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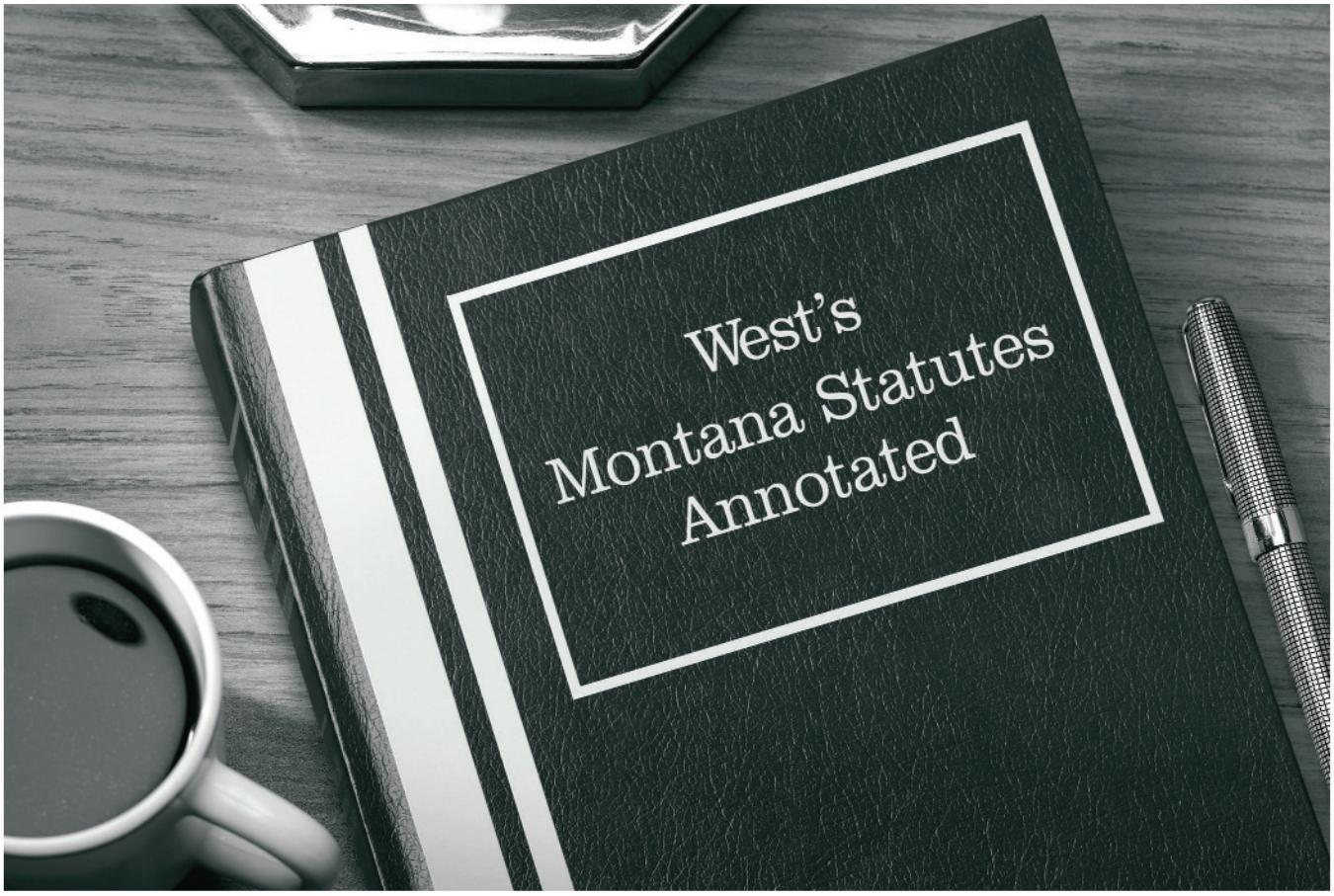

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FEBRUARY INDEX

Cynthia Smith

PRESIDENT'S MESSAGE

The way we're wired

Humanity is built in, but civility is a choice

Because of some recent events, I have been ruminating about humanity and civility, and the connection between the two. Being too lazy to get out of my chair and walk to the bookcase to get a dictionary, I looked online for the definitions of "humanity" and "civility." One website, that purported to be a company with a hyphenated name, the last of which rhymes with "Schmebster," claimed to have no definition for either word.

I then found a dictionary site for Merriam-Webster, which did have definitions for the two words. Merriam-Webster defines "humanity" as "the quality or state of being humane." Of course, that required further research into the meaning of "humane," which was defined as being "marked by compassion, sympathy or consideration for humans or animals." The Merriam-Webster website defines "civility" as "civilized conduct, especially courtesy and politeness."

I have been thinking about humanity because of the horrible devastation in Haiti, where a magnitude 7.0 earthquake resulted in a death toll that now exceeds 70,000. While the depth of the tragedy is difficult to comprehend, the response from around the world is life-affirming. People and nations from around the globe are sending aid to Haiti. Factions that once opposed each other are working side by side to help their fellow humans. Certainly, they all fit the Merriam-Webster definition of being marked by "compassion, sympathy, or consideration for humans."

