

Lawyer

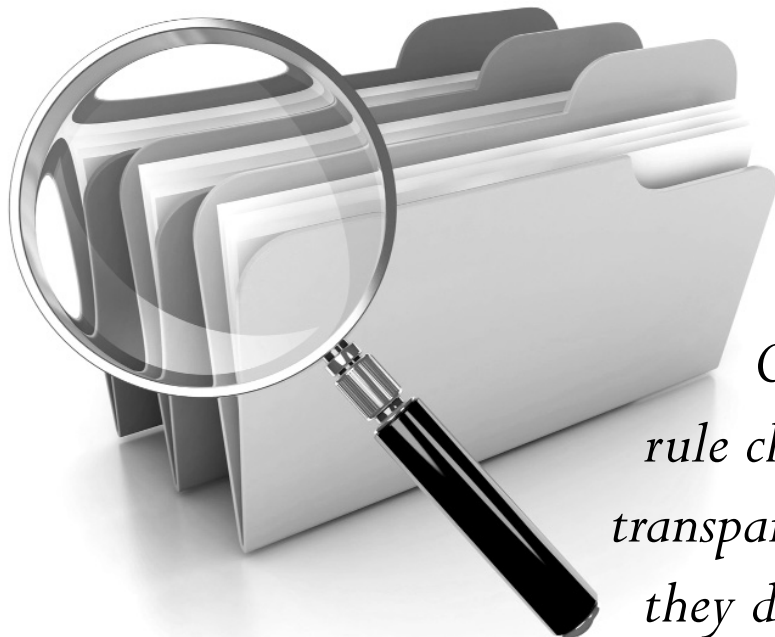
THE STATE BAR OF MONTANA



If you haven't
taken it yet. . .

The State Bar's
Member Survey
is happening 'til Jan. 7

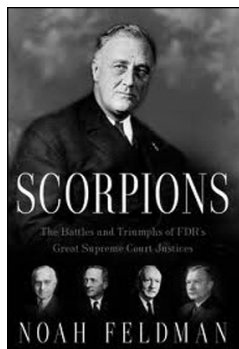
Find the survey form at www.montanabar.org



Open and shut?

*Court's lawyer-discipline
rule changes intended to increase
transparency; but critics say they
they didn't go far enough*

Just in time for Christmas:



**FDR's
jousting
justices**

Meet the new lawyer-legislators



Happy holidays!
*From the
staff and officers
of the State Bar*



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Joe Sullivan

PRESIDENT'S MESSAGE

Coffee, donuts and civility

Get to know your fellow attorneys better

Civility can arise when you least expect it and from the simplest of acts. Here are a few examples.

Example #1. Not long ago, two attorneys I deeply respect were on opposite sides at a hearing. Comments were made after the hearing once the courtroom had cleared and the two attorneys ended up toe-to-toe and nose-to-nose arguing with each other (not in their quiet inside voices). A few days later, one of these attorneys (call him Attorney A) explained to me what had happened. As a result of our conversation, Attorney A reached the conclusion the right thing to do would be to call the opposing attorney (Attorney B). He did so. Attorney B felt equally bad. The two ended up talking things out in a civil manner and probably created more professional respect for each other in the process.

Example #2. Law and motion day in the 9th Judicial District is something I have always enjoyed. Without fail the clerk, one of the attorneys in the hall, or even the sheriff or a deputy acting as bailiff has pointed me to a conference room, jury room, or law library with coffee and donuts. This has been true whether I was in Conrad, Shelby, Choteau, or Cutbank. This has been true whether under the tenure of Judge McPhillips, Judge Buyske, or Judge McKinnon.

It is not that I need the caffeine or calories (quite the opposite is true as to the latter). It is five or ten minutes where I get a chance to reacquaint myself with attorneys I know, as well as meet some I do not. It is a small tradition that has substantial benefits. The payoff is a noticeable level of familiarity and civility in the courtroom during the subsequent hearings.

I firmly believe familiarity breeds collegiality and respect. I equally believe anonymity allows animosity to needlessly fester. I initially practiced in a metropolitan area of nearly two million. I know first-hand how different practice is when you know you will probably never cross

paths with the opposing attorney again in your legal career. It is a substantial contrast to Montana where you are not only likely to meet your opponent in court several times in the future, but you are likely to meet him in the grocery store next week or end up coaching her daughter in Heisey youth league basketball. As a result, we treat each other better. I deeply value that.

That is not to say having a close-knit legal community does not have its down sides. I began my practice in Montana as an associate hearing the war stories of my senior partners Bill Coder and Bob Emmons. Apparently, a Cascade County Bar Association Annual Meeting was not deemed a success unless there was at least one fist fight between two or more learned counsels.

Example #3. I have had the pleasure of co-authoring Supreme Court briefs with Doug Wold, one of the most professional and civil attorneys I have met. I learned a great deal from Doug. One concept was, the audience you are writing for is intelligent and they neither have the time

nor the desire to hear anything but legitimate argument as to the issue at hand. As such, the finished briefs I wrote with Doug were always civil in tone and never contained any negative reference to opposing counsel.

Special note. I should briefly mention an upcoming article on civility. The Montana Chapter of the American Board of Trial Advocates (ABOTA) is a group of knowledgeable trial attorneys who all have vast trial court experience. One of the group's chief objectives is civility. In a subsequent *Montana Lawyer*, Don Robinson will provide us with some insight as to an ABOTA civility project he has put together.

Conclusion. There are many valid reasons for having a state, local, and specialty bar associations, but common to all is the ability to bring attorneys together and allow them the opportunity to get to know each other. While it may only seem to be coffee and donuts, a lunch meeting, or

The courthouse coffee room is a small tradition with substantial benefits. The payoff is a noticeable level of familiarity and civility in the courtroom.

State Bar member survey is under way

Go to www.montanabar.org to fill out this important form; you can win a gift card

The new State Bar of Montana member survey began online on Dec. 1 and members who have completed it have already put their names in the hat for gift-card prizes.

Helping to attract members to take the first member survey since 2005, the State Bar is offering drawings for three gift cards worth \$100, \$75, and \$50.

The survey will provide the Bar leadership with important information about the challenges that Montana Bar members face in their law practices. It will also allow members to tell the Bar how it can improve its services to them.

The results of the survey also will provide useful information for attorneys and law firms, such as the amounts of compensation Montana-licensed attorneys receive, for comparison purposes.

The survey form, which only takes about 15 minutes to fill out, is only available online, at the home page of www.montanabar.org. Click on the link under the "Front Burner," go to the simple instruction sheet, then fill out the easy-to-use form on your computer. You will receive navigation prompts on the online form, and you can exit the survey before completing it and return at any time. When done, just exit the survey and it automatically submits.

Your answers, which are confidential – in no way connected to your name, which is not required – will go to the

ABA Division for Bar Services, which will compile the results. The survey form will be on the Bar website through Jan. 7.

The survey can only be completed online. Print copies of the forms for postal mailing will not be available.

The survey information will provide an accurate overall portrait of the Montana Bar and its members. Much of the data will be compared to the 2005 data, telling us how much the Bar and the practice of law has changed in the past five years. Some of the questions will be new, covering topics not on the radar in 2005. In that survey, 43 percent of the State Bar members participated, a very high survey turnout.

As a token of the State Bar's appreciation for completing the survey, you will be entered into a drawing to win one of the gift cards. They are Bank of America gift cards which hold no hidden



fees or drawdown charges for their users. In order to enter the drawing, you must provide your name and e-mail address in the demographic section at the beginning of the survey. Doing so will not compromise the confidentiality of your responses. ○

Reminder: Time to comment on limited scope representation

The Montana Supreme Court will accept public comments on the proposed revisions to the Montana Rules of Civil Procedure and the Montana Rules of Professional Conduct dealing with limited scope representation for 90 days following the October 6th date of the order. **See the order and proposed changes at www.montanabar.org.** Other recent rule changes with comment periods can be found on **Page 21**.

cocktails and dinner, the positive ramifications can be considerable.

With that in mind, I challenge each of you to get to know more of your fellow attorneys. It is a challenge to make your practice more enjoyable and respectful. It is a challenge to reduce the animosity-driven tension in your practice. More specifically, it is a challenge to attend the annual State Bar meeting, to attend your local bar meetings, to get involved in the New Lawyers Section, to actively participate in the State Bar's sections or the specialty bars dealing with your practice area, and to volunteer as a member of the multitude of State

Bar committees. Whether you are new to the practice or a seasoned veteran, your involvement will create greater camaraderie which I firmly believe leads to greater civility.

As to the two attorneys who had gone toe-to-toe, their phone conversation ended something like this:

Attorney B: "I apologize again. You were really the bigger man in initiating this call."

Attorney A: "I apologize also. (And, with his tongue firmly planted in his cheek) Since I am the bigger man, I WIN!" ○

Court sets new rules on attorney discipline to allow transparency

By Charles Wood
The Montana Lawyer

The Montana Supreme Court – in a 6 to 1 vote – has issued revisions to the Montana Rules of Lawyer Disciplinary Enforcement (MRLDE) that are the result of a 2006 newspaper lawsuit challenging the lack of public access to a lawyer disciplinary matter.

The Nov. 9 revisions allow the public to see the details of an attorney's violation of rules of conduct after a formal discipline process is complete, while still allowing for a private admonition to attorneys who commit minor misconduct.

The rules take effect on Jan. 1, 2011. But any disciplinary matter then pending shall be concluded under the rules existing prior to that date.

The revised rules, presented below, contain the following:

- Bars release of information before a formal complaint is filed, except under five specific circumstances.
- Upon the filing of a formal complaint with the clerk of the Supreme Court, the proceedings before the Commission on Practice and pleadings and other documents filed with the clerk or Commission will become public.
- The disciplinary counsel is allowed to issue a letter of caution to a lawyer or take other corrective action for "minor" ethics lapses, with any such actions *not considered a disciplinary action* and therefore not public information.
- Such factors as whether the duty is owed to a client, to the public, to the legal system, or to the profession – and any existence of prior offenses – will be allowed to help determine the disposition of discipline.
- A lawyer under discipline proceeding stills retains a measure of confidentiality by entering a "conditional admission" to his offense.

THIS MATTER BEGAN when the *Billings Gazette* filed suit against the Supreme Court's Commission on Practice (COP) and Office of Disciplinary Counsel (ODC). Pursuant to the public's "right to know" guaranteed in the Montana Constitution, the *Gazette* sought to open "confidential" lawyer disciplinary files held by COP and ODC pertaining to a former Billings assistant city attorney.

Instead of ruling on the merits of the *Gazette's* claim, the Supreme Court determined, simply, that because it has exclusive jurisdiction over lawyer discipline, the 1st District Court where the suit was filed did not have authority to open lawyer disciplinary files and that the attorney's disciplinary files could not be retroactively opened.

The *Gazette* then challenged the constitutionality of the dis-

ciplinary rules. Even though it concluded that the *Gazette's* petition had "arguable merit," the Court on Nov. 26, 2008, decided to dismiss the *Gazette's* petition and initiate a public rulemaking process. The Court agreed to set up a working group consisting of representatives of the *Gazette*, the Commission on Practice, the Montana Newspaper Association, and the State Bar of Montana. Earlier this year, the Court issued proposed revisions to the rules and allowed a 60-day public comment period that ended Aug. 5.

THE RESULTS HAVE NOT made everyone happy.

"Now, some two years later – after studies, meetings, working groups, e-mails, written position statements, and countless hours – we are essentially back where we started – at square one," argued Justice Jim Nelson in his dissent.

"Despite making some cosmetic changes to the Rules of Lawyer Disciplinary Enforcement, it remains the case that lawyer discipline administered through 'admonition' (see MRLDE 13 below) will still likely remain private," Nelson wrote.

The *Billings Gazette* said in a Nov. 22 editorial, titled "Court's public access revision still leaves room for secrecy," that "the long-awaited revision . . . goes further than the old one to state that disciplinary proceedings and records are open to the public. However, it retains and creates exceptions and relies on those determining the discipline to decide when information can be withheld from the public – without a workable way for the public to object."

Helena attorney Mike Meloy, who represented the *Gazette* in the case, was quoted in the editorial as saying, "The rule on its face is much more open. But as a practical matter, we're right back where we started."

The editorial also quoted Justice Brian Morris, who was part of the working group appointed to draft new rules. He said the Court has set "a very high standard" for closing lawyer disciplinary hearings. "You could no longer have a public censure and have the information remain confidential."

"This isn't the end of the story," he continued. "We can see how it works out." If further changes are needed to protect the public interest, the rules can be changed again, he told the *Gazette*.

According to the editorial, attorney Meloy and Justice Morris agreed that the case that started this quest – the secrecy about the reasons for serious discipline of the former assistant city attorney – probably couldn't happen under the new rule.

"The rule certainly isn't the simple, straightforward directive on openness that we sought," the *Gazette* editorial said. But it said Justice Nelson's 10-page dissent "offers instructive insight into how Montana's lawyer disciplinary counsel and adjudicatory panels should uphold the public's right to information. It should be required reading for everyone involved in

holding Montana lawyers accountable for following the laws of the state and the rules of the Supreme Court.” [See excerpts from the dissent at right]

THE FOLLOWING ARE new Rules 3, 4, 5, 9, 10, 13, 20, and 26 in the Montana Rules for Lawyer Disciplinary Enforcement as amended by the Nov. 9 Supreme Court order. Rule 11 is abrogated.

RULE 3 – REVIEW PANELS: COMPOSITION; POWERS & DUTIES; QUORUM

A. Composition. The Chairperson of the Commission shall appoint one or more Review Panels of five members each, at least two of whom shall be non-lawyers; shall designate a Chairperson for each Review Panel; and shall realign the membership of Review Panels from time to time.

B. Powers and Duties. A Review Panel shall:

- (1) Review Disciplinary Counsel’s request to file a formal complaint, together with the complaint, the response from the lawyer against whom the complaint was made and any reply from the complainant together with other relevant documents and Disciplinary Counsel’s intake summary, investigative report and recommendations;
- ~~(2) Determine any preliminary and procedural matters.~~
- ~~(2)(3)~~ Refer complaint to Disciplinary Counsel for any further investigation, if needed, to determine whether a formal complaint is appropriate;
- ~~(4) Dismiss the complaint when the facts do not appear to warrant disciplinary action.~~
- ~~(5) Request Disciplinary Counsel to prepare and file with an Adjudicatory Panel a formal complaint when the facts appear to warrant disciplinary action.~~
- ~~(6) Request Disciplinary Counsel to prepare and file with an Adjudicatory Panel a complaint proposing interim suspension in an appropriate case.~~
- ~~(4)(7)~~ Hear and determine requests for review pursuant to Rule 10C(3) and for reconsideration pursuant to Rule 14;
- ~~(5)(8)~~ Authorize the stay of disciplinary proceedings for good cause shown pursuant to Rule 28;
- ~~(6)(9)~~ Conduct show cause hearings when a lawyer has refused to respond to inquiries from the Office of Disciplinary Counsel or the Commission; and;
- ~~(7)(10)~~ Notify parties of action by a Review Panel.

C. Quorum. Three members of a Review Panel, at least two of whom are lawyers, shall constitute a quorum, however, any act of the Review Panel shall require the vote of three members.

