or more controlled – i.e., law enforcement-monitored – drug transactions. Phone records, wire transfers, hotel receipts, drug ledgers, and other documentary evidence further implicate your client. Typically, if your client decides to take the case to trial, the evidence against the defendant is so strong that there is generally little hope for an acquittal. Your pre-trial investigation might reveal some legal issues to support a motion to suppress evidence or a statement, but the likelihood of success on any such motion is slim. Investigating snitches for cross-examination and impeachment is crucial.<sup>60</sup> The situation is further complicated by the so-called “rocket docket,” i.e., trial within 30 to 70 days of arraignment; typically pretrial motions are due about two-to-three weeks after arraignment.<sup>61</sup>

As to punishment, your client is subject to the “advisory” U.S. Sentencing Guidelines<sup>62</sup> as well as the mandatory minimum sentences prescribed by statute.<sup>63</sup> The applicable Guidelines’ range is based primarily on the type and quantity of drugs.<sup>64</sup> The greater the quantity of drugs attributable to your client, the higher the Guidelines’ sentencing range.<sup>65</sup> The drug guideline is determined not merely by reference to the offense of conviction, but by including all of your client’s “relevant conduct.”<sup>66</sup> Relevant conduct includes conduct of co-conspirators that is “reasonably foreseeable” and within the scope of the agreement, although the court must make individualized findings of foreseeability as to each conspirator.<sup>67</sup>

The Guidelines provide that “[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.”<sup>68</sup> Thus, the more prior convictions, the higher the Guidelines’ sentencing range.<sup>69</sup> If your client has a prior state or federal felony drug conviction, the U.S. attorney will seek to double the mandatory minimum from 5 to 10 years or from 10 to 20 years.<sup>70</sup> If there are two prior convictions, a life sentence results.<sup>71</sup> If your client has two or more prior drug or violent crime convictions,

**More PRISONER’S DILEMMA, Page 29**

# Another world-class athlete

*Bozeman lawyer is a top 'master' in basketball*

*In August, The Montana Lawyer brought you a story about Monica Tranel, a Montana attorney who won world championships as a rower, and competed in the Olympics. Here, we present another Montana attorney who is playing sports at world-championship levels.*

By **Charles Wood**  
The Montana Lawyer

**T**erry Schaplow has a solo practice in Bozeman. He is 56 years old, and still plays basketball. World championship basketball.

In late October, Mr. Schaplow returned from Sydney, Australia, where his team won the over-55 age group in the World Masters Games basketball tournament.

He was not coach of the team, nor counsel, nor even "of counsel." He is a playing 6-foot-3 guard. He apparently still has all the moves.

Mr. Schaplow, who played for the Montana State University Bobcats from 1971 to 1974, has competed in three of the annual Masters Games since 2002, winning the basketball world championship all three times in his age category:

- In Melbourne, Australia, in 2002, where his team won the gold medal in the 45-plus age group.
- In Edmonton, Alberta, in the 50-plus group in 2005.
- The gold-medal win in Sydney in October.

He already has been invited to play in the next Games in Turin, Italy.

The World Masters Games host the best athletes in the world over age 40 to compete in the same events that are held at the Olympic Games. More than 28,000 athletes registered to compete in the Sydney Masters Games this year.

**MR. SCHAPLOW HAS BEEN** on seven National Masters basketball teams since 2002. Four of those week-long national



Terry Schaplow, far left, is shown with some of his mates on the 2007 national champion team (55-plus age group) from Kentucky.

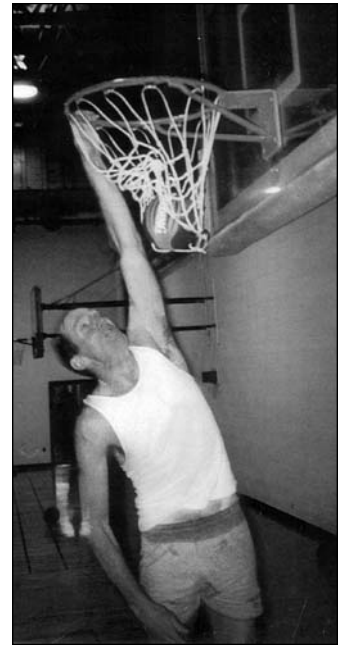
tournaments in Coral Springs, Fla., saw his teams come away with the gold medal – once in the 45-plus age group, twice in the 50-plus division, and once in the 55-plus group. In those national tournaments, Mr. Schaplow was named to the All-Tournament Team twice.

He was on the 2009 championship team at the Spokane three-on-three Hoopfest, the largest three-on-three tournament in the world. He and his teammates won the Hoopfest in 2007, too.

"I have discovered that the key to winning a national championship is to get on a team with good players, to make up for my lack of skills," Mr. Schaplow told *The Montana Lawyer*.

**IT WAS AT THE** Coral Springs tournaments that Mr. Schaplow was recruited for the World Masters Tournaments by "a guy in Chicago" who builds the teams and pays their way to wherever in the world they play.

For an old duffer, Mr. Schaplow is sharing the boards with some of the world's best basketball players for their ages, including former NBA players like Tim Hardaway of the Golden State Warriors and Glen Rice of the Los Angeles



Schaplow shown above when he was 44 and could still dunk. He is 56 now and can no longer dunk, "but can still get the rim with both hands," he said. "There are not too many 44-year-old, 6-foot-3 white guys that can still dunk," he said.

Lakers. In his tournament travels, he has been roommate with Greg Kite, former player of the Boston Celtics and Orlando Magic, and with John Gianelli, formerly of the New York Knicks.

**AFTER PLAYING** for the Bobcats in '71-'74 and then graduating from the Willamette University College of Law in Oregon, Mr. Schaplow mostly played in pickup games with college kids at MSU while getting his law practice under way. He also played in the Big Sky Games and in a three-on-three tournament in Polson.

More recently, after he joined the World Masters circuit, he organized a three-on-three tournament at a State Bar Annual Meeting in Butte.

"I have never played professional basketball," he said, "and my body is just not breaking down like those (professional) guys."

So if a middle-aged guy invites you to join a pick-up game at the next Annual Meeting, get his name first. ○

## STATE BAR NEWS

# New set of Criminal Jury Instructions

A revised and expanded set of the Montana Criminal Jury Instructions will go on sale in December.

The 2010 Instructions, authored by the Commission on Montana Criminal Jury Instructions and published by the State bar of Montana, is an all-new manual, not just an update of the 1999-2003 Criminal Jury Instructions. At 530 pages and 10 chapters, the 2010 set will have more and newer instructions, which have been renumbered into a consecutive sequence.

The Instructions will be sold by the State Bar on a compact disk that contains the Instructions in Word format and .pdf format. The Word format allows each instruction to be edited by lawyers and legal assistants to fit the current criminal case (even WordPerfect users will have no trouble editing and printing the documents). The .pdf version is not editable so as to preserve the original documents. The .pdf version, however, allows users

## Lawyer-discipline case law updated

The Office of Disciplinary Counsel's annotated manual of lawyer-discipline cases in Montana has been updated to include cases through 2008.

The manual, titled "Public Discipline Under the Montana Rules of Professional Conduct," can be purchased on compact disk at the State Bar of Montana Bookstore (see Page 16) for \$35.

to jump straight to specific instructions from the indexes, and will allow users to fill in the blanks when forms are presented.

The price of the CD has not been set, but will be announced at [www.montanabar.org](http://www.montanabar.org) when the CD goes on sale.

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**Fundamentals of Mediation** 22.50 CLE credits, including 2.50 Ethics (no SAMI) credits. Presented by Montana Mediators, (406) 839-3323

December 10-11 Billings – MSU Billings campus

**Divorce Mediation** 15.0 CLE credits, including 1.50 Ethics (no SAMI) credits. Presented by Montana Mediators, (406) 839-3323

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**Insurance Coverage Litigation** 6.0 CLE credits, including 1.0 Ethics (no SAMI) credit. Presented by the National Business Institute, (800) 930-6182

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**State Ethics Law** 3.0 CLE credits, including 3.0 Ethics (no SAMI) credits. Presented by the state Personnel Division, (406) 444-3985

January 8 Glasgow – Cottonwood Inn

**The Glasgow CLE: Land Use, Ethics/SAMI, Family Law, Mental Competency, Wind Power** 6.0 CLE credits, including 2.0 Ethics credits (1.0 of which meets the SAMI requirement). Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. See program and registration details at [www.montanabar.org](http://www.montanabar.org)

January 15-17 Big Sky – Huntley Lodge

**Annual CLE & Ski** 10.0 CLE credits, including 3.0 Ethics credits. Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. See program and registration details at [www.montanabar.org](http://www.montanabar.org)

## All other CLEs

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## Other web & phone CLEs for Montana credit are:

■ For the State Bar of Montana's approved online CLEs, go to [www.montanabar.org](http://www.montanabar.org) and click CLE / Online CLE Courses

■ MTLA's SeminarWeb Live! Seminars at [www.seminarweblive.com/mt/index.cfm?showfullpage=1&event=showAppPage&pg=semwebCatalog&panel=browseLive](http://www.seminarweblive.com/mt/index.cfm?showfullpage=1&event=showAppPage&pg=semwebCatalog&panel=browseLive)

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## STATE BAR CALENDAR

### December 1

**Deadline for IOLTA compliance forms and pro bono survey** – must be completed online or returned by mail

### December 3

**Board of Trustees Orientation & Budget Discussion**, 3 p.m., State Bar Offices, Helena

**State Bar Executive Committee** meeting, 7 p.m., Helena

### December 4

**State Bar Board of Trustees** meeting, 9 a.m., Great Northern Hotel, Helena

### December 17

**Technology Committee** conference call, 10 a.m.

### December 25 & January 1

**State Bar offices closed** on Christmas Day and New Year's Day only.

### January 8

**General Practice CLE**, Cottonwood Inn, Glasgow

**State Bar Executive Committee** meeting, 10 a.m., State Bar Offices, Helena

### January 10

**Content & advertising deadline** for February issue of *The Montana Lawyer* magazine.

### January 15-17

**Annual CLE & Ski**, Huntley Lodge, Big Sky

### January 28

**Employee-Benefits (VEBA) Trustees** meeting, 10 a.m., Montana Bankers Association conference room, 1 North Last Chance Gulch, Helena

### January 29

**State & Federal Planning Rules CLE**, Helena

### February 12

**Real Estate CLE**, Fairmont Hot Springs

**State Bar Executive Committee** meeting, 10 a.m. State Bar Offices, Helena

### February 19

**Bench-Bar Conference**, Missoula

### February 26

**Eminent Domain CLE**, Bozeman

### January 15 Teleconference

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### January 22 Teleconference

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### January 28 Billings – Holiday Inn Grand

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### January 28 Missoula – DoubleTree Hotel

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### January 29 Helena

**State & Federal Planning Rules** Presented by the CLE

Institute of the State Bar of Montana, (406) 447-2206.