I ALSO HAVE BEEN thinking about civility because I recently became aware of a deposition conducted by a non-Montana attorney that does not fit the Merriam-Webster definition of "civilized conduct, especially courtesy and politeness." In taking a deposition, the attorney acted like a police interrogator, and actually made jokes on the record at the deponent's expense. In defending a separate deposition, the same attorney objected to approximately 95 percent of the questions being asked, sometimes objecting even before the question was concluded. Whether the attorney was taking or defending a deposition, his conduct did not appear to be aimed at seeking the truth. Instead, it appeared to be about showing off his self-perceived superiority over opposing counsel.

So how are these events, and the words "humanity" and "civility," related? I believe that, when the chips are down, we can't suppress our humanity. It is always there, within all of us. We are wired to want to help each other, and we reach out when another desperately needs our help.

Civility, on the other hand, is a choice. I suspect that, when that lawyer left the deposition room, he went home to his children and acted like loving parents do. I suspect that lawyer, like the rest of us, would reach out to help another who was in desperate, life-threatening need. I suspect that his lack of civility was more of a litigation tactic than a personality characteristic.

The attorney in my example appeared to be showing off his self-perceived superiority over the opposing counsel.

I believe that civility happens when we let our humanity surface. If we suppress our humanity, by being uncivil, we are making a choice – a bad choice. Does that lawyer really believe that his incivility helped his client's case? I think the opposite is true.

IN MONTANA, we are fortunate that most of the Bar members treat each other civilly. They do it because it is the right thing to do, and because, as the saying goes, Montana is just like a small town. They know their paths will cross again and so they try to treat others with dignity and respect. All of their clients benefit from the wisdom of that approach to litigation.

Maybe I am generalizing. Maybe I am giving Montana lawyers too much credit, or maybe I really am just a Pollyanna. But I want to believe it is true. One of the things I like about living in Montana is the humanity that its citizens show to each other. And one of the things I like about practicing law in Montana is the overriding civility I see among its Bar members.

I think we have the right idea about how to help our clients, and that in the end, civility is far more effective in competently representing clients than gamesmanship and rude behavior.

❍

Wheat and Cotter assume their new jobs

Bozeman attorney Mike Wheat and Helena attorney Mike Cotter were sworn in during January to two of the top jobs in the Montana legal system.


Justice Wheat

Mr. Wheat now becomes Justice Wheat, appointed by Gov. Brian Schweitzer to replace Justice John Warner who retired from the Montana Supreme Court on Dec. 31.

Mr. Cotter was appointed by President Obama to be the new U.S. attorney for Montana.

JUSTICE WHEAT, 62, was one of 11 attorneys to apply for the job and one of the three finalists recommended by the state Judicial Nomination Commission. The other finalists were Carlo Canty of Helena and John Warren of Dillon.

On the day of his appointment, Justice Wheat told the Lee Newspapers State Bureau that he was "really excited" about the appointment. "I've been a lawyer since 1978, and I view serving on the Montana Supreme Court as a crowning glory to a legal career," he said.

Justice Wheat said both Canty and Warren are "very, very qualified individuals who could have done the job . . . I'm just the lucky one the governor appointed and had confidence in."

Justice Wheat's appointment is for the calendar year 2010. He told the Lee Newspapers that he intends to run for statewide election in November to complete Justice Warner's term, which ends in December 2014.

Justice Wheat, a former state senator, said he had already run for statewide office once – he was runner-up to Steve Bullock in the three-way Democratic primary race for attorney general in 2008.

Justice Wheat was a decorated U.S. Marine Corps machine gunner in Vietnam. He later received a bachelor's degree in Political Science and a law degree from the University of Montana.

After completing law school, he was a deputy county attorney in Butte-Silver Bow County for three years. Then he and a law-school classmate, Michael Cok, formed the Cok Wheat law firm in Bozeman. He practiced there from 1981-2008 before retiring as partner.

MIKE COTTER'S first week on the job as the new U.S. attorney for Montana has been a whirlwind of briefings and meetings throughout the state, with a learning curve akin to "drinking water through a fire hose," he told the *Helena Independent Record*.

He takes over from former U.S. attorrney Bill Mercer (see story below) as supervising prosecutor for all federal crimes committed in Montana, including on the seven Indian reservations.

"It's a pretty steep learning curve," said Mr. Cotter, who lives in Helena with his wife and former law partner and current Montana Supreme Court Justice Patricia Cotter. "I look forward to working with the attorneys and staff at the U.S. Attorney's Office and fulfilling the goals of the Department of Justice."