RULE 4 – ADJUDICATORY PANELS: COMPOSITION;

Excerpts from Justice Nelson’s dissent

■ Rather than ridding the discipline process of admonitions altogether – the substitute being the nondisciplinary letter of caution issued by Disciplinary Counsel . . . we have retained the option for COP to privately discipline an attorney for his or her misconduct, by means of a private admonition.

■ . . . in addition to authorizing an Adjudicatory Panel to impose an admonition privately, MRLDE 13 indicates that the Adjudicatory Panel may also decide “to close an adjudicatory hearing” altogether. This flies in the face of MRLDE 20B, which states that the proceedings before COP are public, except in the narrow circumstances listed in MRLDE 20B(1)-(4).

■ MRDLE 13 states that before imposing a private admonition, COP must consult with the lawyer subject to sanction. No doubt it will be the exceptional lawyer that

More on NELSON’S DISSENT, Page 32

POWERS & DUTIES; QUORUM

A. Composition. The Chairperson of the Commission shall appoint one or more Adjudicatory Panels of nine members each, at least three of whom shall be nonlawyers; shall designate a Chairperson for each Adjudicatory Panel; and shall realign the membership of Adjudicatory Panels from time to time.

B. Powers and Duties. Adjudicatory Panels shall, in accordance with the specific procedures and provisions of these Rules:

- (1) Hold hearings on formal complaints and complaints for interim suspension filed by Disciplinary Counsel;
- (2) After hearing, make findings of fact, conclusions of law and recommendations to the Court for discipline or other disposition of formal complaints and complaints for interim suspension;
- (3) Hear and determine preliminary and procedural matters incidental to the exercise of its powers and duties;
- (4) Administer ~~private~~ admonitions; ~~pursuant to Rule 13.~~
- (5) Hear and determine requests for reconsideration pursuant to Rule 14;
- (6) Administer oaths, provide for discovery and exercise its subpoena power pursuant to Rule 19;
- (7) Authorize the stay of a disciplinary proceeding for good cause shown pursuant to Rule 28;
- (8) Hold show cause hearings when a lawyer has refused to respond or cooperate with the Office of Disciplinary Counsel, a Review Panel or an Adjudicatory Panel pursuant to Rule 24;
- ~~(9) Administer discipline by consent pursuant to Rule 26.~~
- ~~(9)(10)~~ Conduct proceedings relative to disability and transfer to inactive status pursuant to Rule 28;
- ~~(10)(11)~~ Hold hearings on petitions for reinstatement and make recommendations for their disposition to the

More on DISCIPLINE RULES, Page 29

Number of lawyers in Legislature jumps to 10

After reaching a record low of seven attorney-legislators in the 2007 and 2009 Legislative session, the number of attorneys in the 2011 session is back up to 10.

One, Sen. Jeff Essman of Billings, was elected by his party to be Senate majority leader, and three have been chosen to be chairs of committees, including both the House and Senate Judiciary committees.

Four of the attorneys are new to the Legislature. Five attorneys have served in earlier sessions. *The Montana Lawyer* has been keeping track starting with the 1999 session, and the number of lawyer-legislators has been as high as 14 in the 2001 and 2003 session. But Montana continues to be one of the states with the lowest number of attorney-legislators.

Because a legislator who has a law degree can be a great benefit to the law-making process, past State Bar of Montana presidents have encouraged attorneys to become involved in politics.

Attorneys in the 2011 Legislature are:

Senate

● **Jim Shockley**, a Republican from Victor, will serve his fourth term in the Senate after serving three terms in the House. He will be the chair of the Senate Judiciary Committee and chair of the State Administration Committee.



● **Jeff Essman**, a Republican from Billings, was elected Senate majority leader in the November party caucuses. He will serve his fourth term in the Legislature and also will be chair of the Senate Rules Committee.



● **Larry Jent**, a Democrat from Bozeman, was re-elected to his third term in the Senate after spending three terms in the House.



● **Anders Blewett** (Alexander Blewett IV) a Democrat from Great Falls, served one term in the House before being elected to the Senate this year.



New face:

● **Art Wittich**, a Republican from Bozeman, was elected to his first term in November. He practices law at the Wittich Law Firm.



New faces:

● **Steve Fitzpatrick**, a Republican from Great Falls, is a newcomer to the Legislature this session. He practices law at the Smith, Walsh, Clark & Gregoire Law Firm.



● **Kristin Hansen**, a Republican from Havre, will be serving her first term in the Legislature. She is the chief deputy county attorney for Hill County.



● **Austin Knudsen**, a Republican from Culbertson, is a first-term legislator. He lives in Culbertson, but practices law in Plentywood with the O'Toole Law Firm.



House

● **Ken Peterson**, a Republican from Billings is serving his third consecutive term in the Legislature after having served previously. He will be chair of the House Judiciary Committee.



● **Mike Menahan**, a Democrat from Helena was elected to his second term in the House of Representatives.



New Congress full of attorneys

Of the 94 incoming members of the U.S. House of Representatives, 90 percent are Republicans, and nearly 40 percent have law degrees, the *Wall Street Journal* reported

Watch for the State Bar's Bill Watch List

Beginning later in December, the bills that the State Bar is closely following in the 2011 Legislative session will be listed on a "Bill Watch List" on the Bar homepage at www.montanabar.org. The text of the bills can be found on the Legislature website at <http://leg.mt.gov/>

Bar to hold its Law School for Legislators on Jan. 4

The State Bar of Montana will present its biennial Law School for Legislators on Jan. 4, one day after the opening of the 2011 Legislature.

Designed for new legislators, the half-day school – from 8 a.m. to noon in the House chambers – will focus on the Montana Constitution, the relationship of the Legislature to other branches of government, and the finer legal points in the lawmaking process.

It will be the fifth Law School for Legislators presented by the State Bar – with assistance from the Legislative Council and the University of Montana School of Law – since it began in 2000. Each school has drawn between 85-120 legislators.

The topics and speakers for the 2011 Law School for Legislators are:

Parameters of Legislative Authority under the Montana Constitution – *Betsy Griffing, UM Law Adjunct Professor and ACLU Montana*

Legal Assistance to the Legislature by Legislative Services, & Statutory Construction – *Robert Stutz, director, Legal Services Office, Legislative Services Division*

The Open Meetings Law Affects the Legislature – *Attorney Mike Meloy*

The Role of the Courts: Interpretation – *Supreme Court Justice Jim Rice*

Administrative Law & the Executive Branch – *John Moore, state's Professional Development Center*

Attorney General Opinions – *Chief Deputy Attorney General Chris Tween*

The Uniform Code Commission – *UM Law Professor E. Edwin Eck*

Support Montana's Court Help Program

Funds to be sought from Legislature

By **Tammy Plubell**

It should come as no surprise to those of us in the legal profession that the unmet legal needs of low-income Montanans are expansive. As practicing Montana attorneys, we are encouraged to donate generously of our time, money, or both in an effort to address those unmet legal needs.

Despite the generous and herculean efforts of many Montana attorneys, the civil legal needs of low-income Montanans remain unmet. In 2005, through a collaborative effort of entities and individuals concerned about access to justice for all Montanans, a legal needs study of low-income Montana households confirmed that there were probably in excess of 200,000 civil cases each year for which there was no legal assistance available.

Montana's legal needs study taught us that if all Montanans are going to be able to access the justice system, we cannot rely solely on legal aid programs and pro bono services to enable them to do so.

THE RESULTS of the 2005 legal needs study prompted a creative, multifaceted, collaborative response from the same access-to-justice entities and individuals concerned about these unmet legal needs. Staff members at the State Bar of Montana have been instrumental in coordinating that multifaceted response by:

- Providing staff support to Montana Supreme Court-created entities appointed to help develop and coordinate access-to-justice programs and services in Montana.

- Coordinating communication between access-to-justice entities.

- Actively participating in and supporting access-to-justice projects and programs.

One part of the response to improve access to justice for all Montanans has evolved because the Montana Supreme Court, the 2007 Montana Legislature, and Governor Brian Schweitzer understood the magnitude of unmet civil legal needs in Montana. The governor and Legislature funded, with one-time only funding, the Self-Help Law Program, a product of the 2005-2006 Law & Justice Interim Committee.

WITH MODEST funding, this program, as part of the Judicial Branch, opened full-time self-help law centers in Billings and Kalispell, and partnered on smaller projects and centers in eight other communities. Funding for an additional two years for the program was incorporated into the economic stimulus bill (HB645) that the 2009 Legislature enacted.

What began in 2007 as Montana's Self-Help Law Program, has proudly evolved into the Court Help Program. The Court Help Program has maximized the funding the Montana Legislature has provided by partnering with non-profit and private groups as well as colleges to greatly expand services through grants and volunteer projects.

The program has strived to level the civil justice system playing field. On the one hand, it provides tools and information to assist Montanans who do not have an attorney to navigate their own way through the legal process in civil matters. On the other hand, the program also works to increase and support the pools of attorneys willing to provide pro bono legal services to low-income Montanans. Staff members of the State

Bar of Montana have actively participated in developing and enthusiastically supported both of these approaches.

THE COURT HELP Program has worked with local judges statewide to encourage judicial involvement in developing and sustaining pro bono programs and has been instrumental in developing and expanding local pro bono programs in 10 judicial districts across the state.

Additionally, the program has developed legal education for attorneys volunteering in the areas most commonly requested for pro bono services and worked in partnership with the University of Montana School of Law to develop a pro bono program to assist veterans with disability benefits claims before the Veterans' Affairs Board.

IN 2010, THE Court Help Program has two full-time Self-Help Law Centers – one in Flathead County and one in Yellowstone County. Each center is staffed by an employee and a volunteer pool, including college interns, community volunteers and AmeriCorps members, who assist people with finding legal forms and information. As of June 2010, the full-time centers have served more than 10,000 people since opening in January 2008. Customer satisfaction surveys have been overwhelmingly positive.

Through the Court Help Program, there are also five part-time Self-Help Law Centers staffed by part-time employees, college interns, community volunteers, and AmeriCorps members. These part-time centers operate in Bozeman, Great Falls, Missoula, and Sidney. The State Law Library in Helena also offers a Self-Help Law Center as part of its services. In the month of April 2010 alone, 260 people received assistance from these part-time centers.

MONTANA IS a big state with a large rural population unable to easily access one of the Self-Help Law Centers. Consequently, the Court Help Program, in collaboration with the Montana Legal Services Association and the Montana Attorney General's Office, has obtained federal grant funding to

support the work of six AmeriCorps members who travel to the 14 rural counties of Blaine, Custer, Glacier, Hill, Lincoln, Park, Phillips, Pondera, Rosebud, Stillwater, Sweet Grass, Toole, Teton, and Valley to assist residents with legal needs.

In partnership with the Montana Legal Services Association and the Supreme Court's Commission on Self-Represented Litigants, the Court Help Program has developed user-friendly, plain-language legal forms and instruc-

The Montana Supreme Court is asking the 2011 Legislature to appropriate \$680,000 from the state's general fund to keep the Court Help Program in operation for fiscal years 2012 and 2013.

tions to assist self-represented litigants. Completed forms and instructions for name changes, emancipation, stepparent adoption, modification of parenting plans, and landlord/tenant actions are available on public websites. Forms for debt collection actions and simple wills and probate will also soon be available.

THE COURT HELP Program and State Law Library are also working with the State Library to provide Montana public library employees across the state with the tools, training, and support they need to assist library users who are experiencing legal problems.

The Court Help Program and Montana Legal Services Association have obtained grant money to fund coursework at the University of Montana School of Law and to support the law-school students' production of three educational videos addressing the needs of self-represented litigants. A second grant will fund work stations for self-represented litigants in at least two sites in rural Montana.

Montana's access-to-justice entities are in the process of updating that 2005 legal needs study, but common sense suggests that in the recent economic decline the Montana Legal Services

Association, the Montana Justice Foundation, private and government attorneys working pro bono, and government agencies cannot possibly respond to the expansive unmet civil legal needs of low-income Montanans without the Court Help Program.

The Montana Supreme Court is asking the 2011 Legislature to appropriate \$680,000 from the state's general fund to keep the Court Help Program in operation for fiscal years 2012 and 2013.

AS MEMBERS of the legal profession, we each have an ethical duty to promote equal access to justice for all Montanans, not just those who can afford it. Some of us fulfill that duty by providing free legal services to those in need, while others donate money to entities such as the Montana Justice Foundation, or volunteer in other indirect ways. Some of us have not yet found a way to

contribute. With the 2011 Legislature just days away from convening, we can all unite in a common goal of supporting the Court Help Program.

If you are not convinced by the Court Help Program's accomplishments listed above, try a personal visit to one of the self-help law centers in your community or at least pick up the phone and talk with someone who works or volunteers there. If you are convinced that \$340,000 a year is money well spent on a program that promotes equal access to justice on so many levels, then make sure you express that support to your local legislators.

If that is your only contribution to promote access to justice for low-income Montanans in 2011, it is a very important and meaningful one.

TAMMY PLUBELL is a Helena attorney appointed to the Montana Supreme Court's Equal Justice Task Force and is a member of the communication working group that is shared with the State Bar's Access to Justice Committee and the Supreme Court's Commission on Self-Represented Litigants.

The evolution of the State Bar's Group Benefits Trust

2011 premiums will see 12.8% rise

By **Jim Edwards**, president
Mountain West Benefits

The State Bar of Montana Group Benefits Trust (GBT) will celebrate its 13th year in 2011. The GBT is a 501c(9) Voluntary Employee Benefits Association (VEBA). The majority of law firms in Montana participate in the GBT; it provides health insurance coverage for almost 2,500 individuals.

Since inception, the GBT has been overseen by trustees who serve in a fiduciary capacity to the plan. ERISA is the law that governs qualified multi-employer benefit plans; it requires that fiduciaries make decisions solely in the interest of the plan participants and their dependents and that they defray any or all reasonable expenses related to plan administration.

In 1998, George Bousliman was the executive director of the State Bar of Montana. George asked the Law Practice Committee of the Bar to explore the opportunity to develop a health insurance trust for the membership. Some members of this initial committee included Carey Matovich, Bob Minto, Bernie McCarthy, and Peggy Probasco. After many months of discussion concerning the appropriate insurance contract to operate under – fully insured or self-funded – benefit plans were developed, premiums were established and the first law firms were presented with quotes.

By the end of 1999, 14 law firms had joined and the GBT was covering about 250 Montanans.

INITIALLY, THE GBT operated as a traditional, fully insured contract with Blue Cross Blue Shield of Montana as the insurer. After two years, the trustees negotiated a more favorable insurance arrangement – called a *retention contract*. In a retention contract the insurer charges full premiums but at the end of the year, if the premiums exceed claims and operating expenses, the carrier returns the excess. It is these initial excess premiums, along with the earnings over the years on these funds, that allowed the GBT to accumulate reserves and to offer the membership “premium holidays” on multiple occasions.

In 2005 the trustees were successful in negotiating an even more favorable insurance arrangement with the carrier, and what is known as a *minimum premium contract* replaced the retention contract. Because of the fiduciary obligation the trustees have to (1) manage the plan in the best interests of the plan participants and (2) defray reasonable expenses, moving

to a minimum premium contract was the logical progression as this contract allowed

the GBT to hold 100 percent of the claims portion of the premiums in its own claims account. This separated out the fixed costs (the carrier’s administration, taxes, pooling charges, etc.) and only these fixed costs – the *retention*, was paid in the form of a monthly premium. Thus the name of the insurance contract, a *minimum premium* arrangement.