Brochure to be mailed to member and details to be posted at [www.montanabar.org](http://www.montanabar.org)

### February 12 Fairmont Hot Springs

**Real Estate CLE** Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. Brochure to be mailed to member and details to be posted at [www.montanabar.org](http://www.montanabar.org)

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# State Bar of Montana Bookstore

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See order form on Page 13

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# Addressing those notary journal confidentiality concerns

By **Betsy Brandborg**  
State Bar Legal Counsel

Effective Oct. 1, 2009, all Montana notaries are required by statute to maintain a notary journal that could become a public document, raising lawyers' concern that the journal contains confidential client information (see November *Montana Lawyer*).

Section 1-5-416(1)(g), MCA provides that all Montana notaries "keep and maintain an official notary journal recording the details of each notarial act performed" including the date, the type of notarial act, the type and date of the document, name, address and signature of the individual and type of identification used, among other information. Section 1-5-419, MCA mandates transfer of a notary's journal to the county clerk and recorder upon a notary's expiration, resignation, death, or removal.

A notary journal is necessary, Montana Secretary of State Counsel Jorge Quintana and Deputy Secretary Rusty Harper explained, because notaries regularly complain that they are asked to notarize documents that have been signed outside their presence. The point of the notary journal is to record the signature as it occurs. The journal is mandated to protect the notary. That's why it belongs to the notary and does not belong to the firm that pays the notary. Notaries are independent public officers commissioned by the state.

Montana attorneys who are notaries have requested an opinion from the State Bar's Ethics Committee addressing their concerns about disclosing confidential information in the journal. Examples of confidential documents causing the attorneys' concerns include pre-nuptial agreements and relinquishment of parental rights in adoption proceedings.

Montana Rule of Professional Conduct 1.6 on confidentiality provides that a "lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary...to comply with other law..."

The Ethics Committee may address the issue of whether the administrative record-keeping goal of the statute is trumped by a lawyer's mandate to maintain the confidences of clients within Rule 1.6.

However, Ethics Opinions are simply advisory peer opinions, and are treated as such by the Courts. The State Bar's Executive Committee is also addressing the issue and has directed State Bar staff to explore alternatives, including legislation, with the Montana Secretary of State's Office.

**WHILE LEGISLATION TO ADDRESS** the issue is under consideration, the secretary of state suggests in the inter-

im that when a notary leaves a firm, the firm requests that the journal be sealed by the district court, with language specifying that access to the journal is only via court-ordered access to a particular page of the document: "*In re Sealing the Notary*

*Journal of [the notary].*" The Secretary's of State's Office also agreed that one signature per page in the journal is acceptable, as long as the page reflects that the other entries were left intentionally blank. It is NOT acceptable to keep two journals under the current statute, as earlier reported.

Possible legislation would permit the sealing of all journals, requiring a court order to unseal the specific journal page. Apparently, there is a fear that certain vendors are inclined to "mine" the filed journals for names of future customers.

**IN SUMMARY, ALTERNATIVES** available to safeguard confidential information contained in notary journals of notaries who resign, die, are removed, or whose terms expire include:

- Request that the journal be sealed by the district court, with language specifying that access to the journal is only via court-ordered access to a particular page of the document: "*In re Sealing the Notary Journal of [the notary].*"
- The Secretary of State's Office also agreed that one signature per page in the journal is acceptable, as long as the page reflects that the other entries were left intentionally blank. It is not appropriate to keep two journals.
- Not all documents require notarization. Confirm the necessity prior to recording otherwise confidential information.
- Prior to notarizing a document, distinguish whether the lawyer is performing the service as a witness or as a lawyer. The witness/lawyer rule potentially preempts future representation.
- Finally, the secretary of state suggests using general terms of art in the journal. Instead of writing "prenuptial agreement" write "contract" or "agreement."

**THOSE SEEKING ADDITIONAL INFORMATION** about Montana's current notary statutes can visit the Secretary of State's website at:

<http://sos.mt.gov/Notary/Changes.asp>.

# New act requires disclosures by neutral arbitrators

By **Ross W. Cannon**  
State Bar Dispute Resolution Committee

**A** new act that became effective on Oct. 1, 2009, requires that a person being proposed to serve as a neutral arbitrator must disclose in writing to each party to the arbitration all matters that bear on that person's ability to act as an impartial arbitrator.

The disclosures required are:

- Any matters that would require disqualification of a judge.
- Employment of the proposed arbitrator by a party to the arbitration within the last five years.
- The names of parties to each arbitration in which the proposed neutral arbitrator served as a party or neutral arbitrator after Oct. 1, 2009, including the results of each arbitration.
- Any attorney-client or employment relationship the proposed neutral arbitrator has had with any party to the arbitration within the last five years.

The proposed neutral arbitrator's failure to make a material disclosure required by the act constitutes a ground for vacating the arbitrator's award.

## The Act

The 2009 Montana Legislature enacted the "Fairness in Arbitration Act." Ch. 399, L. 2009. The act becomes part of the Montana Uniform Arbitration Act, Title 27, Chapter 5, Parts 1-3 codified at §§27-5-116, 27-5-211 and 27-5-312, MCA. [References to MCA are hereafter omitted]. The act originated as HB 322 sponsored by Rep. Anders Blewett (D) HD 21 (Great Falls), and co-sponsored by Rep. Ken Peterson (R) HD 46 (Billings) and Sen. Jim Shockley (R) SD 45 (Victor). The bill, as amended, passed out of the House Judiciary Committee by a vote of 17-1 and passed the House by a vote of 95-3. It passed the out of the Senate Judiciary Committee by a vote of 12-0 and passed the Senate by a vote of 50-0.

The act requires that beginning Oct. 1, 2009, a person who has been proposed, nominated, or appointed as a neutral arbitrator pursuant to an arbitration agreement [proposed neutral arbitrator] must disclose to each party to the agreement "all matters that could cause a person aware of the facts underlying a potential conflict of interest to have reasonable doubt that the person would be able to act as a neutral or impartial arbitrator." §27-5-116(3).


In addition, the proposed neutral arbitrator must specifically disclose: (1) the existence of any ground specified in §3-1-803 for disqualification of a judge; (2) whether he or she has been employed by a party to the arbitration proceeding within the last five years; and (3) the names of the parties to arbitration

proceedings commenced after Oct. 1, 2009, other than the pending proceeding, in which he or she served or is serving as a party arbitrator or as an attorney to a party to that proceeding, and the results of each of those proceedings that were arbitrated to conclusion, including (1) the date of the arbitration award, (2) identification of the prevailing party, (3) names of the parties' attorneys, and (4) the amount of monetary damages awarded, if any. §§27-5-116(4)(c)(i)(A) and (4)(c)(ii)(A)-(D).

That proposed neutral arbitrator must make the same disclosures with respect to arbitration proceedings in which he served or is serving as a neutral arbitrator. §27-5-116(4)(d)(i)(A) and (4)(d)(ii)(A), (B), (D), and (E). In addition he must identify the person and the party who selected him to serve as a neutral arbitrator, if any. §27-5-116(4)(d)(ii)(C).

The proposed neutral arbitrator must make the disclosures set out in §§27-5-116(4)(c)(i)(A), (4)(c)(ii)(A)-(D), (4)(d)(i)(A), and (4)(d)(ii)(A-E), MCA, for all arbitration proceedings in which the he or she served as a party or neutral arbitrator after Oct. 1, 2009.

§27-5-116(4)(e), on the other hand, requires the proposed neutral arbitrator to disclose any attorney-client relationships



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he has had with a party or an attorney for a party within the last five years. Similarly, §27-5-116(4)(b) requires him to disclose whether he has been employed by a party to the arbitration within the last five years.

After Oct. 1, 2014, the proposed neutral arbitrator must make all of the disclosures required by the act within the last five years. §27-5-116(4)(c)(i)(B) and §27-5-116(4)(d)(i)(B).

The proposed neutral arbitrator must make the disclosures required by the act in writing to all parties within 10 days of the date he is proposed and must serve them on the parties in accordance with Title 25, chapter 3, part 2.

Excluded from the act are (1) arbitration proceedings pursuant to a collective bargaining agreement, (2) arbitration agreements approved by the Securities & Exchange Commission, and (3) arbitrations conducted by the State Bar of Montana's voluntary fee arbitration program. §27-5-116(7)-(8).

Section 2 of the act amends §27-5-312 to require a neutral arbitrator appointed by a district court after Oct. 1, 2009, to comply with the disclosure provisions of Section 1 of the act [§27-5-116].

Section 3 of the act amends §27-5-312 to provide that a neutral arbitrator's failure to make a material disclosure required by Section 1 [§27-5-116] constitutes a ground for vacating the award.

## Amendments to the original version of HB 322

In its original form, HB 322 required a proposed neutral arbitrator to make all of the disclosures set out above for five years prior to the date he or she is proposed. In its final form the disclosures required by the act, except the disclosures concerning attorney-client and employment relationships, need be made only for arbitrations the proposed neutral arbitrator participated in as a party or neutral arbitrator after Oct. 1, 2009. After Oct. 1, 2014, all disclosures must be made for the five

years preceding the date he or she is proposed.

The final version of HB 322 also deleted provisions which would have required the proposed neutral arbitrator to disclose any employment or prospective employment or other arrangement for compensated service or whether he had participated in discussions regarding prospective employment or other service with a party to the arbitration. Another provision deleted from the final version of the bill would have required the proposed neutral arbitrator to disclose the amount he was paid for his services as a neutral arbitrator. Still another provision deleted from the final version of the bill would have required disclosure of any professional or significant personal relationships the proposed neutral arbitrator or his spouse or minor child living in his household had with a party or an attorney for a party to the arbitration.

And whereas the original bill provided that a proposed neutral arbitrator's failure to make a disclosure required by section 1 [§27-5-116] would constitute a ground for vacating an award the final version provided that his failure to make a "material" disclosure would constitute a ground for vacating an award. The final version of the bill also shortened the time for vacating an award after discovery of a proposed arbitrator's failure to make a "material" disclosure required by Section 1 from one year to 90 days. A proposed amendment that would have made it clear that the proposed neutral arbitrator would not have to make any of the disclosures required by the act for arbitrations concluded prior to Oct. 1, 2009, was left out of the final version of HB 322 presumably because of the conflicting requirements set out §27-5-116(4)(d)(ii)(C) and §27-5-116(4)(b) which require the proposed neutral arbitrator to disclose any attorney-client or employment relationships with a party within the last five years prior to the date he is proposed.

## Unresolved Issues

The act leaves a number of issues relating to disclosures unanswered, among which are the following:

- It does not establish a time bar for challenging a proposed arbitrator once he had made the required disclosures.
- It does not define what is a "material" disclosure sufficient to warrant vacating an arbitration award if not made.
- Must a proposed neutral arbitrator make the disclosures required by the act with respect to arbitrations exempted from it, i.e., those conducted pursuant to collective bargaining agreements, securities arbitrations or arbitrations conducted by the State Bar of Montana's voluntary fee arbitration program?
- What if a party or attorney to a prior arbitration proceeding in which the proposed arbitrator was involved declines to allow the proposed arbitrator to make the required disclosures? Must the proposed arbitrator withdraw?
- Must arbitrators provided by arbitration forums such as the American Arbitration Association, National Arbitration Forum, and JAMS meet the disclosure requirements of the Montana act in addition to the disclosures those forums require

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their arbitrators to make?

■ Would an arbitration conducted in Montana pursuant to the Federal Arbitration Act would be subject to the disclosures required of the Montana act or would the federal act's disclosure requirements preempt the Montana act's disclosure requirements?

Given that much of the language found in HB 322 derives from counterpart disclosure provisions found in §1289.1, California Code of Civil Procedure, attorneys might find it useful to review decisions of the California courts with respect to these and other disclosure issues that might arise under the

Montana act at least until such time as the Montana Supreme Court addresses them.

**ROSS W. CANNON**, a Helena attorney, is an arbitrator and mediator and long-time member of the State Bar Dispute Resolution Committee. His particular role on the Committee has been to track and occasionally testify on bills of interest to the Committee. In that capacity, he testified before the House Judiciary Committee to express concerns some members of the committee had with respect to some of the provisions of HB 322. He also worked with the bill's principal sponsor to secure some of the changes to the original version of bill discussed above.

## Court appointments

*The Montana Supreme Court has made the following appointments to Court commissions:*

● **Advisory Commission on Rules of Civil & Appellate Procedure:** Lake and Sanders Counties District Judge Kim Christopher has been appointed. Her appointment brings the Commission membership up to the three district court judges required by state law.

Six members of the Commission were reappointed to new terms: Two-year terms – Anthony Johnstone and Philip Grainey; one-year terms – Robert Savage, Julianne Burkhardt, Dana Christensen, and Randy J. Cox.

● **Equal Justice Task Force:** Appointed for new three-year terms are Co-Chairs Nancy Sweeney and Andrew King-Ries, as well as members District Judge Kurt Kruger, Judy Meadows, Rick Bartos, Ann Gilkey, Klaus Sitte, Cynthia Smith, and Robin Meguire.

● **Commission on Practice:** Gene Huntington of Helena has been appointed for a term ending Aug. 31, 2011. He replaces deceased lay member Jim Canan.

● **Commission on Courts of Limited Jurisdiction:** Judge Greg Mohr, elected as president of the Montana Magistrates' Association, will replace the former president, Judge Johnny Seiffert, as the Association's representative on the Commission.

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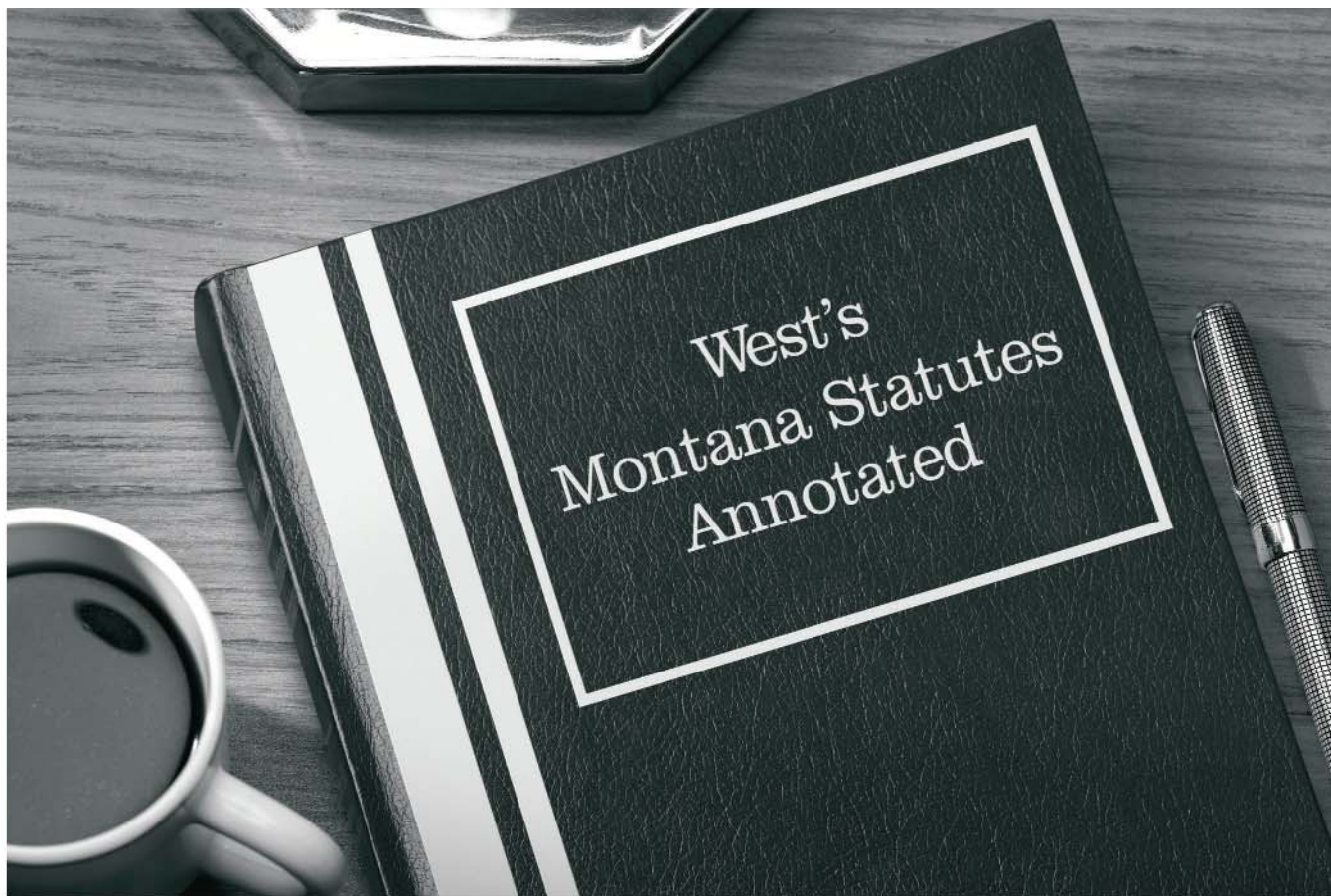
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# Make discipline more public, some Montana justices say

By **Mike Dennison**  
Billings Gazette State Bureau

Several Montana Supreme Court justices on Nov. 20 said details on the formal sanctioning of lawyers for professional misconduct should be made public, and that rules should be adopted toward that goal.

"If the system is going to discipline an attorney, that should be public," said Justice James Nelson. "I think we should do away with this whole process of private discipline."

Nelson and fellow Justices Brian Morris and Pat Cotter, who met in Helena Friday as part of an informal working group examining the issue, said new court-sanctioned rules could allow for a private, formal warning of attorneys who commit minor misconduct, but would make public details of those who are formally disciplined.

**THE GROUP** was created in the wake of a case involving former Billings Assistant City Attorney Moira D'Alton, who was disciplined by the high court in 2006 for violating several rules of professional conduct.

Details about how she violated the rules were not made public. The state Commission on Practice, a court-appointed body that polices the legal profession in Montana, often allows lawyers who admit to violations to agree to a "private admonition," the details of which aren't revealed.

The *Billings Gazette* sued to obtain more information on the case and eventually lost before the Supreme Court. But the high court later agreed to appoint the working group to consider whether to change the rules that allow keeping details of the private admonitions secret.

Disciplinary Counsel Shaun Thompson, whose office investigates

complaints of attorney misconduct, argued on Nov. 20 that private admonitions should continue, because they often allow the Commission on Practice to resolve cases without filing a formal complaint with the Supreme Court.

Prosecuting formal complaints is time-consuming, he said, and the private admonitions often involve fairly minor offenses. "If we do away with private admonitions, it would significantly add to our workload, and we'd need more staff," Thompson said.

**THOMPSON ALSO** had proposed a new procedure in which lawyers could choose to make a "conditional admission" to violations they had committed, with the penalty being a public reprimand.

Mike Meloy, a Helena attorney representing the *Gazette*, said no attorneys would choose that option if they still could have a private admonition. "I feel very strongly that whenever a lawyer does something that merits discipline, they've crossed the line and that should be made public," Meloy said.

The justices on the working group essentially agreed that details of formal disciplinary actions should be made public, but that Thompson's office should have some discretion to issue a private warning to attorneys who commit minor infractions.

They directed Thompson and other members of the group to collaborate on possible rule changes to achieve those goals.

The other members of the panel are Dillon attorney John Warren, who chairs the Commission on Practice; John Barrows, executive director of the Montana Newspaper Association, and Chris Manos of the State Bar of Montana. ○

## Lawyer finds no escape by quitting the Bar

Billings attorney Marvin Alback was suspended from the practice of law by the Montana Supreme Court on Nov. 10, even though he resigned from the State Bar of Montana on Nov. 6.

"[W]hile respondent may seek to moot the Commission on Practice's recommended discipline, we do not believe that an attorney's resignation from the Bar presents an impediment to the Court's imposition of discipline. . .," the Court said in its Nov. 10 order.

The order outlined several delaying tactics Mr. Alback used unsuccessfully to put off the Commission's recommendation of a 90-day suspension for earlier misconduct.

On Nov. 4, the Court received a copy of a letter sent by Mr. Alback to the State Bar stating he would resign his membership on Nov. 6, the resignation would be permanent with no attempt on his part to ever again seek to practice law in Montana or elsewhere.

But that did not matter to the Supreme Court. "[A]ny discipline imposed remains part of the attorney's record, regardless of the attorney's status as a member or non-member of the Bar," the Court wrote.

Furthermore, regardless of his resignation, the Court said, Mr. Alback must still pay the costs of the disciplinary proceedings against him.

## Attorney suspended

Attorney R. Allen Beck of Lewistown was suspended from practice for 30 days by the Montana Supreme Court.

The Commission on Practice recommended the suspension, charging Mr. Beck with violating rules on competence, diligence, expediting litigation, and return of files in his relationship with a set of clients. He also was charged with failing to respond to an earlier, informal complaint.

Mr. Beck's 30-day suspension was to begin Dec. 1, and he was ordered to pay the costs of the discipline proceedings.



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# Top 10 nonprofit governance mistakes

By **Ellis McGehee Carter**  
charitylawyer.blogspot.com

*from a lawyer's perspective*

Lawyers who regularly represent tax-exempt and nonprofit organizations are eventually solicited for advice regarding nonprofit governance. Often these questions drift into management issues. While always quick to point out that my expertise is in non-profit law, not management, I have summarized some of the most common governance mistakes I have witnessed in my practice.

**1. Failing to understand fiduciary duties.** When you volunteer to serve as a director or officer of a nonprofit, you accept the responsibility to act with the duties of good faith, due care and loyalty. You also accept the potential liability for failing to fulfill those duties. Increased scrutiny from the IRS, Congress, state attorneys general, the Department of Justice, donors, and the media require vigilance at every step. It is no longer sufficient to rubberstamp committee or staff recommendations or to simply “abstain” from dicey decisions. Today, board service comes with real responsibilities and real consequences for those that fail to live up to them.