If claims for any month were lower than the maximum amount of monthly claims liability, as determined and agreed upon in the minimum premium insurance contract, the GBT simply kept the excess.

The accumulation of excess premiums, in most but not all years since 2005, has also allowed for premium holidays and additions to reserves, and now allows the trustees to move the GBT to the most advantageous contract – a partially *self-insured* arrangement.

THE GBT HAS purchased an additional insurance component since first moving to a contract where it could recover excess premiums (the retention contract), to the present minimum premium contract. This insurance is called *specific stop loss* (SSL). The SSL insurance limits the amount charged to the GBT for any jumbo claim, to a certain maximum amount. Presently, in the minimum premium contract the SSL is purchased at \$240,000. Over the last three years, the amount of claims that have been reinsured (pooled out of the GBT’s claims liability) is \$1,837,000.

Going back 13 years to the initial discussions regarding the most advantageous insurance contract to operate under, it has been a goal to move the GBT to a partially self-funded plan. The trustees are pleased let the law firms participating in the GBT know that effective Jan. 1, 2011 the plan will be moving from the minimum premium arrangement to a partially self-insured contract.

The self-funded contract includes specific stop loss (SSL) insurance. The trustees are purchasing this coverage at \$150,000, much lower than has been the case under the minimum premium contract (SSL was at \$240,000). The trustees are also purchasing *aggregate stop loss* (ASL) insurance. ASL provides protection to the GBT by establishing a maximum

More GROUP BENEFITS TRUST, Page 33

Summary of September Board meeting

The following is a summary of the minutes of the State Bar of Montana's Board of Trustees on Sept. 16 in Great Falls:

BAR PRESIDENT'S REPORT – Cindy Smith

The Executive Committee, at the request of the Bar president, approved the establishment of a diversity working group. The president appointed Ann Moderie, June Lord, and Pam Bailey as members of the group.

SECRETARY-TREASURER'S REPORT – Paul Stahl

The Bar's investment accounts are up 32 percent, but confidence in the economy remains an issue with the markets. The five portfolios are made up of 80 percent bonds, which are becoming more and more difficult to purchase. Another review of the Bar's current investment policy was recommended.

The ad hoc committee on the State Bar budget – consisting of members Paul Stahl, Jane Mersen, and Ann Shea – continues to meet regularly. Using input from the May strategic planning meeting, the Committee will focus on programs that were given a low priority rating.

The amount of the reserves needs to be increased each year in order to help with inflation costs. It is estimated the Bar's reserve account (the amount necessary to run the bar for three months) will be invaded by the year 2014 if alternative financial resources or budget cuts are not instituted.

The ad hoc committee is contemplating a future dues increase request to the Montana Supreme Court, with an automatic inflation increase.

PAST PRESIDENT'S REPORT – Chris Tweeten

Board of Bar Examiners member Randy Cox presented a proposed petition to adopt a uniform bar exam during the Past Presidents Committee meeting at the Law School in August.

BOARD CHAIR'S REPORT – Shane Vannatta

Mr. Vannatta welcomed Ellen Donohue and Leslie Halligan to their first meeting as Bar trustees and congratulated re-elected trustees and new officers.

EXECUTIVE DIRECTOR'S REPORT – Chris Manos

The Bar will try to establish better relations with the local bar associations by providing an updated handbook of information offering technology and resources available to them.

BAR COUNSEL'S REPORT – Betsy Brandborg

The Secretary of State's Office has asked the Bar to support its petition regarding the notary journal statute issue.

The Technology Committee will put together a series of one-hour technology CLEs.

The Bar submitted comments in August on the proposed revisions to the Rules for Lawyer Disciplinary Enforcement

(see story on Page 6).

EQUAL JUSTICE COORDINATOR REPORT – Janice Doggett

Responses to the Tribal Needs Survey were received from every tribal court. The Native American working group would like to see more self-help centers across Montana and would like to hold a full-day Native American tribal conference with tribal leaders.

VISTA volunteer Brendan Kelley is drafting documents for an online library for teachers and attorneys that will be available through the Law-Related Education web page.

LAWYERS ASSISTANCE PROGRAM – Mike Larson

Mike further highlighted the LAP Committee was to meet in November regarding the closing of a practice and what to do with the files upon an attorney's death or illness.

A CLE is being developed that will focus on retirement and dementia issues.

ISSUES REQUIRING BOARD ACTION

■ **MOU with Justice Foundation.** The Board authorized the Executive Committee to continue to negotiate a draft of a memorandum of understanding (MOU) with the Montana Justice Foundation. The existing Bar policies do not include a reference to the relationship between the Bar and the MJF. The MOU is to assist in the clarification of roles, duties, and responsibilities of both parties.

■ **Public Law Section revised bylaws.** Proposed amendments approved by the section were provided to the trustees, which the trustees approved.

■ **State Bar social networking policy.** A proposed social networking policy modeled after the State Bar of Wisconsin had been approved by the Executive Committee. The Board voted to delete Paragraph 2 of the policy, then voted to adopt the amended policy (see policy on Page 14).

■ **State Bar trademark usage policy.** The Trustees reviewed the proposed trademark usage policy (see policy on Page 14), which sets guidelines on use of the State Bar's name and logo. The Board amended the section (d) Protection of the Marks by adding:

"The State Bar of Montana, through its Executive Committee, shall take reasonable measures to protect the State Bar of Montana's interests in the marks, including but not limited to:"

The Board then adopted the State Bar Trademark Usage Policy as amended. The trustees were in consensus that a

guidance sheet was necessary to understanding the policy.

■ **State Bar revised bylaws** (informational). The bylaw working group consisting of members Shane Vannatta, Randy Snyder, Darcy Crum, and Chris Tweeten is reviewing the allocation of trustee areas as well as the general structure of the bylaws as a whole. In addition to the requirement of a review every 10 years, the trustees are concerned that the number of trustees is inconsistent with the number as set by the Montana Supreme Court. Recommended changes could be provided to the trustees as early as the Dec. 3 Board meeting.

HEALTH BENEFITS TRUST – *Chris Gittings*

The State Bar health plan continues to be very successful with \$9 million in premiums per year. Of the 2,500 people on the plan almost 113 are Bar members. The plan has seen an annual increase of 5.5 percent in costs over the last 7 years with costs continuing to rise. The initial paperwork to become completely self-funded has been filed. A new investment manager has been selected. (See related article on Page 7.)

MONTANA TRIAL LAWYERS ASSOCIATION (MTLA) – *Amy Eddy, president*

The MTLA would like the Montana Supreme Court to revisit the district court rules because issues of importance are taking too long to resolve. A pilot program using special masters charging reduced fees to try and keep up with cases has not seen a lot of progress. The MTLA will be creating a committee consisting of some of its board members and district court judges to review the rules.

NEW LAWYERS' SECTION – *Dwight Schulte / Mike Talia* Mr. Schulte introduced incoming President Mike Talia.

The Section would like to continue its momentum to keep new lawyers involved with the State Bar. Mr. Talia would like to see new lawyers appointed as liaisons to the various committees and sections.

The State Bar's support of the use of technology and collaborative software programs is appreciated. It makes it easier for the Section to hold meetings and work on projects.

Erica Grinde is actively working to get new lawyers in Montana to serve seniors by assisting with the ABA's elder assistance program.

PARALEGAL SECTION – *Barbara Bessey*

The Paralegal Section's annual CLE is scheduled for March 25, 2011, in Missoula. The Section is discussing the possibility of doing an online survey to the members asking them to give the Board suggestions of new CLE topics and securing attorneys and paralegals to deliver presentations. Typically, the Section Board chooses the topics; however, in an effort to get members involved in their section, an online survey is more interactive and easier for members to take.

The Paralegal Section has also been asked to assist with a CLE for new lawyers in suggesting possible attorney/paralegal teams to present topics at the University of Montana School of Law addressing information not covered in law school of the "learning curve" and the business aspects of starting their own practices.

The Bar gave the Section approval to participate in Legal Services' Developer Program Document Clinics.

ABA DELEGATE REPORT – *Bob Carlson*

The ABA's Annual Meeting was held Aug. 5-10 in San Francisco. Several highlights included a resolution to amend

More BOARD SUMMARY, Page 27

STATE BAR CALENDAR

December 24

State Bar offices closed for Christmas holiday.

Dec. 31

State Bar offices closed for New Year's holiday.

January 3

Board Of Bar Examiners meeting, 10 a.m., State Bar offices, Helena

January 4

Law School for Legislators, 8 a.m.-noon, House Chambers, Capitol, Helena

January 7

State Bar Executive Committee meeting, 10 a.m., State Bar offices, Helena

January 12

News and advertising content deadline for February edition of *The Montana Lawyer*.

January 14-16

Annual CLE & Ski, Big Sky

February 4

State Bar Executive Committee meeting 10 a.m., State Bar offices, Helena

Rules Update (Federal, Civil, Etc.) CLE – Bozeman

February 18

Annual Real Estate CLE, Fairmont Hot Springs

February 25

Bench-Bar Conference, Bozeman

New social networking policy for Bar entities

Social networking is quickly emerging as an important way for an association to interact with its members and the public, and facilitate member-to-member dialog. Social networks (such as, but not limited to, blogging, microblogging, communities like Facebook and My Space, networking sites like LinkedIn, and social media offer opportunities for outreach, information sharing, and interaction.

The following policy, adopted by the Board of Trustees in September, applies to State Bar of Montana volunteers, sections, committees, and related programs or groups (entities) wishing to use the State Bar's name and/or graphic identity (logo) in conjunction with the creation or maintenance of a social networking presence that identifies the entity as being sponsored by or affiliated with the State Bar.

Administering the social networking site

Each State Bar entity desiring a social network presence will designate a representative to serve as its administrator. Site administration, including setup, content development and management, and administration of these policies, is the responsibility of the sponsoring entity, which shall appoint an individual to administer the social network site (site adminis-

trator). The site administrator will provide the State Bar staff liaison with administrative access to the social network in the event emergency assistance is needed. Entities are responsible — in conjunction with their respective site administrators and all those individuals participating in a social network established under this policy — for complying with these guidelines.

Guidelines for social networking

In sum, be professional, respectful, and discreet in your online dialog. Represent the State Bar and your profession well. Exercise good judgment. State Bar members who fail to do so, or who fail to comply with these guidelines, may not only forfeit the right to participate in social networking activities sponsored by the State Bar, but may also be subject to penalties and discipline for failing to adhere to applicable Rules of Professional Conduct, as well as civil or criminal liability and penalties, as warranted.

1. Be responsible. You are personally responsible for the material you post. All statements must be true and not mislead-

More SOCIAL NETWORKING, Page 28

Board sets policy on the usage of the State Bar name and logo

The following policy on the use of the State Bar of Montana's name and logo was adopted by the Board of Trustees on Sept. 16, and has become a new section (3-11) of the Board Policies:

Use of Organization Name and Logo

(a) Purpose and Objective. The State Bar of Montana's name, logo, and other marks (collectively "the marks") are valuable property of the State Bar of Montana, protectable under state and federal law. In order to avoid inadvertent or purposeful misuse of the marks by external persons or entities, the Board of Trustees adopts the following policy.

(b) Impermissible Uses. Except upon the express, written permission or license of the State Bar of Montana, no person or entity may use the marks for commercial purposes. Such commercial

purposes include without limitation: use to indicate endorsement by the State Bar of Montana of products or services.

(c) Permissible Uses. The following uses of the marks is automatically permitted (and an implied license given) in the following limited circumstances:

- (1) by members of the State Bar of Montana (including firms or associations of members) to indicate membership or affiliation with the State Bar of Montana without indication or the appearance of endorsement by the State Bar of Montana of the member's products or services;
- (2) by persons or entities for non-commercial purposes (i.e. for information or comment) to provide a webpage link or other contact information of the State Bar of Montana;
- (3) by ABA-accredited educational

institutions and educators therein for purposes of instruction; and
(4) by organizations currently approved by the Board of Trustees under 2-141.

(d) Protection of the Marks. The State Bar of Montana, through its Executive Committee, shall take reasonable measures to protect the State Bar of Montana's interests in the marks, including but not limited to:

- (1) seeking trademark registration under state or federal law;
- (2) requesting all users of the marks to use a trademark disclaimer (super-script "TM" for trademark, "SM" for service mark or "®" for a federally-registered mark) where appropriate to indicate the State Bar of Montana's claim of trademark rights in the marks, and as a condition of the use of the marks (whether expressed or implied);
- (3) requesting unauthorized users of the marks to cease and desist such use. ○

Upcoming CLE seminars for Montana lawyers

CLEs with Ethics & SAMI* credits

**Substance Abuse / Mental Impairment*

5.0 Ethics credits required every 3 years – 1.0 of them must be a SAMI credit. See www.montanabar.org for SAMI updates.

December 10 Helena – Metcalf Building, Capitol Complex
State Ethics Law 3.0 CLE credits, including 3.0 Ethics (no SAMI) credits. Presented by the state Personnel Division, (406) 444-3985

January 19 Billings – Holiday Inn Grand
Employment Law Alphabet Soup 6.0 CLE credits, including 1.0 Ethics (no SAMI) credit. Presented by the National Business Institute, (800) 930-6182

February 23 Great Falls – Holy Spirit Parish Hall
Annual Red Mass Ethics CLE "Ethical Considerations: Candor Amongst the Court & Counsel;" presenter: Hon. John Warner, retired Supreme Court Justice. Voluntary luncheon at Parish Hall at noon; CLE at 1:30 p.m.; Red Mass at conclusion of CLE (see story below)

All other CLEs

December 7 Helena – Metcalf Building, Capitol Complex
Montana's Wrongful Discharge Act 3.0 CLE credits. Presented by the state Personnel Division, (406) 444-3985

December 7 Teleconference
Gathering Necessary Data 1.50 CLE credits. Presented by Cannon, (800) 775-7654

December 9 Helena – Montana Club
Medical Marijuana Law 1.0 CLE credit. Presented by the 1st Judicial District Bar, (406) 457-2011

December 15 Helena – Metcalf Building, Capitol Complex
Writing Administrative Rules of Montana 10.0 CLE credits. Presented by the state Personnel Division, (406) 444-3985

Other web & phone CLEs for Montana credit are:

■ For the State Bar of Montana's approved online CLEs, go to 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

■ Lorman Education Services' teleconferences at www.lorman.com/teleconferences/

■ The National Business Institute's live teleconferences at www.nbi-sems.com/Default.aspx/?NavigationDataSource1=N:304

December 21 Helena – Metcalf Building, Capitol Complex
Preventing Harassment 3.0 CLE credits. Presented by the state Personnel Division, (406) 444-3985

January 7 Teleconference
Paralegal Seminar on Protecting the Child's Rights 1.0 CLE credits. Presented by the Montana Association of Legal Assistants, (406) 546-2150

January 14-16 Big Sky Resort
Annual CLE & Ski 10.0 CLE credits. Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. Program details will be mailed to State Bar members and presented at www.montanabar.org.