**2. Failing to provide effective oversight.** Boards are entitled to delegate tasks to committees, officers, staff, or in certain cases, professionals, but only if they perform sufficient oversight. Oversight is commonly exercised through policies and procedures so long as the board ensures that the policies and procedures are actually followed. Common oversight mechanisms include review of financial statements and the annual Form 990 as well as the implementation of various governance policies.

Popular governance policies for nonprofits include conflict of interest policies, executive compensation policies, travel and expense reimbursement policies, whistleblower policies, etc. Difficult tasks that require more time and focused attention can be delegated to committees. Common governance committees include those designed to oversee finances, investments, audits, and compensation.

**3. Deference to the executive committee, board chair or the organization's founder.** No one owns a tax-exempt nonprofit. No one committee, director, or individual can control the organization. The executive committee, if one exists, is typically charged with acting on behalf of the board when the board is not in session and cannot be easily convened. It is, however, accountable to the full board and should not be permitted to operate as a “mini-board.” The chair's primary duty

is typically to preside over board meetings and to act as a liaison between the board and the chief executive. The chair

does not have the power to override decisions of the board. Similarly, the founder may act as the chief executive and run the day-to-day affairs of the organization. The founder may also sit on the board, but even founders serve at the pleasure of the board. The board has a duty to review the performance and set compensation for the chief executive and, if necessary, censure or even terminate the chief executive.

**4. Micro-managing staff.** For a nonprofit organization with paid staff, once board members demand keys to the organization's offices and start making direct demands on staff that report to the chief executive, the board has crossed the line. The board's key duties are to provide oversight and strategic direction, not to meddle in the organization's day-to-day affairs. Board members who cross this line are undermining the authority of the chief executive to their own detriment and should be prepared to quit their day jobs.

Similarly, staff should not invite micromanagement by asking the board to take on day-to-day tasks that the staff should be handling. The size and budget of smaller organizations necessitates some blurring of these lines, but board members and staff should know their roles and attempt to adhere to them as much as possible.

**5. Avoiding the hard questions.** It is can be uncomfortable to ask tough questions or to disagree with one's fellow board members. However, group-think rarely leads to sound decision-making. Often, the most valuable board members are the ones who, calmly and respectfully, speak their minds. It is important to set a tone that encourages a free exchange of ideas, both good and bad. Open, vigorous discussions about key issues should be encouraged. A board that passes every resolution “unanimously” should evaluate whether it needs to do more to encourage a thoughtful and open discussion.


**6. Insufficient conflict management.** If a conflict of interest is with an insider, a family member or a business, it's not enough to simply disclose the conflict and have the disinterested directors approve the transaction. In such cases, the disinterested members of the board need to consider alternate arrangements that do not give rise to a conflict of interest. If after considering alternatives, the board still finds the transaction with the insider is in the best interest of the organization, then the board should carefully document the basis for the decision and the fact that the interested director did not partici-

pate in the deliberations or vote. The best practice is to follow the procedures outlined in the intermediate sanctions regulations to properly analyze and document the proposed transaction.

## 7. Lack of awareness of laws governing tax-exempts.

Directors that hail from the for-profit world often assume nonprofits operate in a less-regulated environment. In reality, the opposite is true. Tax-exempt organizations enjoy an array of tax and other benefits. To ensure those benefits are not exploited, Congress and local governments have imposed additional legal requirements that tax-exempts must follow. It is essential that directors of tax-exempt entities be aware of the various federal, state, and local laws that apply to the organization.

Many directors are unaware whether they are governing a private foundation, a public charity, a supporting organization, or another form of tax-exempt entity, all of which are subject to different limits on their activities. Board members should understand, at a minimum, the penalties they face for overpaying key employees or other insiders, for engaging in excessive lobbying or political activities, for accommodating tax shelter transactions, for making egregious bad bargains on behalf of the organization, the impact of failing to pass the public support test, etc. Ongoing board training and orientation for new board members is often the best solution.




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## 8. Operating with outdated, inconsistent governing documents.

Over time, many organizations change their mission and purpose without updating their governing documents. Similarly, many organizations develop governance practices that do not comply with their original governing documents.

For example, it is not uncommon to see bylaws that call for voting members, although no member votes have ever taken place. Or bylaws with a term that calls for the cessation of the organization on a date that has long since passed. Frequently, these issues stem from copying another institution's bylaws without regard to the distinctions between the organizations or current law.

Encourage compliance by conducting regular reviews of the governing documents and checking the bylaws before electing additional officers or directors, creating additional committees, adopting amendments, etc.

**9. Airing disagreements outside the boardroom.** Every board's motto should be "what happens in the boardroom stays in the boardroom." Inherent in the duty of loyalty that all board members must adhere to, is an implied duty of confidentiality. Once an issue is settled by board vote, the board members who voted against the majority must present a united front. If a vote is so disagreeable that a board member cannot carry on in this manner, the board member should consider resigning.

In extreme cases, if the board member believes the corporation's rights are being violated, the board member could join together with other like-minded board members to bring a derivative suit to enforce the organization's rights.

**10. Failure to cultivate board diversity.** The initial board is typically made up of friends and advisors of the organization's founder. Over time, the initial board may reach out to its members' trusted friends and advisors to fill vacancies. This approach to board recruitment can lead to the "usual suspect" syndrome. This is where the same individuals who went to the same schools, belong to the same clubs, and hail from the same neighborhoods and professions are institutionalized onto an organization's board.

If your organization is run by a group of "usual suspects," consider mixing it up by creating a matrix of skills, experiences, and backgrounds that would add valuable perspectives to the board. Those with law, accounting, and fundraising skills are obvious choices. Substantive mission-related skills are also important. For example, an educational organization may want to recruit a retired teacher or school administrator; whereas, a domestic violence shelter may want to include a policy expert, social worker, or someone who has been a victim of abuse.

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**ELLIS McGEHEE CARTER** is an attorney with the law firm of Fennemore Craig in Phoenix. Devoting 100 percent of her practice to advising tax-exempt and nonprofit organizations, she was awarded the 2002 Nonprofit Advocate of the Year award by the Arizona State Bar's Volunteer Lawyer Program.

ensure that the responsibilities of the legal profession to the public are more effectively discharged.

*In the Matter of the Unification of the Bar of the State of Montana*, No. 12616 (1974).

### III. The proposed amendments are constitutional.

Most lawyer advertising and solicitation is commercial speech, and as such, it generally receives an intermediate level of First Amendment protection. Advertising and solicitation can not be prohibited, but reasonable restrictions may be imposed by the state.

The U.S. Supreme Court case holding that commercial speech is entitled to some protection is *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). In that case, the Court analyzed a statute that prohibited pharmacists from advertising the prices of prescription drugs and concluded that the state could not completely suppress dissemination of such information. Because of differences between commercial speech and traditionally protected political speech, the Court found that a lesser degree of protection is adequate to ensure the free flow of commercial information. 425 U.S. at 771, n. 24. Accordingly, commercial speech is entitled to an intermediate level of protection that falls between wholly unprotected speech, such as untruthful statements, and completely protected political speech. The Court stated that commercial speech may be regulated by time, place, and manner restrictions not based on content, restrictions against false or misleading speech, and prohibitions against speech that proposes an illegal transaction. 425 U.S. at 771-772.

The Supreme Court extended this newly articulated commercial speech doctrine to protect lawyers' truthful print advertising in *Bates v. Arizona State Bar*, 433 U.S. 350 (1977). *Bates* held that a blanket ban on advertising of routine legal services is unconstitutional.

Later, outside the context of lawyers' speech, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Supreme Court provided a standard for regulating commercial speech. The test has four parts: (1) the expression regulated must propose a lawful activity and not be misleading; (2) a substantial governmental interest must be at stake; (3) the regulation must directly advance the substantial governmental interest; and (4) the regulation must be no more extensive than is necessary to serve that interest. 447 U.S. at 566.

The Supreme Court has employed the *Central Hudson* test several times in cases involving various provisions of state codes or rules regulating attorney advertising and solicitation. In *In re R.M.J.*, 455 U.S. 191 (1982), the Court reversed Missouri's discipline of a lawyer for publishing print advertisements that, although truthful, departed from a menu of permissible content in Missouri's Code of Professional

Responsibility. In *Florida Bar v. Went For It Inc.*, 515 U.S. 618 (1995), the Court found that protecting the privacy of grieving accident victims' families is a legitimate state interest. Accordingly, it upheld a restriction that prohibited plaintiffs' personal injury lawyers from sending letters to accident or disaster victims or their families within 30 days after the accident or disaster.

As a result of decades of litigation over regulation of lawyers' marketing activities, several propositions have become settled:

- A state may ban false or misleading advertising, as well as advertising that promotes or advocates illegal activity. *Bates v. Arizona State Bar*, 433 U.S. 350, 384 (1977); *California v. Morse*, 25 Cal. Rptr. 2d 816 (Cal. Ct. App. 1993); *Gould v. Harkness*, 470 F. Supp. 2d 1357 (S.D. Fla. 2006); *In re Keller*, 792 N.E. 2d 865 (Ind. 2003).

- A state may to some extent restrict the time, place and manner of lawyer's advertising and solicitation. *Bates v. Arizona State Bar*, 433 U.S. 350, 384 (1977); *Florida Bar v. Went For It Inc.*, 515 U.S. 618 (1995).

- Reasonable warnings or disclaimers or other prescribed content may be mandated to dissipate the possibility of consumer confusion or deception. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-653 (1985); *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988); *Mason v. Florida Bar*, 208 F. 3d 952 (11th Cir. 2000).

- A state may place reasonable restrictions on lawyer advertising and solicitation that is intrusive or overbearing. *Bates v. Arizona State Bar*, 433 U.S. 350, 384 (1977); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 464 (1978); *Florida Bar v. Went For It Inc.*, 515 U.S. 618 (1995); *Chambers v. Stengel*, 256 F. 3d 397 (6th Cir. 2001).

A review of the State Bar's current proposals establishes that constitutional boundaries have been observed. To protect consumers from confusion or deception (a lawful government interest), 11 categories identifying specific misleading communications are proposed to be added to Montana's Rule of Professional Conduct 7.1. The proposed amendments to the rule advance a government interest and are no more extensive than necessary to serve that government interest in consumer protection.

### IV. The proposed amendments are included within the "state action" exemption to the Antitrust Act and hence do not violate antitrust laws.

The Sherman Antitrust Act, 15 U.S.C. Section 1, et seq., is designed to preserve full and free competition and to penalize practices that unreasonably restrain those who seek to compete. To this end, Section 1 declares illegal every contract, combination, or conspiracy in restraint of interstate trade or commerce, while Section 2 prohibits monopolies or attempts

to monopolize.

Certain State Bar activities are deemed exempt from anti-trust law by virtue of a judicially created exemption known as the "state action" doctrine. In *Parker v. Brown*, 317 U.S. 341 (1943), the Court ruled that there was no intent in the Sherman Act to nullify state power. The Court ruled that the exercise of regulatory power by the states, even though it might result in anticompetitive activity, does not violate the Act. To fall within the protection of the state-action doctrine, there must be a clearly articulated state policy to replace competition with regulation and there must be state supervision of the anticompetitive conduct. *Southern Motor Carriers Rate Conference Inc. v. United States*, 471 U.S. 48 (1985) and *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992).

The proposed amendments establish the boundaries of lawyer advertising by identifying types of misleading communications. While the proposed amendment arguably impairs competition, legitimate state policy allows this Court to protect consumers within Montana's attorney regulatory scheme. The proposed amendment to Rule 8.5 subjects lawyers who advertise in Montana to this Court's supervision and disciplinary authority. The "state action" doctrine defeats any antitrust challenges to the State Bar's proposed amendments.

## V. Conclusion

One need only watch an evening of television to see the extent to which out-of-state providers of legal services attempt to offer representation to Montanans. Most of the advertisements include specific state disclaimers. Adding Montana protections to those advertisements is a sensible alternative. The petitioners believe that amendments to the Rules of

Professional Conduct are necessary to make the Rules clearer and more useful to clients, attorneys and the public. The Board of Trustees of the State Bar of Montana and the Ethics Committee request the Court adopt the proposed changes.

Petitioners request that the Court provide a period of comment before taking action on this petition. We request that the Court direct publication of this petition and the proposed rule changes in *The Montana Lawyer* and on the State Bar's website and solicit comments or responses from the Bar membership and public before considering the request for amendment. Petitioners request that they be given the opportunity to reply to comments or responses from the public and the bar.

## NOTES

1. Participants included then-Ethics Committee Chair Cynthia Smith (also current Bar president; at the time of the meeting, Board of Trustee chair), current Ethics Committee Chair Mike Alterowitz and former Chair Keith Maristuen (also former State Bar president); Ethics Committee members Ted Hess-Homeier, Kent Kasting (also former president of the Utah State Bar), and Tim Strauch (also former discipline counsel); Former State Bar Presidents Robert Sullivan and Andy Suenram; then-Board of Trustee member Robert Spoja; Roberta Zenker, member of the Supreme Court's Unauthorized Practice Commission and former Madison County attorney, and Montana Trial Lawyer Association Executive Director Al Smith.

2. The working group consisted of Cynthia Smith, Keith Maristuen, Tim Strauch, Andrew Suenram, and Robert Spoja.

3. The language not adopted from ABA Model Rule 7.2 (b), and hence not included in Montana's rule, provides: "(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement."

4. See also *Bates v. Arizona State Bar*, 433 U.S. 350, holding the Antitrust Act inapplicable under the state action doctrine: "the challenged restraint is the affirmative command of the Arizona Supreme Court....That Court is the ultimate body wielding the state's power over the practice of law...., and, thus, the restraint is 'compelled by direction of the state acting as a sovereign' quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).



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## PRISONER'S DILEMMA, from Page 11

your client might be labeled a “career offender” and thus be subject to a much higher guidelines sentencing range.<sup>72</sup>

### Exceptions to the statutory minimum sentence

There are only two exceptions to the statutory mandatory minimum sentence: when your client cooperates with the government,<sup>73</sup> and when your client qualifies for the “safety valve.”<sup>74</sup>

#### Cooperating with the government.

Cooperating with the government means providing “substantial assistance in the investigation or prosecution of another person who has committed an offense.”<sup>75</sup> Experience informs that this may include a written proffer, verbal information, acting undercover, repeated debriefings with law enforcement officers, meetings with prosecutors and defense attorneys, and testifying in court or before a grand jury. The U.S. Attorney’s Office unilaterally determines whether the coopera-

tion is “substantial.”<sup>76</sup> If the cooperation is deemed substantial, the assistant United States attorney may file a “substantial assistance” motion under U.S.S.G. § 5K1.1 (“§ 5K”<sup>77</sup> motion), authorizing the court to sentence below the advisory Guidelines’ sentencing range, and more importantly a motion under 18 U.S.C. § 3553(e) (“§ 3553(e)”<sup>78</sup>) authorizing the court to sentence below the statutorily-mandated minimum sentence at the time of sentencing. Without a § 3553(e) “substantial assistance” motion, and absent the “safety valve” exception discussed below, the judge cannot sentence the defendant below the mandatory minimum.<sup>79</sup>

Once a “substantial assistance” motion is submitted, the federal district court has discretion to sentence below the Guidelines’ range (a 5K motion), below the statutory mandatory minimum sentence (3553(e) motion), or below both.<sup>80</sup> If your client provides substantial assistance after the date of sentencing, the assistant U.S. attorney may file a motion under Rule 35 of the Federal Rules of Criminal Procedure (“Rule 35”) motion requesting a further sentence reduction.<sup>81</sup> Theoretically, your client is entitled to the § 5K motion and/or the § 3553(e) motion (on the date of sentencing), as well as the Rule 35 motion (after the date of sentencing).<sup>82</sup>

Unfortunately, in the recent past, the government expects and demands full and complete cooperation, but then, at its discretion, will refuse to file a “substantial assistance” motion.<sup>83</sup> Alternatively, the government will file a “substantial assistance” motion, but the court does not reduce the sentence or reduces the sentence by only a few months, effectively nullifying the benefit of cooperation.<sup>84</sup> In fact, under recently implemented policy, when your client pleads guilty, the U.S. Attorney’s Office refuses to commit to a cooperation motion, regardless of the extent of the client’s assistance to the government.<sup>85</sup> Instead, the government merely commits to considering a “substantial assistance” motion and does not announce its decision until shortly before sentencing.<sup>86</sup> Despite your client’s cooperation, the Assistant U.S. Attorney will seek sen-

tencing enhancements under the guidelines, will oppose your arguments for a lower guidelines range, and will not dismiss any § 851 notice which, at a minimum, doubles the mandatory minimum sentence.<sup>87</sup>

In sum, in 2009, your client takes a great risk by cooperating, and often obtains very little, if any, benefit. Any benefit depends on the discretion of the government first and then, if authorized by the government, of the sentencing judge.

**The “Safety Valve.”**<sup>88</sup> The safety valve exception permits the federal district court to sentence below the statutory mandatory minimum sentence if the following five criteria are satisfied:

1. The defendant does not have more than 1 criminal history point, as determined under the Sentencing Guidelines;<sup>89</sup>
2. The defendant did not use violence, or credible threats of violence, or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
3. The offense did not result in death or serious bodily injury to any person;
4. The defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the Sentencing Guidelines, and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;<sup>90</sup> and
5. Not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude a determination by the court



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*When ipsie dixit is not enough*

that the defendant has complied with this requirement.<sup>91</sup>

The safety valve can be applied by the court regardless of whether the government files a “substantial assistance” motion.<sup>92</sup> If the safety valve applies in a drug case, the defendant also benefits from a two-level decrease in the calculation of the advisory guidelines.<sup>93</sup> Thus, your client can benefit from the safety valve without cooperating or providing “substantial assistance,” as long as your client provides complete and truthful information as to his or her involvement in narcotics trafficking.

If your client possessed a firearm, your client will be ineligible for the safety valve even if he or she is a first time offender.<sup>94</sup> For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.<sup>95</sup> Unfortunately, even if your client cooperates and provides substantial assistance, experience dictates that the U.S. attorney will not concede that the firearm enhancement does not apply and will not dismiss a gun count.<sup>96</sup> In other

words, in Montana, neither guidelines stipulations nor charge-bargaining are part of the cooperation agreement. In fact, the U.S. Attorney’s Office adheres to the Sept. 22, 2003, memo from then Attorney General John Ashcroft requiring prosecution to charge and secure convictions for the most readily provable serious offense, which means prosecute to obtain the greatest sentence.<sup>97</sup>

As with drug crimes, the practitioner must become familiar with the nuances of federal firearms statutes, case law, and Guidelines. For example, although in 1993 the U.S. Supreme Court held that a person who trades a firearm for drugs “uses” that firearm within the meaning of 18 U.S.C § 924(c),<sup>98</sup> the Court also held in 2009 that the converse is not true – a person who trades drugs for a firearm does not “use” the firearm under § 924(c).<sup>99</sup>

The typical written plea agreement from the U.S. attorney for the District of Montana includes the following provisions:

Plead guilty to the most serious count, usually the mandatory minimum conspiracy count (making your client potentially responsible for all drugs possessed by all co-defendants if drug possession by the co-defendants was “foreseeable” to your client), and, if charged, the § 924(c) gun count(s).<sup>100</sup>

If notice of a plea is timely (usually about two weeks before trial), the government will recommend the 3-level guideline deduction for acceptance of responsibility,<sup>101</sup> unless your client obstructed justice prior to sentencing.<sup>102</sup>

Your client agrees to provide “all of his requested financial information” to the government and to the Probation Office.<sup>103</sup>

Waiver of the following rights:

- a. Your client waives the right to jury trial and all attendant rights thereto;
- b. Your client waives the right to appeal the conviction;
- c. If the government files a substantial assistance motion<sup>104</sup> and the court accepts the plea agreement, your client waives the right to appeal

the sentence;

d. Your client waives the right to have a post-sentencing hearing on a substantial “assistance motion”<sup>105</sup> for your client’s cooperation provided after sentencing. Your client waives the right to “request” such a hearing and waives the right to be “present” at such a hearing if one is held;

e. Your client waives the right to collaterally attack the judgment or sentence<sup>106</sup> except as to claims of ineffective assistance of counsel (IAC);

f. Your client waives any claim of double jeopardy or right to specific performance of the plea agreement if your client moves to withdraw the plea, withdraws the plea, or obtains dismissal, reversal, or remand of any of the counts of conviction;

g. If the original charges are restored, your client also waives any objections, motions, or defenses based upon the Statute of Limitations, the Speedy Trial Act, or any other potential restriction of counts dismissed.<sup>107</sup>

The government is not bound to make a specific sentencing recommendation: “The United States and the defendant reserve all right, without condition, to make any appropriate sentencing recommendation.”<sup>108</sup>

The government makes no agreement as to the guidelines’ calculations: the guidelines are calculated by the United States Probation Office and determined by the court.<sup>109</sup> The government reserves the right to object to the guidelines’ calculations and to any sentence outside the guidelines’ range.<sup>110</sup>

The court is not bound by the sentencing recommendation of either party.<sup>111</sup>

The court may impose sentence “anywhere” within the advisory guidelines’ range or may impose “any reasonable sentence”<sup>112</sup> above or below that Guideline range. Although not stated in the plea agreement, if any counts are dismissed, conduct from dismissed counts, i.e., drug quantity, can be used to calculate the Guidelines.<sup>113</sup>

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**Cooperation provisions  
i.e., “Potential Departure for  
Substantial Assistance”**

Your client must:

- i. provide a “truthful written proffer;”
- ii. provide “complete, truthful, forthright, material, important, valuable, and meaningful” information as to “any subject inquired of him;” and

Although usually detained without bail prior to trial, your client recognizes that detention is likely after their change of plea and pending sentencing.<sup>119</sup>

In the past, this type of a plea agreement would have been considered a contract of adhesion and in violation of public policy.<sup>120</sup> What, if anything, is your

did not breach the plea agreement.<sup>124</sup> So, if you stand by while your client enters into one of these one-sided plea agreements, realize the 9th Circuit Court of Appeals will likely not give your client any relief if he or she does not get any benefit from cooperating.<sup>125</sup>

If no one cooperates, as Judge Kleinfeld suggests, all federal drug defendants benefit in accordance with the Prisoner’s Dilemma game. The government would be forced to offer substantial benefits, i.e., dismissals and lighter sentences, in return for cooperation. However, as in the game, the real world is full of self-interested defectors, betrayers, and snitches. Because they will not adhere to Patrick Henry’s principle of “united we stand, divided we fall,”<sup>126</sup> our clients collectively will fall victim to an overly-punitive federal criminal justice system.