February 4 Teleconference
Nuts and Bolts of Legal Writing (Paralegal Seminar) 1.0 CLE credit. Presented by the Montana Association of Legal Assistants, (406) 546-2150

Ethics CLE & Red Mass set for Great Falls

The 4th Annual Red Mass Ethics CLE will be held in Great Falls at 1:30 p.m. on Feb. 23 at Holy Spirit Parish, featuring retired Supreme Court Justice John Warner.

The CLE will be open to both lawyers and paralegals. CLE credit is pending, but the CLE will qualify for at least 1.0 Ethics credit.

Following the CLE a traditional Red Mass will be hosted by the Parish at the Parish Hall with Great Falls-Billings Diocese Bishop Michael Warfel presiding. The custom of a special mass for the bench and bar arose in 13th Century Europe.

The CLE and associated events are sponsored by the Parish and a committee

of Great Falls area attorneys – Mary Matelich, Glenn Tremper, Richard Martin, Dale Schwanke, Karen Reiff, Theresa Diekhans, George Darragh, and Anders Berry.

The mass, and a noon luncheon that will precede the CLE, are optional, but all CLE attendees and their spouses or guests are invited to attend both. There will be a charge of \$25 for the CLE session and the luncheon will cost \$10 a person.

State Bar of Montana Bookstore

These Montana legal manuals and videos are for sale or rent via this mail-order catalog. Other Montana Bar-produced video seminars, are available for download to your computer on the Online CLE catalog at www.montanabar.org.

LEGAL PUBLICATIONS

Montana Real Estate Transactions
2010, 360 pages, \$180

Montana Citizens' Guide to the Courts
2010, 20 pages, print copy \$10
Free download at www.montanabar.org

Montana Students' Guide to Turning 18
2008, 22 pages, CD \$10
Free download at www.montanabar.org

Montana Probate Forms
2006, 288 pages
Book plus CD \$150

Civil Jury Instructions
(MPI – MT Pattern Instructions)
1999 w/2003 Update, 400 pages
Book plus CD \$200

Criminal Jury Instructions
New 2010 edition
650 pages, on editable CD only
CD \$130

Handbook for Guardians & Conservators
2005, 60 pages incl. 5 forms
Book plus CD \$150

2011 Lawyers' Deskbook & Directory
Pre-Order
Book, \$40
Mid-year update CD for 2010, \$20

MT Family Law Form Book
2005, 93 pages incl. 26 forms
Book and CD \$150

Public Discipline Under MT Rules of Professional Conduct
2009, 115 pages annotated
Book \$35

Public Information Flyers
tri-fold brochures, \$10/bundle of 100
Client Bill of Rights
Dispute Resolution
Divorce in Montana
How Lawyers Set Their Fees
Purchasing Your Home
Renting a House or Apartment
Small Claims Court
After an Auto Accident
When You Need a Lawyer
Wills & Probate

Statute of Limitations Manual
1998, 95 pages w/2001 Update
Book \$25

Step-parent Adoption Forms
2003, 5 forms
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U.S. & Montana Constitutions
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6. Changes in Civil Procedure; SAMI Part II
7. Health Reform 102; Hot Topics Facing U.S. Attorney's Office
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9. Changes in Federal Pleading Standards; Energy Issues
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3. In Praise of the Guilty Project – .75 Ethics credit
4. Loyalty Apocalypse – 1.25 Ethics credits.
5. Accountability for Prosecutorial & Defense Attorney Misconduct – .75 Ethics credits
6. Common Dilemmas in Criminal Ethics – 1.0 Ethics credit.

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Attorney-Paralegal Practice Tips

Malpractice & Impaired Lawyers, Going Paperless, Estate Planning, Ethics & Social Networking, Federal Rules Change, Employment ADA, Access to Justice for Aged

Bankruptcy

Consumer Law, Mortgage Issues, Dept. of Revenue Update, Means Testing, Compliance Issues, Practice Issues, Foreclosure Issues, Chapter 7, Fraud, Judges' Update

Basic Office Practice

Mtn. States Transmission Intertie, 2nd Amendment Law, Pitfalls into Windfalls, Real Estate, Ethics Tips, Malpractice & Impaired Lawyers

Bench-Bar Conference

Attorney-Client Privilege, Limited Representation, Civility, Bankruptcy Bomb, Oral Argument Tips

CLE & SKI

Ethics Opinions & Notary Opinion, Changes in Rules of Civil Procedure, Litigating in Economic Red Zone, Liability While Serving on Boards, Property Law

Construction CLE

ADR, Federal Contracts, Supreme Court Cases, Construction Lawyers Speak, Contractor' Perspective, Contract Claims with DOT, Psychology in Construction Cases

Elder Law

Mental Impairment Among Lawyers, Powers of Attorney, Conservatorship & Guardianship, MontGuides, Medicare 101

Eminent Domain

Its Legal Foundation, Constitution & Representing Landowners, Negotiating with DOT, Land Use Interaction, Recent Game Farm Cases

Energy Update

Wind development, NW Energy's Role, Federal Energy Regulatory Commission, Surface Access Rights, Oil & Gas Drainage, NEPA

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Conflict Check, Title Policy, Choosing Type of Foreclosure, Bankruptcy, Summary Judgment

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Reactions to limited-scope representation

The Montana Supreme Court's order proposing new rules to encourage limited-scope representation, otherwise known as "unbundling" of legal services, was featured in the November *Montana Lawyer* magazine, along with a President's Message by State Bar President Joe Sullivan addressing the issue.

Mr. Sullivan requested that Bar members and others respond to the idea of more more limited-scope representation in Montana and promised that those responses would be published by the Bar. On these two pages are three of those responses, one by a member of the access-to-justice working group that recom-

mended enhanced limited-scope representation, one from a North Dakota attorney, and one from the State Bar Ethics Committee in the form of a formal Ethics Opinion.

See further responses under "Front Burner" at www.montanabar.org.

Giving a 'safe harbor' to practices already in place in Montana law

First of all, I'd like to thank all involved for the frank and honest discussion about limited scope representation (LSR). From the President's Message, to the Cover Story, to the State Bar Ethics Committee, it is clear all concerned have the best interests of our justice system in mind, and want to do the right thing regarding LSR.

Toward that end, a few facts seem to have become lost in the discussion.

First, LSR is here now...it is permitted, it is ethical, and it has been around in Montana since at least 2004. Rule 1.2 (c) provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

The rules proposed by the Montana Supreme Court Equal Justice Task Force, the Montana Supreme Court Commission on Self-Represented Litigants, and the Access to Justice Committee of the State Bar simply provide "best practices" and "safe harbors." As the Montana Supreme Court states in its order asking for comment, the rules would "encourage LSR," recognizing LSR is here now.

One very important "safe harbor" is the LSR arrangement must be in writing. This makes it clear what representation is covered, and what is not. This will take care of many of the concerns voiced by well-meaning objectors to the proposed rules.

Probably the biggest single objection to the proposed rules is the so called ghostwriting provision. The issue has moved beyond whether document assistance is allowed (it is) to whether the author of the document must be disclosed within the four corners of the document. The proposed rules follow California, where a good 20 years of experience shows the proposed rule (not requiring disclosure of the author) works well. This rule avoids the chilling affect disclosure would result in. Of course, opposing counsel and the court know

Further discussion of this issue is featured at the www.montanabar.org home page

help with a document occurred, as it is presumably well written. But the end result is beneficial – a well prepared document helps all concerned.

Last, as President Sullivan's article points out, LSR has been around for some 20 years in other states, and it "never caught on in any significant way." That is fine. But for those attorneys and clients who may want to engage in LSR, let them do so using "best practices."

Kudos to the Supreme Court for considering the issue, and indeed indicating their inclination to encourage LSR in Montana.

**– Russell C. Fagg
District Court judge, Billings
(Member, drafting committee of propose rules)**

Problems with the ghostwriting

Mr. Sullivan made some very good points in the President's Message section of the November issue of *The Montana Lawyer*. I practice in the area of collection law in North Dakota, South Dakota, Minnesota, and Montana. We encounter ghostwritten legal documents much more frequently now than we have in the past, primarily because of debtors' use of the Internet where they are able to employ ghostwriters, most of whom are not admitted to the bars of the states in which the ghostwritten pleadings are to be filed.

In most cases the purchasers of the ghostwriters' services are poorly served because they do not know how to handle proceedings beyond the initial filings.

Compounding the problem for these individuals, judges can tell when pleadings are ghostwritten, and they will frequently withhold the procedural leniency often granted to true pro se parties.

We rarely encounter attorney ghostwriters who are licensed in the states in which the ghostwritten documents will be used or filed, and I do not believe I have ever encountered them in North Dakota.

North Dakota has set out the requirements for attorneys

who assist otherwise unrepresented parties in N.D. R. Civ. P. 11(e) as follows:

(e) Limited Representation.

(1) Notice. An attorney who assists an otherwise unrepresented party on a limited basis must serve a notice of limited representation on each party involved in the matter. The notice must state precisely the scope of the limited representation. An attorney who seeks to act beyond the stated scope of the limited representation must serve an amended notice of limited representation. The attorney must also serve a notice of termination of limited representation on each party involved in the

matter.

(2) Filing. If the action is filed, the party who received assistance of an attorney on a limited basis must file the notice of limited representation with the court.

(3) Scope of Rule. The requirements of this rule apply to every pleading, written motion and other paper signed by an attorney acting within the scope of a limited representation.

– **Clifton Rodenburg
Johnson, Rodenburg & Lauinger
Fargo, N.D.**

Excerpt of State Bar Ethics Committee opinion on limited-scope representation

Facts: The Montana Supreme Court has requested members of the Bar comment about proposed changes to the Montana Rules of Professional Conduct and Civil Procedure. The proposed changes are to Rules 1.1, 1.2 and 4.2 of the Rules of Professional Conduct and Rule 11 of the Montana Rules of Civil Procedure, along with the addition of two new Rules of Civil Procedure, 4.2 and 4.3. The stated intent of the proposals is primarily to encourage limited scope representation as one means of addressing the unmet legal needs of low to moderate income Montanans.

The Ethics Committee offers the following Opinion pursuant to the mandate of Article III of the State Bar Constitution to review the Rules of Professional Conduct and recommend changes.

Questions Presented:

1. Are the proposed amendments to Montana Rules of Professional Conduct 1.1 and 1.2 necessary to meet the stated goal of the Court?
2. Does the proposed amendment to permit “ghostwriting” under Rule 11 of Montana’s Rules of Civil Procedure reduce the standard of care by an attorney?
3. Are the proposed amendments consistent with the lawyer’s traditional “functions” as an “advisor,” “advocate,” and “negotiator”? (See Preamble: A Lawyer’s Responsibilities (3) of the Montana Rules of Professional Conduct.)

Short Answer:

1. No. The Ethics Committee believes that while the goal behind the proposed rules is commendable, the proposed amendments are unnecessary because Rule 1.2(c) and 1.5(b) already authorize limited scope representation “if the limitation is reasonable under the circumstances.” Conversely, if the limitation is not “reasonable under the circumstances,” it should not be permitted. The proposed amendments appear aimed at authorizing what otherwise would be “unreasonable” limited scope representations and insulating lawyers who agree

to them. This, the committee fears, could create a second tier of representation that could result in more confusion to clients and greater time and expense to the courts and clients of counsel serving opposite a pro se litigant utilizing a limited scope attorney. The current limited scope rule 1.2, in combination with the existing rules of conduct (specifically Rule 1.5 on fees), are sufficient to address the stated goal. Current rules provide a substantial amount of elasticity, raising questions about the need for revisions.

The Ethics Committee’s full opinion on this issue will be found at www.montanabar.org.

2. Yes. The proposed amendment to Rule 11 of Montana’s Rules of Civil Procedure invites substandard attorney work and increased invalid filings that will only serve to clog already crowded Court dockets.

3. No. The proposed amendments, to the extent they promote the so-called “unbundling” of lawyer services, tend to diminish and de-value the lawyer’s counseling or “advisor” role and instead emphasize the lawyer’s scrivener role. While this changed emphasis arguably serves the client’s “wants,” it discourages qualitative attention to the client’s “needs” and in that sense actually undermines the stated goal of the proposed amendments.

Conclusion:

The Equal Justice Task Force Working Group has clearly been working to address the issue of representation for indigent Montanans for a long time. The Ethics Committee respects the time and attention paid and admires their resolve. The work done to date is commendable, as is the goal.

However the Ethics Committee suggests that to a significant extent the stated goal can be accomplished without the rule changes proposed. The Ethics Committee would welcome an opportunity to meet with the Working Group to develop language within the Montana Rules of Professional Conduct that would address the need identified, without invoking a sea change to full or limited service representations. ○



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Orders propose appellate procedure changes

90-day comment periods set for each

Two orders issued on Dec. 3 by the Montana Supreme Court contain proposed changes to the Montana Rules of Appellate Procedure. Both orders are numbered. AF 07-0016. The two orders, with the comment periods set by the Court, are:

IN RE PROPOSED CHANGES TO THE MONTANA RULES OF APPELLATE PROCEDURE

The Office of the Appellate Defender (OAD) has asked the Court to adopt certain changes to the Montana Rules of Appellate Procedure with the primary purpose of cutting unnecessary costs. The proposed changes would: (1) require court reporters to file certificates of service of transcripts on appeal; (2) eliminate the requirement that transcripts be provided to both the Attorney General and the county attorney in certain types of appeals; and (3) eliminate the requirement that briefs filed with the Court be printed on bond paper.

Shown below are the proposed Rules 8, 10, and 11 of the Rules of Appellate Procedure, intended to accomplish the purposes suggested by OAD.

Rule 8. The record.

...

(4) Format, filing and service of transcripts, and number of copies.

(a) A transcript shall contain a title page, index pages listing witnesses and exhibits, as applicable, the body of the transcript, and a page certifying in writing - and executed by the court reporter - that the transcript is a true and correct verbatim record of the proceeding transcribed. The court reporter shall also include a certificate of service of the transcript on all applicable parties.

Each page shall measure 8 ½ by 11 inches, with combined left and right standard text margins not exceeding 2.25 inches. A page number shall appear in the upper right corner of each page.

Rule 10. Filing and service of papers – generally.

(2) Service of all papers required. Copies of all papers, including any transcript, filed by any party and not required by these rules to be served by the clerk of the supreme court shall, at or before the time of filing, be served by the party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel. In criminal cases appealed by the defendant and in appeals relating to involuntary commitment and proceedings regarding abused or neglect-

ed children, all transcripts, briefs, motions, and other papers shall be served on both the county attorney and the attorney general. In those types of cases, transcripts shall be served only on the attorney general's office.

Rule 11. Form of briefs and other papers – duplication.

(1) Form of briefs, appendices, petitions, including petitions for writs, motions, and other papers. Briefs, appendices, petitions, motions, and other papers shall be produced by any standard printing, word processing, typewriting, or equivalent process capable of producing a clear black image on paper. Such paper shall be standard quality, opaque, unglazed, acid-free, recycled paper, 25% cotton fiber content, with a minimum of 50% recycled content, of which 10% shall be post-consumer waste.