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**Even if your client cooperates fully with the government, whether he gets a sentencing break is up to the government – and even if the government authorizes it, the extent of the sentence reduction is decided by the court.**

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- iii. provide “complete, truthful, and forthright testimony if called upon” in court or before a grand jury.<sup>114</sup>

If your client provides any “materially false information” or if your client withholds “material information,” your client can be charged with such crimes as fraud, false statement, obstruction of justice, or perjury.<sup>115</sup>

The government agrees that the information provided will not be used against your client in any criminal proceeding (use immunity) and will not be used against your client at sentencing.<sup>116</sup>

**The “reward:”** “The United States will consider and evaluate the written proffer and the recommendations of law enforcement. If the prosecution concludes that the assistance provided is substantial, truthful and complete, as required, an appropriate motion will be made.”<sup>117</sup> However,

- i. No departure motion is offered or promised by the government; and
- ii. No motion will be filed “if the government determines that the information is either untruthful, willfully incomplete, of little value, or insubstantial.”<sup>118</sup>

client getting from the plea agreement? Although, by signing the plea agreement, your client is required to waive every possible constitutional and statutory right (except ineffective assistance of counsel (IAC)). By accepting the plea agreement, your client is only getting the hope of a lighter sentence if the government, upon the recommendation of law enforcement, decides to file a “substantial assistance” motion.<sup>121</sup> This decision is virtually unreviewable by the district court and waiver of appellate review is always part of the deal.<sup>122</sup>

At an oral argument in the U.S. Court of Appeals for the 9th Circuit, Judge Kleinfeld recognized the one-sided and unfair nature of federal plea agreements in Montana:

When I read your deal, it looks like there’s no deal, it’s a seduction, ‘you give us everything you have and we’ll decide whether we want to do anything for you and we don’t promise to’ . . . The defense bar knows that these kinds of 5K1.1 provisions in plea agreements are totally worthless and no one should cooperate.<sup>123</sup>

The defense often wins the oral argument only to lose the appeal. Despite the apparent consensus of the panel that the plea agreement was unfair, the *Jones*’ court ruled that the government

### **Your client’s dilemma**

Your narcotics client faces a real-life dilemma in Montana federal court and must make “choices.” Your client can proceed to trial, and even if loses, he has asserted his Sixth Amendment right to a jury trial. In the process, the defense attorney cross-examines the government’s snitches and exposes their motivations and likely exaggerations, if not fabrications. And the client does not join the world of rats and place his fate in the discretion of the government and expose himself to the dangers (both in and out of custody) of cooperation. Of course, conviction is likely, as is a higher, and often much higher, sentence. Moreover, proceeding to trial at a practical level forecloses the opportunity to cooperate. An acquitted client has no incentive to cooperate. Conversely, the government is unlikely to reward a defendant who proceeds to trial with a substantial assistance motion; which could give rise to a bad-faith claim that the government is punishing the defendant for exercising his Sixth Amendment right to a jury trial.

Alternatively, your client can “plead to the sheet,” that is plead guilty to all charges without a plea agreement.<sup>127</sup> Your client thus accepts responsibility and likely will gain a reduced guidelines’ sentencing range. Moreover, your client does not waive as many rights as



the government demands for a plea agreement, other than the right to trial, and maintains the right to appeal his sentence, which the client forfeits as part of the government's cooperation demands.<sup>128</sup> Furthermore, your client is not on the government's hook to cooperate, which at the same time eliminates the possibility of a sentence reduction for cooperation and possibly will interfere with a potential safety valve reduction because your client is not playing the government's game. Relatedly, absent a plea agreement, the government may be more aggressive at sentencing, including withholding the third acceptance of responsibility point.<sup>129</sup>

A third option is to enter a plea agreement without agreeing to cooperate.<sup>130</sup> A plea agreement typically assures the client the maximum (three points) acceptance of responsibility reduction under the guidelines.<sup>131</sup> An agreement without cooperation also assures the right to appeal a sentence.<sup>132</sup> Refusing to cooperate also prevents your client's future from resting on the discretion of the government. Yet, that benefit forecloses a substantial assistance sentence reduction, and could interfere with the application of the safety valve. In its plea agreements, the government requires a greater waiver of rights than a guilty plea alone requires.<sup>133</sup>

Finally, the client can cooperate as

part of a plea agreement. Cooperation usually assures full acceptance of responsibility credit under the guidelines.<sup>134</sup> And, of course, cooperation is the only way your client can obtain a substantial-assistance sentence reduction, and cooperation similarly facilitates but is not required for safety valve eligibility. With cooperation, the parties may advocate together, convincing the court to sentence lower.<sup>135</sup> Yet, the sentence ends the client's case, as he must forego the right to appeal under the government's cooperation demands.<sup>136</sup> And while your client must cooperate fully, whether he gets a sentencing break is up to the government, and even if the government authorizes it, the extent of the sentence reduction is decided by the court.<sup>137</sup>

### The lawyer's dilemma

A zealous advocate is motivated by active interest and enthusiasm, and driven by fervent partisanship for a person, a cause, or an ideal.<sup>138</sup> However, in the Montana Rules of Professional Conduct, "zealous" is deleted and replaced by "dedicated."<sup>139</sup> Are lawyers still permitted to be zealous advocates? Does your client not expect and hope that you will zealously defend him or her? Would you zealously defend yourself, a close friend, or a loved one?

In Montana, federal prosecutions and

federal sentencing law obligate zealous defense. Otherwise, individual defendants will play out The Prisoner's Dilemma – that is, rush to cooperate to save themselves without their lawyer ensuring, or at least attempting to gain, their maximum benefit for the cooperation. Naked cooperation without a cooperation agreement gives the government what it wants without any consideration for the defendant. The lawyer must maximize that consideration, if the client chooses to cooperate.

A complacent lawyer may be a "Judas goat." A Judas goat is a goat used at a slaughterhouse and in general animal herding.<sup>140</sup> The Judas goat is trained to associate with sheep or cattle, leading them to a specific destination. In stockyards, a Judas goat will lead sheep to slaughter, while its own life is spared.<sup>141</sup> Judas goats are also used to lead other animals to specific pens and on to trucks.<sup>142</sup> The term is a reference to the biblical traitor Judas Iscariot.<sup>143</sup>

What advice, strategy, and tactics does the lawyer employ to be a zealous advocate rather than a Judas goat? First, you must spend the time necessary to establish a relationship of trust with your client. The lawyer must become thoroughly versed on the facts and law of the case as well as on the intricacies of the federal criminal system in Montana, including the policies of the United

States Attorneys' Office. You must thoroughly investigate the facts and research the law. Is there an arguable suppression issue? Is there a defense, such as entrapment or mere presence, which might prevail at trial? If there is no viable defense, what is the sentencing strategy? You must determine the prior criminal record of your client and, at the beginning of the case, seek dismissal of prior state convictions, if possible.<sup>144</sup> Is there a factual or legal contention to attain the lowest Guidelines range possible and to obtain a sentence below the mandatory minimum? Of utmost consideration are the personal, philosophical, and practical approaches of the judge, assistant U.S. attorney, probation

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officer, and law enforcement officers assigned to the case. The attorney must be able to answer these questions for himself.

There is work to do: your client must decide whether to cooperate; often, the government wants a cooperation decision quickly, because if your client does not cooperate, it will focus its cooperation efforts on another individual. The frequent short notice for your client to make a major decision heightens the prisoner's dilemma. The lawyer must be able to give open, honest, and informed advice as to the choices set forth above.

Your client decides whether to plead guilty or go to trial.<sup>145</sup> Your client also decides whether to cooperate or not.<sup>146</sup> You, the lawyer, provide your best advice. Your client can make an informed decision only if you are fully informed and spend the time to explain the options to your client. "[A] defendant has the right to make a reasonably informed decision whether to accept a plea offer."<sup>147</sup>

How sound is the advice you will give to your client? Do you understand the laws and procedures in federal court? Will you spend adequate time to investigate and study the facts and law of the case? Will you take the time to meet with your client and your client's family and carefully explain the options and the consequences of the decision your client will make? Are you your client's zealous advocate, or are you merely selling your client out to a long Bureau of Prisons sentence?

## NOTES

1. Unlike state courts of general subject matter jurisdiction, federal courts only exercise the limited subject matter jurisdiction bestowed by the Constitution and Congress. See U.S. Const. Art. III §2.

2. President Nixon instituted the modern-day "war on drugs." He characterized the abuse of illicit substances as "public enemy number one in the United States" at a press conference given on June 17, 1971. National Drug Control Strategy – Budget Summary. PDF. White House (February 2005).

3. *Gonzales v. Raich*, 545 U.S. 1, 5 (2004) (The Supreme Court held that the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and

use of marijuana in compliance with California law.")

4. See generally Dan Baum, "Smoke and Mirrors: the War on Drugs and the Politics of Failure" (Little, Brown and Co. 1997).

5. Between 1984 and 1999, defendants charged with federal drug offenses increased from 11,854 to 29,306. United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Drug Offenders, 1999 with Trends, 1984-99 (available at [www.ojp.usdoj.gov/bjs/abstract/fdo.99.htm](http://www.ojp.usdoj.gov/bjs/abstract/fdo.99.htm)). In fiscal year 1995, the U.S. Attorney's Office in Montana prosecuted 41 methamphetamine cases; in 2000, it prosecuted 94 methamphetamine cases. U.S. Sentencing Commission Fiscal Year 1995 and 2000 Guideline Sentences – Montana. (Available at [www.ussc.gov/ANNRPT/1995/mt95/pdf](http://www.ussc.gov/ANNRPT/1995/mt95/pdf) and [www.ussc.gov/ANNRPT/2000/mt00/pdf](http://www.ussc.gov/ANNRPT/2000/mt00/pdf)).