IT IS ORDERED that public comments will be accepted on the above proposed changes to the Montana Rules of Appellate Procedure for 90 days following the date of this Order. Such comments shall be filed, in writing, with the Clerk of this Court.

IN RE PROPOSED CHANGES TO RULE 7 OF THE MONTANA RULES OF APPELLATE PROCEDURE

The Court is considering changing M. R. App. P. 7, regarding mandatory appellate alternative dispute resolution, to allow the parties to an appeal subject to that rule a second opportunity to select their own appellate mediator. In that regard, the Court is considering adding the language below to M. R. App. P. 7(4)(d):

Rule 7. Mandatory appellate alternative dispute resolution.

...

(4) Selection or appointment and payment of mediator – immunity.

...

(d) In the event the parties do not voluntarily and timely select a mediator, the clerk of the supreme court shall appoint as a mediator for the appeal the next self-nominated attorney on a list maintained by the clerk for that purpose pursuant to section (4)(e) of this rule. The order of appointment, substantially complying with Form 6 in the Appendix of Forms, shall be signed by the clerk of the supreme court and served upon the mediator and the parties to the appeal. The parties may substitute a mediator of their choice for the mediator appointed by the clerk only if, within 10 days of the clerk's appointment, they file a written stipulation signed by all parties agreeing upon a substitute mediator. The parties must also serve a copy of such a

stipulation upon the mediator appointed by the clerk.

IT IS ORDERED that public comments will be accepted on

the above proposed change to M. R. App. P. 7 for 90 days following the date of this Order. Such comments shall be filed, in writing, with the Clerk of this Court. ○

Forum discusses merit selection of MT judges

By the **Helena Independent Record**

Retired Montana Supreme Court Chief Justice Karla Gray thinks using a merit-selection plan to choose the state's judges would better protect judicial impartiality and fairness. Gray is planning on taking this idea to the Legislature in hopes of bringing a shift from the current nonpartisan elections for judges.

During a public forum in Helena on Nov. 16, Gray told the audience she thinks the current system excludes far too many talented people.

"What about all of the lawyers in small-town Montana and other cities that would be fabulous?" she asked about 60 people who were attending the forum, which was titled Selecting Montana Judges: Protecting Impartiality, Ensuring Accountability and Preserving Public Trust.

"The election process is tainted once it becomes a political race," Gray said. "I think the worst thing about judicial elections is the money. It's essentially a popularity contest and a money contest."

Gray is backing a "21st century merit selection plan" and is going to go approach the Legislature in an attempt to get a referendum bill to the voters. "I think the public is ready to get engaged in this issue," she said.

"Is the way we go about it sufficient enough for people to cast an informed vote for judge or justice?" Gray asked.

In a merit-selection system, a citizen commission reviews applicants for a judicial seat and then recommends three candidates to the governor for appointment. Voters then decide whether to retain the appointed judges. Currently, nine states use merit selection.

Keynote speaker of the forum, James Sample, a professor at Hofstra School of Law, said it has been 25 years since any state has converted to the merit system. Nevada attempted to change and failed just two weeks ago, he said.

"The primary focus needs to be on improving the system we have," he said.

Sample said enacting change will be a heavy lift. Referendums fail because even those who go to the polls often don't vote in judicial elections.

"Voters are very reluctant to give up their vote even in elections where they don't elect to cast that vote," he said.

Gray and fellow panelist District Court Judge Dorothy McCarter said if they had not initially been appointed to their positions, they probably never would have served. McCarter was appointed by a governor to the First Judicial District in 1989 and later ran for the position in 1992.

"Educating the public on candidates should take priority over spending and popularity ads," McCarter said.

McCarter said it is difficult to sit on a high-profile case when she knows those in the audience will be voting in her election. She said she has been able to rise above the feeling "but it's human nature to keep that in the back of your mind."

Forum panelist Randy Cox, a civil litigator, said judge races are different from those of other elected officials and should be treated as such. "In order to have good judges, we have to move them away from politics and not into politics," he said. ○

Public Defenders can still represent co-defendants, prosecutor says

From the **Missoulian**

A Montana Supreme Court ruling upholding the homicide conviction of a Missoula teenager "essentially preserves the status quo" in cases where co-defendants are represented by public defenders, Missoula County Attorney Fred Van Valkenburg said on Oct. 29.

The court's ruling on Oct. 28 came in a case filed by Anthony St. Dennis, convicted of deliberate homicide in the fatal beating in 2007 of sometimes-homeless Missoula veteran Forrest Clayton Salcido.

Dustin Strahan, then 21, was accused along with St. Dennis, who was 18 at the time, of beating and stomping the short, slight 56-year-old Salcido just off the California Street foot-

bridge.

Strahan testified against St. Dennis in a trial that was moved to Havre because of pre-trial publicity. The Hill County jury found St. Dennis guilty and he was sentenced to 100 years in the Montana State Prison with no chance of parole for 40 years.

Strahan then cut a deal and pleaded guilty to accountability to deliberate homicide.

Although St. Dennis's attorney argued that the fact that both men were represented by the Office of the Public Defender was a conflict of interest that violated St. Dennis's constitutional rights, the court disagreed.

Such situations, Justice Patricia Cotter wrote for the majority, should be decided on a case-by-case basis.

"**I THINK EVERYBODY** except the ACLU (which had filed an amicus brief in the case) was relieved that it came out

the way it did," Van Valkenburg said of the court's decision.

The first case that could raise the [public defender] issue anew was coming up soon in Missoula County District Court.

Raymond Big Beaver stands accused along with Eugene Gonzalez of fatally punching and kicking Johnny Belmarez on April 12 behind a West Broadway business.

Each man is charged with deliberate homicide and each is represented by a public defender.

A status hearing in Big Beaver's case was set for Nov. 9, and Gonzalez has a status hearing on Dec. 16, with trial scheduled for Jan. 21.

"It's a very similar case to St. Dennis," said Van Valkenburg, adding that "I don't think there's any conflict in having separate (public defender) offices represent the defendants."

ED SHEEHY, WHO heads the regional public defender office in Missoula, did not respond to a *Missoulian* call seeking comment. But Sheehy assigned public defenders from different offices to represent Big Beaver and Gonzalez, just as he did for St. Dennis and Strahan.

If any conflict is perceived in that case or any others, a judge could appoint someone outside the public defender system to represent one of the defendants, Van Valkenburg said. ○

ORAL ARGUMENTS

The Montana Supreme Court will hear the following oral arguments:

January

■ Case No. DA 10-0102 GASTON ENGINEERING & SURVEYING, P.C., Plaintiff and Appellant, v. OAKWOOD PROPERTIES, LLC, and YELLOWSTONE BANK, Defendants and Appellees.

Oral argument is set for Wednesday, Jan. 19, at 9:30 a.m. in the courtroom of the Montana Supreme Court, Justice Building, Helena.

■ Case No. OP 10-0280 UNITED STATES OF AMERICA, Petitioner v. JUVENILE MALE, Respondent.

Oral argument is set for Wednesday, Jan. 19, at 1:30 p.m. in the courtroom of the Montana Supreme Court, Justice Building, Helena.

TO VIEW BRIEFS containing details on each case, go to <http://courts.mt.gov/library>, click on "Cases" in the top navigation bar, and search for the case by names or case number.

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- Oft-cited author and frequent speaker on the topic of arbitration and ADR
- Former lead defense and plaintiff's counsel, and former special counsel to a F100 Company responsible for the litigation, management, and settlement of over \$3 billion in contract-related claims
- Former Director, International Dispute Resolution Program, CEPMLP, University of Dundee, Scotland
- Fellow, Chartered Institute of Arbitrators (2002-2009)
- Task Force Member, National Summit on Business to Business Arbitration, Washington DC 2009



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Roosevelt's jousting justices

Review by **Adam Cohen**
for the New York Times

In these equable days on the Supreme Court, when dissents are fashioned as polite disagreements and Antonin Scalia and Ruth Bader Ginsburg are the best of friends, it is hard to imagine a time when the Court was a roiling caldron of ill will. But so it has been at various points in its history – “nine scorpions in a bottle,” in the phrase attributed, perhaps erroneously, to Oliver Wendell Holmes Jr.

SCORPIONS

The Battles and Triumphs of FDR's Great Supreme Court Justices

By Noah Feldman
Illustrated. 513 pp. \$30

when World War II was raging in Europe, and their contentious terms continued through 1954, when *Brown v. Board of Education* was decided.

Although all were committed New Dealers and liberals, each adopted his own theory of the Constitution. The visions they expounded still hold sway and, to a striking extent, their interpretive battles are the ones that continue to preoccupy lawyers, law professors and judges.

FOR MEN WHOSE differences would be the stuff of legend, these four had remarkably parallel early lives. All were self-made outsiders. Frankfurter was born in Vienna and grew up on the Lower East Side of Manhattan, where his father sold linens, silks and furs door-to-door. A City College graduate, he was toiling in New York's Tenement House Department when he quixotically set his sights on Harvard Law School.

Jackson was born into a family of small farmers in the western New York hamlet of Frewsburg. He studied at Albany Law School but did not graduate – the last justice appointed to the Court not to have finished law school. A country lawyer, he argued in makeshift courtrooms in schools, churches and, as he later recalled, a barn.

Black was the eighth and last child of a rural Alabama shopkeeper. He grew up in an unpainted house with farm animals out front, and attended the University of Alabama's law school when there were just two professors and roughly 40 students.

Douglas, a Yakima, Wash., native, had the most hardscrabble upbringing. After his father, an itinerant minister, died, he was raised by a struggling single mother. He paid his way

through Whitman College in Walla Walla by working as a janitor.

THE JUSTICES-TO-BE energetically plotted their ascents. Frankfurter's academic brilliance catapulted him onto the Harvard Law School faculty. From there, he courted Roosevelt assiduously in person and in letters.

Douglas also made his mark in academia, at Columbia Law School and then at Yale, where he became a Sterling professor, the school's highest distinction, before he turned 34. He got a seat on the newly created Securities & Exchange Commission and parlayed that low-profile post into the high-profile chairmanship by barnstorming for the job and intimating that he had an offer to be dean of Yale Law School.

Jackson's ambitions took him from placid western New York into the New Deal maelstrom. While serving as assistant attorney general, he wrote to Roosevelt to offer support for the court-packing plan, Roosevelt's threat to increase the number of justices on the Supreme Court to make it more pro-New Deal. Coming at a time when even many Roosevelt intimates were critical of the idea, Jackson's encouraging words landed him in the president's inner circle.

Black's rise was the most Faustian. Intent on a political career, he joined the Ku Klux Klan and won a Senate seat with the backing of its powerful state political machine. He cut his ties after the election, when the hatemongers had served their purpose.

THE NARRATIVE PICKS UP steam when it turns from what drew these men together to what tore them apart. The pages overflow with rivalries and a “Devil's Dictionary” of invective. Jackson blasts Black for not recusing himself from a case that his former law partner argued. Black exacts his revenge by persuading the president not to appoint Jackson chief justice. Douglas assails Frankfurter as a pedant, complaining that his speeches at the justices' conferences last precisely 50 minutes – the length of a Harvard Law School class. Frankfurter calls Douglas one of the “two completely evil men



Frankfurter



Jackson



Black



Douglas

JOUSTING JUSTICES, Page 34

When a physician testifies

By **Dr. W. David Herbert**
Billings physician and attorney

From the time they begin their professional training, physicians are inculcated with the idea that the practice of medicine is both an art and a science. This concept was really brought home to me when I first began my practice in the military.

I was going over an X-ray with an older gentleman. I explained to him that the X-ray did not tell me where his pain was. The X-ray only indicated that a particular finding or abnormality could be causing the pain that he told me he felt during my physical exam of him.

Then I told him that the X-ray changes did not tell me that he had a bone infection, but only gave rise to a suspicion or possibility of such an infection. Other bone scans and even a biopsy would be necessary to confirm an infection to a degree of medical certainty.

At the end of all this, I can clearly remember him making the statement that what I was engaging in was certainly not “rocket science.”

True, the practice of medicine is not “rocket science.” When people say “rocket science” it is obvious to me that they are talking about applied physics and, more specifically, Newtonian physics. The practice of medicine does not equate to applied Newtonian physics. There is certainly a lot of *art* in the practice of medicine.

An attorney who has a firm grasp of this concept of what the practice of medicine is – and is familiar with how physician competence is evaluated by the medical profession – will be in a much better position when taking a physician’s testimony at trial or in deposition.

When physicians are licensed and certified in their specialties they are not expected to demonstrate 100 percent competence in what they are doing. Actually physicians are continually evaluated and monitored when they are members of hospital medical staffs. Many professional boards require that a physician be tested to be initially certified and periodically tested to maintain certification after that. A physician is considered competent if he is right 75 or 80 percent of the time. For example, a radiologist’s findings may be compared to other radiologists’ findings using inter-rater reliability tests.

ANY TIME AN ATTORNEY is about to take the testimony of a physician at trial or in deposition, I believe it is essential for the attorney to have the physician agree with the statement that the practice of medicine is both an art and a science. This is especially true if the physician’s testimony is adverse to the attorney’s client’s interests. A physician who disagrees with this statement is disagreeing with virtually all of his medical colleagues.

Also, it is incumbent upon the attorney to be intimately

familiar with how a particular physician’s specialty is evaluated by his colleagues.

I have been licensed to practice a medical specialty for more than 30 years and have been an attorney for more than 20 years. It has only recently come to my attention that many Montana attorneys may not be familiar with the concept of the practice of medicine being an art and a science.

I have been a member of the Montana Bar for less than a year. I recently became involved with a case in which medical testimony was pivotal as to how the jury would decide the case. I believe that the testimony of a radiologist was the primary basis of their guilty verdict. The radiologist apparently made a statement about a prior injury not being evident on a MRI. When asked why another non-testifying radiologist stated that there was evidence of a prior injury, the testifying radiologist stated that he was better at reading MRIs than the other radiologist.

I believe that the testifying radiologist’s testimony could have been properly impeached had the defense attorney been aware of the concepts contained in the above discussion. ○



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The screenshot shows the State Bar of Montana website. At the top, there is a navigation bar with links: Home, Login, Contact Us, Site Search. Below this is the main header with the text "STATE BAR OF MONTANA" and "Serving the people of Montana and their attorneys". A secondary navigation bar lists various resources: About the Bar, Admission to the Bar, Bar Groups, Member Benefits, Calendar, CLE, Bookstore, Legal Resources, For the Public. The main content area is titled "Need Legal Help?". Below this title, there is a paragraph explaining the service: "If you need help with a legal issue, you've come to the right place. The State Bar of Montana's Lawyer Referral and Information Service is a good start. In just a few short minutes, you can obtain the name of an attorney to help you with your legal need. Or, you can pursue other options for resolving your issue." There are four sections, each with an icon and a heading: 1. "I want to talk to someone." with a telephone icon, text: "Not sure if you need a lawyer? Help is no more than a phone call away. Talk to an experienced LRIS legal assistant who can help you locate the best resource." 2. "I want to hire a lawyer." with a thumbs up icon, text: "Fill out a form with your contact information, select the area of law you need an attorney for, and the State Bar of Montana will refer you to a lawyer registered with its service. It's that simple!" 3. "I can't afford a lawyer." with a piggy bank icon, text: "If your income falls below certain guidelines, you might be eligible for free or low-cost legal services. There are also free resources available for issues including consumer information, disability rights, landlord-tenant hotlines and many more." 4. "I want more information." with a book icon, text: "Law School for Montana Citizens offers a variety of easy to understand resources to help you resolve your legal issue or become a better consumer. Including access to the courts, forms and information, your answer might be here!"