6. *Id.*

7. *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

8. Mont. Code Ann. § 46-11-503 (2007).

9. U.S. Dept. Of Justice, U.S. Attorneys' Manual (United States Dept. of Justice 1997) 9-2.031.

10. See, e.g., *United States v. Cote*, 544 F.3d 88, (2nd Cir. 2008) ("We have squarely held that the Petite Policy affords defendants no substantive rights. Rather, that policy is merely an internal guidance for exercise of prosecutorial discretion, not subject to judicial review." (Internal quotations and citations omitted)).

11. 21 U.S.C. § 841.

12. The medium drug trafficking sentence for fiscal year 2008 in Montana's federal court was 101.1 months. U.S. Sentencing Commission, Federal Sentencing Statistics by State, District and Circuit, Oct. 1, 2007, through Sept. 30, 2008. Compare, MCA § 45-9-101(4) (Mandatory minimum of one year in the state prison (with exceptions set forth in MCA § 46-18-222) for Criminal Distribution of Dangerous Drugs (Methamphetamine)) and MCA § 45-9-103(3) (No mandatory minimum prison sentence for Criminal Possession of Dangerous Drugs (Methamphetamine) with Intent to Distribute) with 21 U.S.C. § 841(b)(1)(A), (B) (Mandatory minimum 5 and 10 year prison sentences for Distribution of

Methamphetamine and Possession of Methamphetamine with Intent to Distribute).

13. 21 U.S.C. § 841.

14. *Moreland v. Fed. Bureau of Prisons*, 363 F.Supp. 2d 882, 885-886 (S.D. Tex 2005), rev'd, 531 F.3d 180 (5th Cir. 2005).

15. 21 U.S.C. § 841.

16. See Dan Baum, "Smoke and Mirrors: The War on Drugs and the Politics of Failure," 257 (Little, Brown and Co. 1997).

17. *Id.*

18. *Id.*

19. The average federal drug sentence in Montana in 2007 was 124.5 months. U.S. Sentencing Commission.

20. Families Against Mandatory Minimums, Meet FAMM, [www.famm.org/MeetFAMM.aspx](http://www.famm.org/MeetFAMM.aspx) (Last accessed Sept. 21, 2008).

21. U.S. Sentencing Guidelines Manual § 2D1.1(b)(1) (2007).

22. 18 U.S.C. § 924(c) (2006).

23. *Id.* at § 924(c)(a)(A)-(C).

24. The U.S. Supreme Court's recent decision in *Montejo v. Louisiana*, \_\_\_ U.S. \_\_\_ (2009), obligates defense counsel to even more vigilantly protect their client's Fifth and Sixth Amendment rights.

25. 9th Cir. Crim. Jury Instr. § 8.16 (2003).

26. *United States v. Shabani*, 513 U.S. 10, 15-16 (1994).

27. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

28. See e.g., *Krulewich v. United States*, 336 U.S. 440, 446 (1949) ("The modern crime of conspiracy is so vague that it almost defies definition.") (Jackson, J., concurring).

29. *United States v. Jimenez Recio*, 537 U.S. 270, 274-275 (2003) (citations omitted).

30. *United States v. Gibb*, 190 F.3d 188, 197 (3d Cir. 1999).

31. *Id.*

32. *United States v. DeLarosa*, 450 F.2d 1057, 1060 (3d Cir. 1971).

33. *United States v. Williams*, 128 S.Ct. 1830, 1843 (2008).

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34. *Pinkerton v. United States*, 328 U.S. 640, 647-648 (1946) (as a general rule, a conspirator is criminally liable for all acts committed by the co-conspirators during the course of an in furtherance of the conspiracy as long as the acts were "foreseeable").

35. *United States v. Eppolito*, 543 F.3d 25, 49 (2d Cir. 2008).

36. The specifics of the federal guideline/mandatory minimum sentencing scheme are set forth below at U.S.S.G. § 1B1.3.

37. For a more detailed discussion of federal conspiracy law and narcotics offenses, see Federal Defenders of San Diego, Inc., "Defending a Federal Criminal Case," 540-559 (Federal Defenders of San Diego, Inc., 2001).

38. In the federal system, cooperation rewarded with a reduced sentence is known as "substantial assistance." 18 U.S.C. § 3553(3), U.S.S.G. § 5K1.1.

39. See pp. 18, discussing the Guidelines' "safety valve" and substantial assistance.

40. William Poundstone, "Prisoner's Dilemma 8" (Doubleday 1992). Prisoner's Dilemma, Stanford Encyclopedia of Philosophy (available at [www.plato.stanford.edu/entries/prisoner-dilemma](http://www.plato.stanford.edu/entries/prisoner-dilemma)).

41. In 1950, John Forbes Nash, whose life was portrayed in the book and movie, "A Beautiful Mind," introduced the concept of a "Nash Equilibrium" (NE), which became the organizing concept under Game Theory. Nash was subsequently awarded a Nobel Prize in 1994. See [www.nobelprize.org/nobel\\_prizes/economic/laureates/1994/nash-autobio.html](http://www.nobelprize.org/nobel_prizes/economic/laureates/1994/nash-autobio.html).

42. Zero sum game is a game theory term describing a game in which one participant's gain is another player's loss; in other words, the gains and losses offset each other to equal zero.

43. Rasmussen, Eric, "Games and Information: An Introduction to Game Theory," Blackwell Publishing (4th Edition, 2007)

44. *Id.*

45. *Id.*

46. James D. Morrow, "Game Theory for Political Scientists" (Princeton University Press 1994).

47. Jonathan Blumen, "The Prisoner's Dilemma, The Ethical Spectacle" (Sept. 1995). See [www.spec-tacle.org/995/index/html](http://www.spec-tacle.org/995/index/html).

48. Michael Shor, "Prisoner's Dilemma, Dictionary of Game Theory Terms" (available at [www.gametheory.net/dictionary/PrisonersDilemma.html](http://www.gametheory.net/dictionary/PrisonersDilemma.html)).

49. "In more technical language, this demonstrates very elegantly that in a non-zero-sum game, a Nash equilibrium need not be a Pareto Optimum." [http://en.wikipedia.org/wiki/Prisoner's\\_dilemma](http://en.wikipedia.org/wiki/Prisoner's_dilemma).

50. *Id.*

51. Axelrod, Robert (1984), "The Evolution of Cooperation," Basic Books, ISBN 0-4654-02122-2

52. *Id.*

53. Discovered simultaneously and independently by psychologist Robyn Mason Dawes, mathematician Henry Hamburger, and economist Thomas C. Shelling, all Americans.

54. "A Dictionary of Psychology Page" (Andrew M. Coleman, ed., Oxford U. Press 2001).

55. *Id.*

56. However, one study has shown that cooperation is possible in N-person Prisoners' Dilemma if players have incomplete information on the order of their moves. Ko Nishihara, "A Resolution of N-person Prisoners' Dilemma," 10 Econ. Theory 531 (1997).

57. The U.S. Sentencing Commission informs for fiscal year 2006, 74.3 percent of the drug cases in the District of Montana involved meth. See [www.uscc.gov/JUDPAK/2006/mto6.pdf](http://www.uscc.gov/JUDPAK/2006/mto6.pdf). In 2006, 34.5 percent of Montana federal prosecutions were drug cases. See *id.*

58. 21 U.S.C. § 841(b)(1)(A)(ii), (A)(viii), (B)(ii), (B)(viii).

59. U.S. Sentencing Guidelines Manual § 1B1.8 (restricting the use of your client's own admissions in determining the sentence only if the cooperation is pursuant to a formal cooperation agreement).

60. See e.g. *Giglio v. United States*, 405 U.S. 150 (1972).

61. See 18 U.S.C. § 3161(b), (c)(1). The 9th Circuit affirmed a conviction where the district court ordered stand-by counsel to represent the defendant and ordered a two-week continuance for counsel to prepare for trial. *United States v. Moreland*, 509 F.3d 1201 (9th Cir. 2007), vacated and remanded on different issues by *Moreland v. United States*, 129 S.Ct. 997 (2009).

62. *United States v. Booker*, 543 U.S. 220, 245-46 (2005) (transforming the mandatory Guidelines to advisory to cure a Sixth Amendment violation). In *Rita v. United States*, 127 S. Ct. 2456, 2462, 2467 (2007), the Supreme Court held that Federal Courts of Appeals could presume that a sentence imposed within a properly calculated Guidelines' range is reasonable. However, in *Gall v. United States*, 128 S. Ct. 586, 596-97 (2007) (citing *Rita v. United States*, 127 S. Ct. at \_\_), the Court made clear that, although the Guidelines "should be the starting point and the initial benchmark[,] the district judge should consider all of the [18 U.S.C.] § 3553(a) factors [which includes personal history and characteristics] ? [and] [i]n so doing, he may not presume that the Guidelines' range is reasonable." In *United States v. Ward*, the Sixth Circuit held that a 294-month sentence is "reasonable" for a defendant with no criminal history. 506 F.3d 468, 471 (6th Cir. 2007).

63. See 21 U.S.C. § 841.

64. U.S. Sentencing Guidelines Manual § 2D1.1(c).

65. *Id.*

66. *Id.* at § 1B1.3.

67. *United States v. Navarro*, 979 F.2d 786, 789 (9th Cir. 1992).

68. U.S.S.G., Introductory Comment, Chapter Four, Part A.

69. U.S. Sentencing Guidelines Manual §§ 4A1.1-A1.3.

70. 21 U.S.C. §§ 841(b)(1)(A), (B), 851.

71. *Id.* at § 841(b)(1)(A), (B).

72. U.S. Sentencing Guidelines Manual § 4B1.1, 1.2.

73. *Id.* at § 5K1.1; 18 U.S.C. § 3553(e).

74. 18 U.S.C. § 3553(f); U.S. Sentencing Guidelines Manual § 5C1.2.

75. 18 U.S.C. § 3553(e).

76. *Id.* See also *United States v. Flores*, 559 F.3d 1016 (9th Cir. 2009) (In a Montana case even though defendant provided truthful information to government agents the government could refuse to file § 5K1.1 motion because the defendant's assistance did not result in arrests or indictments and thus, according to the government, was not substantial; the district court did not err in refusing to convene on evidentiary hearing to determine whether government fulfilled its obligation to act in good faith).

77. U.S. Sentencing Guidelines Manual § 5K1.1.

78. 18 U.S.C. § 3553(e).

79. 21 U.S.C. § 841.

80. 18 U.S.C. § 3553(3); U.S.S.G. § 5K1.1.

81. Fed. R. Crim. P. 35.

82. See *United States v. Quach*, 302 F.3d 1096, 1102-03 (9th Cir. 2002). However, this issue might be subject to dispute and litigation in the District of Montana. See e.g. Or. at 1-4, *United States v. Jackson*, No. CR 06-16-BLG-RFC-07 (D. Mont. Dec. 20, 2006).

83. *Flores*, 559 F.3d at 1018-19.

84. *United States v. Kevin Jay Croft*, U.S. District Court for the District of Montana, Great Falls Division No. Cr 04-162; *United States v. Kevin Jay Croft*, 302 Fed.Appx. 664 (9th Cir. 2008).

85. See, e.g., *United States v. Frakes*, U.S. District Court, District of Montana, Case Number CR-08-07-M-DWM.

86. See, e.g., *Id.*

87. See, e.g., *Id.*

88. For a practical primer on the safety valve, see March 2009 *Champion* at p. 24 "Fighting for the Safety Valve Reduction (without cooperation)."

89. In order for a defendant to score 1 or 0 criminal history points under the Guidelines, the defendant's criminal record must be limited to a single scorable misdemeanor conviction with a prison sentence of less than 60 days. U.S.S.G. § 4A1.1

90. 21 U.S.C. § 848 defines and delineates the punishment for engaging in a "continuing criminal enterprise."

91. 18 U.S.C. § 3553(f); U.S. Sentencing Guidelines Manual § 5C1.2.

92. *United States v. Mejia-Pimental*, 477 F.3d 1100, 1108 (9th Cir. 2007).

93. U.S. Sentencing Guidelines Manual § 2D1.1(b)(9).

94. 18 U.S.C. § 3553(f)(2); U.S. Sentencing Guidelines Manual § 5C1.2(a)(2).

95. *Id.* at § 2D1.1(b)(1), n. 3.

96. See, e.g., *Frakes*, U.S. District Court, District of Montana, Case Number CR-08-07-M-DWM; *United States v. Becker*, U.S. District Court, District of Montana, CR-02-05-M-DWM.

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97. [www.usdoj.gov/opa/pr/2003/september/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/september/03_ag_516.htm).  
 98. *Smith v. United States*, 508 U.S. 223, 226–241 (1993).  
 99. *Watson v. United States*, 128 S. Ct. 579, 586 (2007).  
 100. See footnote 98.  
 101. U. S. Sentencing Guidelines § 3E1.1.  
 102. *Id.* at § 3C1.1.  
 103. See, e.g., *Frakes*, U.S. District Court, District of Montana, CR-08-07-M-DWM.  
 104. *Id.* at § 5K1.1; 18 U.S.C. § 3553(e).  
 105. Fed. R. Crim. P. 35.  
 106. 28 U.S.C. § 2255.  
 107. See, e.g., *Frakes*, U.S. District Court, District of Montana, CR-08-07-M-DWM;  
 108. See, e.g., *Frakes*, United States District Court, District of Montana, CR-08-07-M-DWM;  
 109. See, e.g., *Frakes*, U.S. District Court, District of Montana, CR-08-07-M-DWM;  
 110. See, e.g., *Frakes*, United States District Court, District of Montana, CR-08-07-M-DWM;  
 111. See, e.g., *Frakes*, U.S. District Court, District of Montana, CR-08-07-M-DWM;  
 112. *Booker*, 543 U.S. at 260–62, 286.  
 113. U.S. Sentencing Guidelines Manual § 1B1.3  
 114. See, e.g., *Frakes*, U.S. District Court, District of Montana, CR-08-07-M-DWM.  
 115. See, e.g., *Frakes*, U.S. District Court, District of Montana, CR-08-07-M-DWM.  
 116. U.S. Sentencing Guidelines Manual § 1B1.8.  
 117. See, e.g., *Frakes*, U.S. District Court, District of Montana, Case Number CR-08-07-M-DWM.  
 118. *Id.*  
 119. See, e.g., *Frakes*, U.S. District Court, District

of Montana, CR-08-07-M-DWM.  
 120. *United States v. Sandoval-Lopez*, 122 F.3d 797, 800 (9th Cir. 1997) (“Plea bargains are contractual in nature and subject to contract–law standards.”).  
 121. See, e.g., *Frakes*, U.S. District Court, District of Montana, CR-08-07-M-DWM.  
 122. See *United States v. Bibler*, 495 F.3d 621 (9th Cir. 2007).  
 123. Ninth Circuit Court of Appeals, Oral Argument for *U.S. v. Jones*, No. 06-30608 (9th Cir. argued Jan. 7, 2008), [www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=1](http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=1).  
 124. *United States v. Jones*, 264 Fed. Appx. 616 (9th Cir. 2008).  
 125. See *Bibler*, 495 F.3d at 624.  
 126. Patrick Henry, Speech, United We Stand, Divided We Fall, (Mar. 1799) In his last public speech given in March 1799, proclaimed, “[l]et us trust God, and our better judgment to set us right hereafter. *United we stand, divided we fall.* Let us not split into factions which must destroy that union upon which our existence hangs.” At the end of his oration, Henry fell into the arms of bystanders and was carried almost lifeless into a nearby tavern. Two months afterward he was dead. (Emphasis added).  
 127. F.R.Crim.P.11  
 128. 18 U.S.C. § 3742(a)  
 129. U.S. Sentencing Guidelines Manual §3E1.1(b).  
 130. Fed.R.Crim.P. 11.  
 131. U.S. Sentencing Guidelines Manual §3E1.1(b).  
 132. 18 U.S.C. §3742(a).  
 133. See, e.g., *Frakes*, U.S. District Court,

District of Montana, CR-08-07-M-DWM.  
 134. U.S. Sentencing Guidelines Manual §3E1.1  
 135. *United States v. Hanna*, 49 F.3d 572, 575 (9th Cir. 1995)  
 136. See, e.g., *Frakes*, U.S. States District Court, District of Montana, CR-08-07-M-DWM.  
 137. 18 U.S.C. § 3553(e).  
 138. *In re Yagman*, 796 F.2d 1165, 1182 (9th Cir. 1986) (“[W]e embrace the fact that zealous advocacy is the attorney’s ideal.”).  
 139. Mont. R. of Prof. Conduct preamble ¶ 9 (rev. Apr. 1, 2004).  
 140. Bender, David A., “Judas goat.” A Dictionary of Food and Nutrition. (2005). Encyclopedia.com.  
 141. Price, Edward, Principles and Applications of Domestic Animal Behavior, CABI (2008)  
 142. *Id.*  
 143. Knowles, Elizabeth, “The Oxford Dictionary of Phrase & Fable” (2006).  
 144. *United States v. Norbury*, 492 F.3d 1012, 1015 (9th Cir. 2007).  
 145. See Stands. for Crim. J. 4–5.1(b), 14–3.2(b) (ABA 1999).  
 146. See John M. Burkoff, “Flipper Ethics” 31–Feb *Champ* 3838–39 ( of the January/February 2007 *Champion*. This is not even a recognized source in ALWD.  
 147. *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) (citing *Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985) (holding that the voluntariness of a guilty plea depends on adequacy of counsel’s legal advice)).

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## NEWS ABOUT MEMBERS

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**Saul H. Seyler** has joined Thiel Law Office in Missoula as an associate attorney. Mr. Seyler is a 2001 Environmental Studies honors graduate from San Francisco State University and earned his JD from the University of Montana School of Law in 2009. Mr. Seyler also received certificates in Alternative Dispute Resolution from the UM School of Law and in Natural Resource Conflict Resolution from the UM Graduate School. While attending law school, Mr. Seyler worked as a legal intern for Thiel Law Office and was involved in numerous complex litigation and legal issues. Mr. Seyler's practice will focus on personal injury, employment and labor law, business consultation, dispute resolution, estate planning, and probate and estate litigation.



**Dwight J. Schulte** has joined the Schulte Law Firm in Missoula. Mr. Schulte graduated from the University of Montana in 2003 with a bachelor of science in Business Administration/Finance. He then attended the University of Montana School of Law, graduating in 2008. After receiving his law degree, he worked for Maclay Law Firm practicing real estate law. Mr. Schulte will practice civil and criminal litigation.

The Brown Law Firm of Billings announced that **Seth Cunningham** has joined the firm as an associate lawyer. Mr. Cunningham graduated from the U.S. Air Force Academy in 2000, and served as an active duty Air Force officer for six years. He was stationed in Florida, Montana, Japan, and the Middle East. He returned to Montana in 2006 to attend law school at the University of Montana, and he graduated with honors in May 2009. After graduation, Mr. Cunningham returned home to Billings to join the Brown Law Firm, where his practice emphasizes civil defense litigation. Seth also serves in the Air Force Reserves as an admissions liaison officer for Air Force Academy and Air Force ROTC.

**Daniel T. Jones** has joined the Great Falls law firm of Jardine, Stephenson, Blewett & Weaver. Mr. Jones received a bachelor's degree from Harvard University, a juris doctorate from the University of Montana School of Law, and a master's degree in business administration from the University of Montana School of Business Administration. Mr. Jones offers legal services for real estate, tax planning, estate planning, and commercial transactions. He is admitted to practice law in all Montana state courts.

**J. Wayne Capp** has been named a shareholder of the law firm of Bohyer, Simpson & Tranel in Missoula. Mr. Capp graduated from the University of Montana School of Law in 2005 following his retirement from the Montana Department of Justice in 2002. He obtained his bachelor of science degree in Sociology from Montana State University in 1981. He is a graduate of the FBI National Academy. Mr. Capp is a member of the Western Montana Bar Association and the American Bar Association. He is admitted to practice before all Montana state and federal courts, as well as the Confederated Salish & Kootenai Tribal Court. His practice areas include personal injury defense, employment law, regulatory law and governmental relations, estates and probate, and business and commercial law. Mr. Capp serves the local community on the board of directors of the Missoula-Ravalli Transportation Management Association and the Stevensville Committee Foundation.

**Jessie Lundberg** has joined the Missoula law firm of Bohyer, Simpson & Tranel as an associate attorney. Ms. Lundberg graduated from the University of Montana School of Law with honors in 2008 after obtaining a bachelor of arts degree in Social Work in 2003. She served as editor-in-chief of the *Montana Law Review* in 2008, and clerked for Judge James R. Browning and Judge Sidney R. Thomas of the 9th Circuit Court of Appeals following law school. Ms. Lundberg is admitted to practice before all Montana state and federal courts, as well as the 9th Circuit Court. She is a member of the American Bar Association. Her areas of practice include insurance defense and coverage issues and general civil litigation.

## DEATHS

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### David Holland, Butte attorney

Longtime Butte attorney David L. Holland died at Crest Nursing Home in Butte on Nov. 16 at age 85.

Mr. Holland was born in Butte and graduated from Butte High School in 1942. He joined the Army Air Corps during World War II, and was stationed in Whitehorse, Yukon Territory, and at many other bases in the U.S. While in the service, he became interested in flying and later flew small airplanes and gliders in the Butte area.

Following his discharge from the Army, Mr. Holland attended and graduated from law school at the University of Montana. He worked as an attorney for state and local government, corporate business, and private practice with various law firms in Butte. He was elected to represent Butte at Montana's Constitutional Convention, heading up the convention's Judiciary Committee.

Mr. Holland married Mary Lou Murphy in 1950, in Butte. They had six children together. She died in 1969. He married Geri Pesanti in 1987, and she and his six children survive him.

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