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the ABA's bylaws to provide additional seats in the ABA House of Representatives for American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands.

The House of Delegates adopted a recommendation commemorating the 50th anniversary of the publication of Harper Lee's novel, "To Kill a Mockingbird."

U.S. Supreme Court Justice Ruth Bader Ginsburg introduced incoming new ABA President Stephen N. Zack.

NORTHWEST BAR ASSOCIATION – *Randy Snyder*

The Northwest Bar hosts a monthly luncheon – CLEs with 40-plus members in attendance, now going on two years. The Bar has an active executive committee which plans meetings, CLE, and social activities. The Bar created additional "members at large" positions for the executive committee. This helped spread the workload, provided additional ideas, and serves to inspire and groom new officers.

The Northwest Bar will host the State Bar Annual Meeting in Kalispell in 2011.

WESTERN MONTANA BAR ASSOCIATION – *Shane Vannatta*

The Western Montana Bar Association (WMBA) is in a dramatic turn-around from the past few years, and was highly active this past year. The officers and board of the WMBA have published a monthly newsletter, held monthly meetings with guest speakers for 0.5 CLE credit, with attendance of 25 to 40 attorneys; hosted a memorial service to honor members of the bar who have passed away; organized a Professionalism CLE with over 100 attendees; funded a \$1,500 law school scholarship; and held its Annual Meeting in July.

The WMBA Pro Bono Program, which serves Missoula, Mineral, and Ravalli Counties, is entering its ninth year. The program currently has sufficient funds, which are primarily used to fund a paralegal loaned from Montana Legal Services. The program initiated a pro bono mediation program last fall, which has been used extensively by the 4th Judicial District judges and standing masters in family law cases. Unfortunately, pro bono referrals of family law cases has hit a snag with many attorneys refusing to take on a new family law matter because they lack the knowledge and training. The Committee is planning to host another pro bono family law CLE.

AREA E – *Olivia Norlin & Ryan Rusche*

The 17th Judicial District Bar Association hosted U.S. Magistrate Judge Keith Strong in Glasgow in April. Judge Strong gave a talk entitled "Relevancy of Federal Court to the Rural Practitioner." The event was well-attended. The Association continues to hold at least two meetings per year.

Area E attorneys worked involve local lawyers and judges in the Eastern Montana Stand Down 2010 in Glendive in September. A "Stand Down" is a community-based intervention program to help homeless veterans.

MONTANA DEFENSE TRIAL LAWYERS ASSOCIATION – *Mark Parker*

MDTLA held its annual CLE in November in Missoula.

So far this year, the MDTLA has submitted one amicus to the Montana Supreme Court.

The MDTLA boasts more than 400 members.

DISPUTE RESOLUTION COMMITTEE – *Mark Parker*

The Dispute Resolution Committee has been fairly active this year with respect to numerous matters, including participating in ABA Dispute Resolution teleconferences and co-sponsoring a three-day conference entitled "Horizons of Mediation Practice" where leading scholar professor Joseph B. Stulberg attended and held panels and workshops.

There has been an effort by the DR Committee members, with the assistance of UM Law Professor Eduardo Capulong, to meet with the chief justice and discuss appellate mediation issues and even discussion of a full-time appellate mediator with the Montana Supreme Court.

On May 12, 2010, Prof. Capulong issued a report on the Supreme Court Appellate Mediation Practice which addresses issues about Rule 7, M.R.App.P.; concerns about why some domestic relations cases are defined out of Rule 7; and other issues.

PROFESSIONALISM COMMITTEE – *Cindy Smith*

The Professionalism Committee has continued to plan and put on CLEs at the State Bar's Road Show and the Annual Meeting.

TECHNOLOGY COMMITTEE – *Ryan Rusche*

The Committee adopted its long-range plan for 2010 – 2012. One objective for the next year will be to replace the large, ABA tech CLE with multiple hour-long CLEs.

The Committee has been discussing social networking and technology in general and what lawyers need to know in today's world in order to remain competent in the practice of law. One member has developed a "technology competency" list that is being debated by the Committee as a potential reference for practitioners.

The Committee continues to provide information to members via its website and electronic mail distributions.

BANKRUPTCY SECTION – *Darcy Crum*

The Bankruptcy Section contributed \$5,000 to Montana Legal Services again this year. The money assists with the Chapter 7 self-help bankruptcy clinics MLS puts on several times a year. The Section's annual CLE was in October in Missoula.

NONPROFIT LAW SECTION – *Tim Fox*

The Nonprofit Section arranged speakers on nonprofit law matters for a portion of CLE & Ski last January, and are now looking to sponsor a one-day CLE on nonprofit law in 2011.

This past Bar dues cycle was the first cycle for the Section to solicit members. The Section had 23 dues-paying members as of May 19. Jill Diveley at the Bar assisted Section in getting the Section's web page up and running. ○

ing. Carefully consider content; what you publish will be widely accessible for some time and, in some cases, indefinitely. Protect your privacy and the privacy of others, and adhere to all statutory prescriptions and Professional Rules of Conduct governing the privacy of individuals and confidential information of your clients.

2. Be upfront, identify yourself. Your honesty - or dishonesty - will be quickly noticed in the social networking environment. Use your real name, and, if relevant, your role or interest in the topic discussed. When appropriate, make it clear you are speaking for yourself and not on the State Bar's behalf.

3. Be civil, respectful. It's okay to disagree with others, but do not use defamatory, abusive, threatening, offensive, or obscene language or post illegal material.

4. Be quick to correct an error. If you make a mistake, admit it. Quickly provide the correct information. If appropriate, modify an earlier post to make it clear that you have corrected an error.

5. Keep it relevant, add value. Write about what you know. Information can add value if it contributes to the legal community's knowledge or skills, improves the legal system or public understanding of the legal system, or builds a sense of community.

6. Follow copyright and fair use laws. Always give people proper credit for their work. Make sure you have the right to use material with attribution before publishing. It's a good practice to link to others' work rather than reproducing it on your site. When in doubt, as to the proprietary nature of material, don't use it. Recognize the potential professional and legal consequences of any failure to follow applicable laws governing the use of others' material.

7. Protect proprietary and client information. Do not discuss or misuse proprietary or confidential information, and follow all professional and ethical rules governing the disclosure of information shared with you by clients. When in doubt, leave it out.

8. Refrain from endorsements of political candidates. The activities of the State Bar are defined by Montana Supreme Court rules, and those rules apply to social networking activity. As a membership organization, the State Bar needs to avoid even the appearance that it directly or indirectly endorses or financially supports candidates for political office.

9. Comply with Montana rules governing lawyer advertising. Comply with all restrictions governing legal advertising when posting content to any social network, including one being administered by an Entity.

10. Do not violate antitrust laws. Antitrust laws prohibit postings that encourage or facilitate agreements between State Bar members concerning the following, as they pertain to legal services: prices, discounts, or terms or conditions of sale; salaries; profits, profit margins or cost data; market shares, sales territories, or markets; allocation of customers or suppliers; or any other term or condition related to competition.

11. Abide by the social network's rules. By joining a particular social network, you agree to abide by that community's terms of use, so review those terms carefully.

Using the State Bar's name and/or logo


State Bar entities may incorporate the State Bar's name and/or logo into their social networking identity with prior approval from the State Bar. To create consistency and community on the web, the State Bar has established standard logo templates, disclaimers, and naming conventions. The Site Administrator for an Entity must work with assigned staff liai-

son from the State Bar to coordinate approval, the development of the social network graphic, and other site requirements.

Enforcing this policy

The State Bar does not actively monitor these sites for inappropriate postings. If an inappropriate posting is brought to the attention of the State Bar, however, the State Bar will take appropriate action to enforce this policy.





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Supreme Court pursuant to Rule 29;

~~(11)(12)~~ Hold hearings and make recommendations to the Court concerning assessment of the costs of proceedings, investigations and audits pursuant to Rule 9; and

~~(12)~~ Approve Disciplinary Counsel's request to file a formal complaint when the facts appear to warrant disciplinary action or transfer to disability/inactive status.

C. Quorum. Five members of an Adjudicatory Panel, at least three of whom are lawyers, shall constitute a quorum, however, any act of the Adjudicatory Panel shall require the vote of three members.

RULE 5 – OFFICE OF DISCIPLINARY COUNSEL

A. Appointment. The Court shall appoint a lawyer to serve as Chief Disciplinary Counsel and may appoint such Deputy Disciplinary Counsels as they deem necessary. Disciplinary Counsel shall not engage in private practice; shall be admitted to practice in Montana at the time of appointment or within a reasonable time thereafter as determined by the Court; and shall maintain offices in Helena, Montana, in facilities designated by the Court.

B. Powers and Duties. Disciplinary Counsel shall perform all prosecutorial functions and shall have the following powers and duties:

(1) Supervise Office of Disciplinary Counsel (Office) staff in performing central intake functions;

(2) Evaluate all information coming to the attention of the Office to determine whether it is within the disciplinary jurisdiction of the Court;

(3) Investigate all information coming to the attention of the Office which, if true, would be grounds for discipline or transfer to disability/inactive status;

(4) Investigate all facts pertaining to petitions for reinstatement or readmission;

~~(5) Dismiss a complaint that Disciplinary Counsel determines does not warrant disciplinary action;~~

~~(6) In addition to dismissing the complaint, Disciplinary Counsel may issue a letter of caution or take other corrective action when Disciplinary Counsel deems it appropriate;~~

~~(5) Dismiss the information which, if true, would not constitute misconduct or incapacity; or recommend discipline;~~

~~(7) Request leave to file a formal complaint when Disciplinary Counsel determines that disciplinary action is warranted;~~

~~(8)(6)~~ Prosecute before Review Panels, Adjudicatory Panels and the Court, discipline, interim suspension, reinstatement and readmission proceedings, and proceedings for transfer to or from disability/inactive status;

~~(9)(7)~~ Employ and supervise Office staff needed for the performance of prosecutorial functions and, when circumstances necessitate their use, appoint and supervise special investigators and volunteer special counsel;

~~(10)(8)~~ Notify promptly the complainant and the lawyer that an investigation is to be initiated by Disciplinary Counsel or, where Disciplinary Counsel dismisses, provide a concise written statement of the facts and reasons a matter has been dismissed;

~~(11)(9)~~ Develop written guidelines for determining which matters fail to allege facts that would constitute grounds for disciplinary action;

~~(12)(10)~~ Request the Clerk of the Supreme Court to notify each jurisdiction in which a lawyer is admitted of a transfer to or from disability/inactive status, reinstatement, readmission or any public discipline imposed in this state;

~~(13)(11)~~ Whenever costs have been assessed against a lawyer by the Supreme Court, assemble and serve on the lawyer an itemized list of the costs of proceedings, investigations and audits;

~~(14)(12)~~ Seek reciprocal discipline when informed of any public discipline imposed in any other jurisdiction;

~~(15)(13)~~ Forward a certified copy of the judgment of conviction to the disciplinary office in each jurisdiction in which a lawyer is admitted when the lawyer is convicted of a serious crime (as hereinafter defined) in this state;

~~(16)(14)~~ Maintain permanent records of discipline and disability matters and compile statistics to aid in the administration of the system;

~~(17)(15)~~ Prepare an annual budget for the Office and submit it to the Board of Trustees of the State Bar of Montana for review;

~~(18)(16)~~ Make reasonable and necessary expenditures pursuant to the reviewed budget to perform the duties of the Office;

~~(19)(17)~~ Supervise and direct Office staff and operations;

~~(20)(18)~~ Prepare and submit to the Court recommendations concerning the annual assessment of Bar members; and

~~(21)(19)~~ Make recommendations to the Court about the lawyer regulation system.

C. Prohibited Activities. Disciplinary Counsel shall not have authority to render advisory opinions, either orally or in writing, or to impose any form of discipline on a lawyer.

RULE 9 – DISCIPLINE AND SANCTIONS

A. Forms of Discipline. Discipline may take one or more of the following forms:

(1) Disbarment. "Disbarment" means the unconditional termination of any privilege to practice law in this State and, when applied to any attorney not admitted to practice law in this State, means the unconditional exclusion from the admission to or the exercise of any privilege to practice law in this State.

(2) Suspension from the practice of law for a definite period of time or for an indefinite period of time with a fixed minimum term. "Suspension" means the temporary or indefinite termination of the privilege to practice law in this State and, when applied to any attorney not admitted to practice law in this State, means the temporary or indefinite exclusion from the admission to or the exercise of any privilege to practice law in this State.

- (3) Public censure.
- (4) ~~Private admonition.~~ Admonition administered by an Adjudicatory Panel of the Commission.
- (5) Probation.
- (6) Requirement of restitution to persons financially injured.
- (7) Reimbursement to the Lawyers' Fund for Client Protection.
- (8) Assessment of the cost of proceedings, investigations and audits. Whenever costs of proceedings are assessed by the Supreme Court as part of the discipline imposed upon a lawyer, the Disciplinary Counsel shall assemble and serve upon the lawyer an itemized list of those costs. The lawyer shall then have ten days thereafter in which to file written objections and, if so desired, request a hearing before an Adjudicatory Panel on whether the amount of such costs is reasonable and necessary. An Adjudicatory Panel shall thereafter recommend an amount of costs to be imposed, and shall file its recommendation, along with any objections thereto, with the Supreme Court, which shall then issue an appropriate order assessing costs.
- (9) Interim suspension pending final determination of discipline.

B. Discipline Criteria. The following factors shall be considered in determining discipline to be recommended or imposed:

- (1) The gravity and nature of the duty violated, including whether the duty is owed to a client, to the public, to the legal system, or to the profession ;
- (2) The lawyer's mental state;
- (3) The actual or potential injury caused by the lawyer's misconduct; ~~and~~
- (4) The existence of aggravating or mitigating factors; and;
- (5) The existence of prior offenses.

C. Probation. A lawyer against whom disciplinary proceedings are pending may be placed on probation by the Supreme Court or, with the lawyer's concurrence, by an Adjudicatory Panel. The probation shall be for such time and upon such terms and conditions as are determined appropriate in the case. Discipline may be imposed for violation of any of the terms and conditions of such probation, including satisfactory completion of a diversion or treatment program.

D. Procedure for Discipline for Willful Contempt of Court and Failure to Purge the Contempt. Upon receipt of a certified copy of an order of contempt that has become final, the Supreme Court may, in its discretion, issue an order to show cause why the lawyer's license to practice law should not be suspended or other discipline should not be imposed. The lawyer against whom such an order has been entered in district court shall not have the right or opportunity to re-litigate the merits of the contempt order, the right to hearing and due process having been afforded him or her in the district court.

In the alternative, the Supreme Court may direct an Adjudicatory Panel to issue the order to show cause or direct the lawyer to appear before the Adjudicatory Panel. In that event, the Adjudicatory Panel shall make a written recommen-

dation to the Supreme Court regarding suspension of the lawyer's license or other discipline.

An attorney who has been purged of the contempt order may be reinstated to practice law. Prior to reinstatement, the lawyer shall be required to pay the costs of any proceedings before the Commission on Practice.

II. PROCEDURE

RULE 10 – OFFICE OF DISCIPLINARY COUNSEL PROCEDURES

A. Central Intake and Evaluation. The Office of Disciplinary Counsel shall perform central intake functions including, but not limited to the following:

- (1) Receive information and complaints regarding lawyers' alleged misconduct from members of the public;
- (2) Make appropriate referrals regarding information and complaints while assuring that any member of the public who wishes to make a complaint against a lawyer is able to do so;
- (3) ~~Provide~~ Send to the complainant access to a packet of written materials containing forms, instructions and information about Montana's lawyer disciplinary process; and
- (4) Receive written complaints on the forms provided.

B. Preliminary Review and Processing of Informal

Complaints. The Office of Disciplinary Counsel shall conduct a preliminary review of each written complaint received by the Office and determine whether the complaint involves a matter that is within the disciplinary jurisdiction of the Court.

C. Investigation.

- (1) All investigations shall be conducted by or under the authority and direction of Disciplinary Counsel. Upon such investigation as Disciplinary Counsel deems appropriate, he or she may:
 - (a)(1) Send the complaint to the lawyer against whom the complaint is made;
 - (2) Send the lawyer's response to the complainant and, if appropriate, request his or her reply to the lawyer's response;
 - (3) Prepare an intake summary; and
 - (4) Conduct an investigation and prepare an investigative report; or
 - (b) With or without some or all of the process set forth in Rule 10C(1)(a), dismiss the complaint without prejudice, where the complaint does not appear to be within the disciplinary jurisdiction of the Court, or the facts do not appear to warrant disciplinary action.
 - (c) Issue a letter of caution to a lawyer or take other corrective action when Disciplinary counsel deems it appropriate. Any such action by Disciplinary Counsel is not disciplinary action.
- (2) Notice of Disposition. In the event of a dismissal, Disciplinary Counsel shall give written notice to the complainant and to the respondent of the dismissal, stating the reasons for the action taken, and advising the complainant of the right to request review of the dismissal, or to file an

amended complaint.

(3) Request for Review. The complainant may file a written request for review of Disciplinary Counsel's dismissal within 30 days of the notice of disposition pursuant to Rule 10C(2). Disciplinary Counsel's dismissal shall be reviewed by a Review Panel upon the record before it. The Review Panel may approve, disapprove, or modify Disciplinary Counsel's disposition determination as to corrective action.

D. Review Panel Proceeding. Disciplinary Counsel shall:

- (1) ~~Prepare recommendations to~~ Request leave of a Review Panel to file a formal complaint; and
- (2) ~~Present the intake summary, investigative report and recommendations to a Review Panel, orally supplementing them at the request of a Review Panel; and~~
- (3) Conduct further investigation at the request of a Review Panel.

E. Adjudicatory Panel Proceeding. Disciplinary Counsel shall:

- (1) Draft and prosecute formal complaints and complaints proposing interim suspension before an Adjudicatory Panel;
- (2) Recommend discipline or other disposition of a case to an Adjudicatory Panel;
- (3) Conduct any discovery pursuant to Rule 19;
- (4) ~~At the request of an Adjudicatory Panel, i~~ Investigate all allegations in a petition for reinstatement and present relevant evidence at an Adjudicatory Panel hearing on the petition; and
- (5) ~~Advocate findings of fact and conclusions of law resulting from Adjudicatory Panel proceedings.~~

RULE 11 - ABROGATED REVIEW PANEL PROCEDURES

A review panel shall:

- (1) ~~Review the complaint, the response from the lawyer against whom the complaint was made, and any reply from the complainant, together with other relevant documents and Disciplinary Counsel's intake summary, investigative report and recommendations;~~
- (2) ~~Determine any preliminary and procedural matters;~~
- (3) ~~Refer complaint to Disciplinary Counsel for any further investigation;~~
- (4) ~~Dismiss the complaint when the facts do not appear to warrant disciplinary action and notify the complainant and lawyer of the Review Panel's action;~~
- (5) ~~Request Disciplinary Counsel to prepare and file a formal complaint when the facts appear to warrant disciplinary action;~~
- (6) ~~Request Disciplinary Counsel to prepare and file a complaint proposing interim suspension in an appropriate case; and~~
- (7) ~~When undisputed facts prove an ethical violation by clear and convincing evidence, recommend to an Adjudicatory Panel imposition of a private admonition in appropriate cases.~~

RULE 13 - PRIVATE ADMONITIONS

At any time before initiation of formal disciplinary proceedings, an Adjudicatory Panel, in its discretion, may give a private admonition to the lawyer in the name of the Supreme Court, either orally or in writing, with or without imposition of costs of proceedings, and may require the lawyer to appear personally before an Adjudicatory Panel to receive the admonition. Thereupon, the matter shall be deemed terminated except that the Commission shall maintain a record of such admonition which record may be considered by Adjudicatory Panels and Review Panels in determining discipline to be recommended or imposed in any subsequent disciplinary proceeding involving the lawyer. Private admonitions are not appealable.

RULE 20 - ACCESS TO DISCIPLINARY INFORMATION

A. Confidentiality. All disciplinary information provided to the Office of Disciplinary Counsel and proceedings before the Commission on Practice prior to the proceedings which are prior in time to the filing of a formal complaint with the Clerk of the Supreme Court shall be confidential, except that the pendency, subject matter, and status of an investigation may be disclosed by Disciplinary Counsel may disclose information if:

- (1) The respondent has waived confidentiality;
- (2) The proceeding is based upon allegations that include either the conviction of a crime or reciprocal discipline;
- (3) The proceeding is based upon allegations that have become generally known to the public; or
- (4) There is a need to notify another person or organization, including the Lawyers Fund for Client Protection Board, or the Commission on Character and Fitness, other lawyer disciplinary agencies, law enforcement agencies, and the Lawyer's Assistance Program, in order to protect the public, the administration of justice, or the legal profession, unless Disciplinary Counsel reasonably determines that disclosure would hinder an ongoing investigation or prosecution, infringe upon the privacy interests of a reporting or other third party, or constitute an unduly broad or burdensome request; or;
- (5) There is a need to disclose information to third parties while investigating a complaint.

~~Upon the filing of a formal complaint, the Commission's entire file on the matter shall be subject to discovery.~~

B. Public Information Proceedings. Upon the filing of a formal complaint with the Clerk of the Supreme Court in a disciplinary matter, or upon the filing with the Clerk of the Supreme Court of a petition for reinstatement, the proceedings before the Commission and pleadings and other documents filed with the Clerk or Commission thereafter shall be public except for:

- (1) Deliberations and minutes of the Commission; ~~and~~
- (2) Information or proceedings with respect to which an Adjudicatory Panel or Supreme Court has issued a protective order; or
- (3) Conditional admissions and affidavits of consent submitted pursuant to Rule 26 of these Rules until, and if, approved by the Court and public discipline is imposed;

and

(4) Hearings conducted pursuant to Rule 26 of these Rules.

C. Violation. ~~Violation by any person of any confidential information under these rules shall be punishable as a contempt of the Supreme Court.~~

D. Duty of Participants. ~~All participants in a proceeding under these rules shall conduct themselves so as to maintain the confidentiality mandated by this rule.~~

C. E. Admissibility in Other Proceedings. The conclusions, opinions and recommendations of Disciplinary Counsel or any investigator or special counsel acting on behalf of the Office Disciplinary Counsel while acting in those capacities are not relevant or admissible for any purpose in any quasi judicial or judicial forum, exclusive of the Commission on Practice and the Montana Supreme Court in a disciplinary action.

RULE 26 - DISCIPLINE BY CONSENT

A. Adjudicatory Panel Approval of Tendered Admission. ~~A lawyer concerning whom an investigation is being conducted because of allegations of misconduct, or against whom formal disciplinary proceedings have been filed may tender a conditional admission to the complaint or to particular allegations therein a particular count thereof in exchange for a stated form of discipline. The tendered admission shall be submitted to an Adjudicatory Panel. An Adjudicatory Panel may refer the tendered admission to the Disciplinary Counsel for recommendations. The Adjudicatory Panel may either approve or reject the tendered admission. The Adjudicatory Panel, with the lawyer's consent, may hold a private hearing for the purpose of obtaining information to aid the Adjudicatory Panel in determining whether to approve or reject the tendered admission. If the tendered admission is approved by the Adjudicatory Panel, such approval shall be final if the stated form of discipline is an private admonition, with or without imposition of costs of the proceeding; but, in all other instances the tendered admission shall be subject to approval or rejection by the Supreme Court. If the tendered admission stated form of discipline is rejected by either the Adjudicatory Panel or the Supreme Court, the admission shall be deemed withdrawn and cannot be used against the lawyer in any subsequent proceedings.~~

B. Affidavit of Consent. A tendered admission shall include an affidavit stating the lawyer's consent to the discipline and that: If the stated form of discipline is approved, the lawyer shall present to the Adjudicatory Panel an affidavit stating his or her consent to the discipline and that:

- (1) The lawyer's consent is freely and voluntarily tendered, and that the lawyer is not being subjected to coercion or duress, and that the lawyer is fully aware of the implications of submitting the consent;
- (2) The lawyer is aware that there has been a formal charge filed against the lawyer, the nature of which the lawyer is presently pending an investigation into, or proceeding involving, allegations that there exists grounds for disci-

pline, the nature of which the lawyer shall specifically set forth;

(3) The lawyer acknowledges that the material facts so alleged are true or the lawyer submits his or her consent because he or she knows that if charges predicated upon the matters under investigation were filed, or if the pending proceeding were prosecuted, he or she could not successfully defend himself or herself.

The final order of discipline shall be predicated upon the complaint, if any, the conditional admission, the affidavit, and such other information and evidence to which the Disciplinary Counsel and the lawyer may have stipulated, or which may have been elicited at a private hearing referred to in Rule 26A.

C. Order of Discipline. If the discipline by consent is a private admonition by the Adjudicatory Panel, the Adjudicatory Panel shall enter the order. In all other instances in which the proposed discipline has been approved, the Supreme Court shall enter the order. The order of discipline by consent shall be filed with the Clerk of the Supreme Court, and a copy thereof shall be served upon the lawyer, the lawyer's counsel, the Commission, Disciplinary Counsel and the complainant.

D. Confidentiality. All tendered admission proceedings prior to entry of a consent discipline order shall be confidential and subject to the provisions of Rule 20 of these Rules. Upon entry of an order imposing public discipline, the conditional admission and affidavit of consent shall be filed with the Clerk of the Supreme Court and made public. ○

NELSON'S DISSENT, from Page 7

chooses to waive his or her right of individual privacy so as to be admonished in public.

■ . . . we have adopted a nondisciplinary category of attorney ethical lapses and a disciplinary category of attorney ethical lapses which both cover "minor misconduct" with no standards to distinguish the two – a situation that will guarantee ad hoc decision-making. Aside from the fact that respondent attorneys will be justifiably confused as to why one, and not the other, applies, the public will have no opportunity to observe how the determination is made . . . If nothing else, then, MRLDE 13 will guarantee endless petitions for review by this Court of the Adjudicatory Panel's decisions . . ."

■ . . . at the various public meetings on this matter, current and former members of COP and members of this Court offered passionate comments extolling the benefits to respondent attorneys of counseling delivered by way of admonitions. These comments recounted the embarrassment, remorse, and contrition often exhibited by the attorney being disciplined . . . Given COP's apparent institutional philosophy in favor of saving the attorney – and his or her reputation – from the humiliation and damage theoretically inherent in being publicly taken to the

woodshed, I expect that more admonitions will be closed to the public . . .”

■ We should have stuck to what we originally committed to do: abrogate admonitions, private or public, altogether. For the sorts of “minor misconduct” described in the rule, Disciplinary Counsel can issue a nondisciplinary letter of caution along with suggestions as to how the attorney can improve his or her practice. But if the attorney’s unethical conduct is serious enough to merit the filing of a formal complaint and the imposition of discipline, then the whole of the disciplinary proceedings should be open to public scrutiny.

■ . . . under MRLDE 20B(3) and 26, conditional admissions and affidavits of consent which result in a private discipline are never made public. Hence, notwithstanding the constitutional right to know, an attorney need simply file a conditional admission and consent to a private admonition in order to keep his or her misconduct under wraps.

■ Having reneged on what I naively had understood was this Court’s firm commitment to make the disciplinary process transparent – by doing away altogether with admonitions, private or otherwise – we have now rendered that part of the existing disciplinary process translucent at best . . . it is not constitutionally permissible

■ . . . I fully support the amendments that permit ODC to issue letters of caution. Indeed, the original proposal for authorizing such letters contemplated that they would supplant admonitions entirely. Letters of caution are not considered discipline. Rather, in my understanding, the letters are issued by ODC to lawyers whose minor misconduct or technical violations of the Montana Rules of Professional Conduct are de minimus, with the expectation that the lawyer’s minor lapses in good practice or judgment will be promptly . . . resolved. This approach is consistent with the notion that, in these sorts of cases, the lawyer’s right of individual privacy clearly outweighs the merits of the public disclosure for an insubstantial ethical lapse. Admonitions, on the other hand, are discipline.

■ The rules and amendments which we adopt today, however, tip the constitutional balance of transparency in the opposite direction from that required by the plain and unambiguous language of Article II, Section 9, its underpinnings as expressed during the 1972 Constitutional Convention, and our well-established caselaw. The amendments place the lawyer’s reputation, his or her desire to avoid embarrassment, and the perceived needs of the lawyer disciplinary system and COP itself . . . ahead of the fundamental right of the public’s right to examine documents and to observe the proceedings of that body. ○

BENEFITS TRUST, from Page 11

annual claims liability..

Specific stop loss is relatively expensive; the reinsurance carrier fully expects to have losses payable on the SSL coverage. Over the years 2008-2010, the reinsurer reimbursed \$1,837,000, the claims which exceeded \$240,000. Besides the groups claims, SSL is the most expensive component in the self-funded arrangement.

The aggregate stop loss premium is very inexpensive; the reinsurer does not expect the GBT claims to exceed what their underwriter has established as the group’s expected claims, let alone for them to exceed the maximum claims liability. The reinsurer sets the maximum claims liability at 120 percent of expected claims. The trustees have set the 2011 premiums so as to fund slightly in excess of the 120 percent maximum liability. The 2011 GBT renewal is a 12.8 percent increase.

SO THERE YOU have it – the evolution of the State Bar Montana Group Benefits Trust. Your GBT trustees are: Chris Manos, Chris Gittings, Glenn Tremper, Gary Bjelland, Kristi Blazer, Mark Parker, Perry Schneider, and Peggy Probasco.

The trustees, State Bar Executive Director Chris Manos, and GBT Executive Assistant Mary Ann Murray – along with Amy Jenks, the chief operating officer of HealthServe, which is the billing administrator for the GBT, and the consulting firm, Mountain West Benefits – have invested an enormous amount of time and energy to help get the GBT to this point.

Beginning in 2011, the premiums you pay for the GBT health insurance will be maximized, with the largest amount possible going to pay for benefits – the medical claims the membership incurs. Lower claims = lower premiums: lower fixed cost = more of your premiums available to pay claims.

To learn more about the benefits plan, see the Member Benefits link atop the home page at www.montanabar.org. ○

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I have ever met.”

If this were all there was, it would be little more than a legal soap opera. But the justices’ larger disputes were over what sort of a nation America would be.

Black was an originalist, insisting the Constitution be given its original meaning, based on a close reading of the text. Today, originalism is generally considered a conservative doctrine, freezing the Constitution in an earlier time. Black, however, was attempting to free it from decades of conservative precedents by going back to first principles.

Jackson was a constitutional pragmatist. His opinion in a case involving President Truman’s seizure of steel mills provided one of the greatest analyses ever of the appropriate dynamics among the branches of government. Jackson’s pragmatism usually took him in a liberal direction, but his service as chief prosecutor at the Nuremberg war crimes trials – which he did while on the court – occasionally pulled him back. In a case overturning the conviction of an anti-Semitic rabble-rouser, Jackson dissented from the free-speech majority, warning of the threat to America from “totalitarian groups who want nothing so much as to paralyze and discredit the only democratic authority that can curb them in their battle for the streets.”

Douglas, a Western-state individualist, carved out a constitutional philosophy based on personal liberty. He ushered in

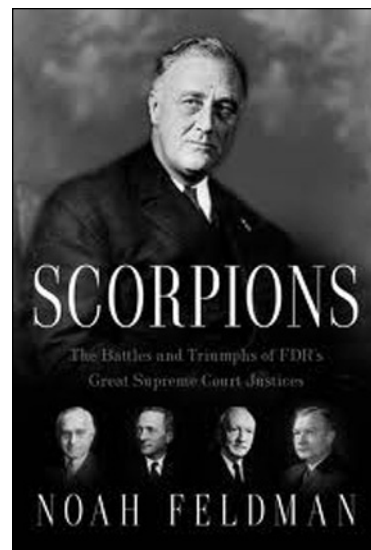
the great privacy decisions of the 1960s and ’70s with his 1965 ruling that the right to privacy prevented Connecticut from banning the use of contraceptives. It was a straight line from there to *Roe v. Wade*.

Frankfurter staked out a philosophy of judicial restraint. Having come of age when conservative judges regularly struck down progressive laws, judicial deference seemed to him to be a liberal position. But times changed, and his belief in judges holding back put him at odds with the Warren court of the 1960s. In 1962, when it initiated modern voting rights with a seminal “one man, one vote” ruling, Frankfurter dissented, arguing for staying out of the “political thicket.” He comes off as a tragic figure, who abandoned his liberal worldview out of fidelity to his constitutional philosophy.

FELDMAN’S ACCOUNT is least sure-footed when he tries to root the justices’ interpretive theories in their biographies. It may be that Black developed his emphasis on text in his days as a Sunday school teacher, or that Douglas, who left his wife for a series of younger women, found his constitutional philosophy in his tumultuous personal life. But it could also be that people who are born literalists become Baptist Sunday school teachers and constitutional originalists, and that inherently freewheeling sorts exhibit their nature in both their life and their work.

Some readers may object that “Scorpions” does not have a Big Idea behind it. That is a fair criticism, but if the book lacks a grand theory, it has an unmistakable lament. Call it “scorpion nostalgia”: the conviction that despite the flaws of Frankfurter, Jackson, Black, and Douglas, today’s Court is diminished for not having justices like them on it.

ADAM COHEN, the author of “Nothing to Fear: FDR’s Inner Circle and the Hundred Days That Created Modern America,” teaches at Yale Law School.



Call it ‘scorpion nostalgia’: That today’s Supreme Court is diminished for not having justices like them on it.

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Please contact the Appraisal Institute at, www.appraisalinstitute.org/findappraiser to locate a Montana Chapter member in your area.



Dan Boucher appointed to be district judge

Gov. Brian Schweitzer has announced the selection of Dan Boucher to serve as the district judge for the 12th Judicial District, covering Hill, Chouteau, and Liberty counties, the Associated Press reported.

Boucher will replace Judge David Rice who is retiring on Nov. 30.

Boucher will begin his new appointment effective Dec. 1. The seat is up for election in 2012.

Boucher is a graduate of Hellgate

High School in Missoula. He received a bachelor's degree in economics from the University of Montana in 1980 and his law degree from the UM School of Law in 1984.

Boucher is regional deputy public defender in Havre and also practices law as a sole practitioner (Altman & Boucher). He joined the Frank Altman law firm in 1984 and became a partner in 1987.

He is admitted to practice law in the

Montana Supreme Court, the U.S. District Court for Montana, Rocky Boy Tribal Court, and Fort Belknap Tribal Court. In addition to his public defender and private practice work, Boucher also served as a part-time deputy county attorney for Hill County.

Boucher is a member of the Montana Officials Association and is president of the Havre Wrestling Officials Association. He is certified as an NCAA wrestling official. During his college years, he worked as a forester, a beekeeper, a teamster, and a bookkeeper.

The Legislative Services Division for the State of Montana has announced the hiring in November of two attorneys:



● **Julianne Burkhardt** graduated magna cum laude from Sweet Briar College in 1987, was inducted into Phi Beta Kappa, and received her law degree in 1994 from the University of Montana. She will be the staff attorney for the Public Health, Welfare & Safety Committee in the Montana Senate.

● **Dan Whyte** graduated magna cum laude from Carroll College in 1985 and received his law degree in 1988 from the University of Idaho. He will be the staff attorney for the Education Committee in the Montana House of Representatives.



The National Elder Law Foundation – the only organization approved by the ABA to offer certification in the area of elder law – has announced that **Sol Lovas** of Billings has successfully completed its examination leading to such certification. Ms. Lovas is now a certified elder law attorney (CELA). She is the first and only attorney in Montana to have achieved CELA certification. Ms. Lovas has been practicing law in the Billings area since 1980, and her practice is limited to estate planning and administration, disability and special needs issues, long-term care (Medicaid) planning, and other elder law issues.

Maggie Sullivan Braun recently became an associate attorney with the law firm of Walton & Luwe. She graduated from the University of Montana School of Law in 2010. Ms. Braun was a member of the National Moot Court team, and a member of the National Environmental Moot Court team. She served as co-president of the Montana Public Interest Law Coalition in 2008-2009. She was clinic student at the Federal Defenders of Montana in 2009-2010. Ms. Braun graduated cum laude from Gonzaga University with BA degrees in

Political Science and French in 2007. Ms. Braun will practice litigation in Walton & Luwe's Bozeman office.

Two new law-school graduates have joined the Helena law firm of Doney Crowley Bloomquist Payne & Uda. They are:

● **Rachel A. Kinkie** became associated with the firm's Helena office in September. She received her JD from the University of Montana School of Law in 2010. She is a native of Montana, raised on a cattle ranch in the Paradise Valley. Ms. Kinkie previously worked for the Montana Stockgrowers Association as a natural resources legal intern and completed her clinical requirement with the U.S. Department of Agriculture Office of General Counsel. Ms. Kinkie's practice will focus on natural resources, agriculture, property rights, and water rights adjudication and permitting.



● **Jacqueline R. Papez** received her law degree from the University of Idaho College of Law in 2010, graduating magna cum laude. While in law school, she published an academic paper addressing Native American legal issues that received awards in Native American law and natural resources/environmental law. Ms. Papez was raised on a ranch near Belfry, Mont. She joined the firm's Helena office in September, and her practice will emphasize environmental, natural resource, business, Native American, and insurance coverage issues.



University of Montana Law Professor **Jeff Renz** participated in the Salzburg Global Seminar on "Islamic & International Law: Searching for Common Ground" in November in Salzburg, Austria. Prof. Renz is a clinical professor of Law at UM, and is a member of the faculty of the Central & Southwest Asia Studies Center.

Rodney T. Hartman has joined the Tolliver Law Firm of

Billings. Mr. Hartman was born and raised in Billings and graduated from Billings West High School in 1968. He received his undergraduate degree from Tulane University of New Orleans in 1972 and then his law degree from the University of Chicago Law School in 1976. He maintained a civil litigation practice in Billings from 1976 through 1995 when he began a position in private industry. Mr. Hartman has now decided to resume his full-time practice of law and will again concentrate in the field of civil litigation.

Jessica Weltman, an attorney with the Federal Defenders of Montana, was recently elected as the president of the board of directors for Women's Opportunity & Resource Development Inc. (WORD). Now in its 25th year, WORD works to break the cycle of generational poverty by investing in women as leaders within their families and communities. WORD programs promote women's access to stable housing, employment and life-skills training, parenting education, early learning and tutoring, and the creation of policies for social change. Ms. Weltman received her law degree from Washington University in St. Louis and her undergraduate degree in History from Carleton College in Northfield, Minn. She worked and volunteered for a number of years as a lobbyist and advocate for organizations focusing on ending violence. She has also been involved with literacy projects, civil rights issues, and human rights work in Nepal.

Kelly Addy, deputy city attorney for Billings, has been appointed by the Montana Supreme Court to the Commission on Courts of Limited Jurisdiction for a term that will expire on June 30, 2014. Mr. Addy replaces Helena City Attorney David K. Nielson who resigned his seat on the Commission.

The Great Falls law firm of Ugrin, Alexander, Zadick & Higgins announced that **David J. Grubich** has joined the firm as an associate attorney. Mr. Grubich received his bachelor of arts degree, with high honors, from the University of Montana in 2007. He received his juris doctor degree, with honors, from the UM School of Law in 2010. Mr. Grubich will specialize in civil litigation. He was stationed at Malmstrom Air Force Base between 1988 and 1992 and served as a police officer and investigator in Illinois for nine years.



DEATHS

Aleta Husted, ex-Miles City attorney

Aleta Husted, 82, a graduate of UM School of Law who practiced law for many years in Miles City died on Nov. 19 in Stockton, Calif.

Ms. Husted grew up in Baker, Mont. She left her law practice after she married Paul Husted. She and Mr. Husted started Blue Caboose Tours & Cruises, a group-travel pioneer. Together they escorted groups all over the world.

James Fewer, Glasgow attorney

Glasgow attorney James K. Fewer, 51, who was active in his community, died of heart failure at his home on Nov. 9. He is survived by his wife, Jennifer, a son, and two daughters. No other obituary information was available.

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ATTORNEY POSITIONS

COUNTY ATTORNEY: Garfield County, Jordan, Mont., is accepting applications for the position of county attorney. Applicant must be licensed to practice law in Montana. This is a 20-hour per week position, salary: \$46,571. Full benefit package included. Experience with criminal prosecution and work with county government is preferred but not required. Starting date would be approximately Feb. 1, 2011. Please submit resume and cover letter to Garfield County Commissioners, PO Box 7, Jordan MT 59337-0007 or call (406) 557-2760. Experience in prosecution is preferred but not required. Deadline for applications is Jan. 14, 2011 at 5 p.m. Any questions or concerns please call Gary Ryder at (406) 342-5546. Garfield County reserves the right to refuse any and all applicants.

ATTORNEY: Southwestern Montana practitioner seeking attorney for general practice assignments. 2-5 years experience preferred. New graduates may apply. Please send letter of application, references, resume, transcript, and writing sample to W.G. Gilbert III, PO Box 345, Dillon MT 59725. All applications confidential. Open until filled.

ALASKA AWAITS YOU! Baxter Bruce & Sullivan PC (www.baxterbrucelaw.com), located in Juneau, Alaska's capital, seeks to hire an associate attorney that will complement its growing practice with an emphasis on real estate, construction, property, commercial, probate, estate planning, and bankruptcy

law. Our 7-member firm enjoys over 110 years of combined experience, and provides associates with excellent opportunities to expand their legal practice. In our continual pursuit to exceed our clients' expectations, we strive to hire exceptional attorneys and staff. The firm offers a spacious, technologically advanced office and very pleasant work environment. All applicants must be licensed to practice law in Alaska, be eligible for admission by reciprocity, or take and pass the Alaska Bar Examination six months of the date of hire. Previous legal experience is preferred, although not mandatory. Applicants should demonstrate an ability to be task-focused, work independently, achieve high standards, make calculated decisions, and be direct, firm, and self assured. Applicants must also possess an exceptional academic background as well as superior research, analytical, verbal, and writing capabilities. All applications will be held in strict confidence. Open until filled. Please submit your resume, law school transcript, references and writing sample to: Z. Kent Sullivan at zsullivan@baxterbrucelaw.com.

ATTORNEY: Seeking attorney for well-established currently solo estate planning/elder law specialty practice. Requirements: 5-plus years estate planning experience, excellent writing skills, interest in elder law. Experience in elder law preferred. Send letter of application, resume, references, transcript, sample estate plan, sample brief, and statement of elder law interest and/or experience to Ms. Sol Lovas, CELA, Attorney at Law, PO Box 399, Billings MT 59103. www.lovaslaw.com.

ASSOCIATE ATTORNEY: Luxan & Murfitt PLLP in Helena, is seeking as associate attorney to assist primarily in the firm's health care practice. Applicants should have experience in health care, or a background or interest in this area of law. The firm offers a good, progressive working environment, a stable and competent staff, good technology, and varied and interesting work.

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ATTORNEY: Three-person firm in Billings engaged in high-end commercial law and estate planning practice is seeking a qualified individual with real estate, commercial, estate planning and/or commercial litigation experience to join the firm. Information regarding the firm is available at www.kdhlaw-firm.com and responses should be directed to Karell Dyre Haney PLLP, 175 North 27th Street, Suite 1303, Billings MT 59101.

DEPUTY COUNTY ATTORNEY: The Lincoln County Attorney's Office is seeking a deputy county attorney to fill a full-time position. This position is available on Jan. 3, 2011, and will be open until filled. Applicants must be licensed to practice law in Montana, experience in criminal law, and trial experience is preferred, including experience as a legal intern. The position requires knowledge of criminal law and procedure, rules of evidence, and civil procedure, and familiarity with computerized legal research and word processing. Salary is \$40,000 to \$45,000 per year, depending on experience, plus excellent benefits. Submit a letter of interest, Public Sector Job Application, writing sample, and two letters of recommendations to: Kootenai Job Service, 417 Mineral Avenue, Libby MT 59923, no later than Dec. 10, 2010. Telephone: (406) 293-6282.

ASSOCIATE: Helena law firm is accepting applications for an associate attorney. Experience preferred, but will work with and train a qualified applicant with a good work ethic as well as strong writing and analytical skills. Our general practice emphasizes defense litigation, personal injury, workers' compensation, and insurance regulation. Submit resume and writing sample to: Keller,

Reynolds, Drake, Johnson & Gillespie PC, 50 South Last Chance Guch, Helena MT 59601.

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UM LAW SCHOOL: The University of Montana School of Law is accepting applications for the director of Admissions & Career Services. For the complete job description and application instructions, please visit our website at: www.umt.edu/law.

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VOCATIONAL EXPERT: Consultant with 20 year experience in vocational issues regarding: earning potential and labor market research, vocational and academic testing, job analyses, transferable skills, and retraining plans. Comprehensive report completions and extensive expert testimony experience. Contact Karen S. Black, CRC, CDMS, CCM; Vocational Consulting Services Inc., PO Box 1296, Bozeman MT 59771; (406) 587-4143; or e-mail kblack@vcsmontana.com.

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