U.S. Attorney Cotter

Mr. Cotter, 60, was confirmed by the U.S. Senate on Dec. 24, after being nominated for the position by Democratic U.S. Senators Max Baucus and Jon Tester. He then met with Mr. Mercer, who had been Montana's U.S. attorney for almost nine years, to discuss the position and issues. "I appreciate the assistance Bill extended to me during this transition," Mr. Cotter told the *Independent Record.*

Mr. Cotter said he will focus on goals set up by the Obama administration, and also will continue some of Mr. Mercer's efforts to reach out to state and local law enforcement agencies in prose-

More *WHEAT, COTTER*, **Page 33**

Mercer, others reflect on his term as U.S. attorney

In interviews with the *Great Falls Tribune* and *Helena Independent Record*, former U.S. Attorney for Montana Bill Mercer and others highlighted what they thought were top accomplishments in Mr. Mercer's nine years on the job.

"Mercer did a lot of good things," said Brant Light, special prosecutor for the Montana Department of Justice. "The thing that had been missing most [before Mercer's term] was a total lack of communication and cooperation between the federal government, the state, and the local governments, and Bill made a lot of effort in correcting that – it's a lot better now."

Mr. Mercer said the push really originated with then-U.S. Attorney General John Ashcroft. "Ashcroft sat every U.S. attorney down and said you all have to implement this National Safe Neighborhood initiative," Mr. Mercer said. "He said you can frame it with your neighbors in your own states, but you have no option about implementing it."


Bill Mercer

"As a result of Mercer's efforts, both Cascade and Yellowstone counties have an assistant county attorney who is cross-deputized as an

More *MERCER*, **Page 33**

The Montana Supreme Court's continued, not-so-subtle assault on arbitration

By **Anna Conley**
Missoula attorney

It is no secret that the Montana Supreme Court has historically been skeptical, if not hostile, toward arbitration agreements obligating Montana individuals and corporations to arbitrate disputes. As put by University of Montana Law School Professor Scott Burnham, "In Montana, arbitration is the legal equivalent of the wolf, a critter much despised except by a fringe group that would spread it widely."[1]

Former Montana Supreme Court Justice Terry Trieweiler's outspoken concurrence in *Doctor's Associates Inc. v. Casarotto*, on remand from the U.S. Supreme Court, admonished federal judges for self-servingly using arbitration to uncrowd dockets at the expense of individuals' rights. This made Montana the poster child for "arbitration-resistant" state courts.[2]

Recent Montana caselaw confirms that the Court has joined with other state courts nationwide in finding indirect ways to invalidate arbitration agreements. The Court unabashedly applies general contract-law principles differently when interpreting arbitration provisions from other contract provisions. The result is the emergence of unspoken "arbitration definitions" and "non-arbitration definitions" for contract law principles such as contracts of adhesion, reasonable expectation, and unconscionability. Attorney James M. Gaitis – in an April 2005 article in *The Montana Lawyer*, "The Ongoing Federalization of Commercial Arbitration in Montana," – wrote that "it would appear that the court is on the brink of creating a narrowly crafted common law unconscionability-adhesion doctrine that applies solely to arbitration provisions."

The Court's approach is not sustainable since practitioners rely on the Court's interpretation of these doctrines in cases involving arbitration clauses in non-arbitration contract disputes, and this creates a schism in contract rules that results in conflicting caselaw. Eventually, the Court will have to call a spade a spade and admit its unequal treatment of arbitration provisions and non-arbitration provisions when utilizing contract law doctrines.

While the Court's concern for the David-like consumer versus Goliath-esque corporations that draft one-sided arbitration clauses is admirable, hijacking traditional contract law principles at the expense of predictability in their application is a high price to pay for redress in such cases.

This article analyzes four ways in which the Court indirectly voids arbitration clauses:

- Utilizing the unconscionability doctrine to void arbitration provisions.
- Judicial usurpation of the arbitrator's role in determining the validity of the underlying contract.
- Narrowly defining arbitration agreements.
- Utilizing a truncated choice-of-law analysis in contracts with arbitration agreements.

In each of these areas, I point out ways in which the Court's analysis is contradictory to its use of the applicable contract law doctrines in non-arbitration cases.

THE MONTANA SUPREME COURT is one of a number of state courts nationwide that has started utilizing unconscionability to void arbitration agreements to get around the U.S. Supreme Court's prohibition on arbitration-specific state law requirements in *Doctor's Associates Inc.* discussed in more detail below. A recent New York University law review article discusses this recent trend in depth and highlights Montana's "arbitration resistant" caselaw as an example.[3] Another scholar recently pointed out that in Montana and other states, "judges are . . . circumventing the Federal Arbitration Act and permitting litigation by parties to arbitration agreements through expansive, arbitration-specific uses of unconscionability."[4]

Montana's history with arbitration is well known based on the *Doctor's Associates* litigation in the mid-1990s. In that case, the U.S. Supreme Court invalidated MCA 27-5-114's requirement that arbitration agreements be in bold letters on the first page of contracts. The Supreme Court ruled that arbitration agreements may only be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability."[5] The MCA provision at issue, MCA 27-5-114, violated this rule by imposing a "special notice requirement" on arbitration agreements "not applicable to contracts generally."[6] MCA 27-5-114 was subsequently amended to comply with this rule by removing the notice requirement and setting forth the rule that arbitration agreements are "valid and enforceable except upon grounds that exist at law or in equity for the revocation of a contract."

In order to successfully challenge an arbitration agreement

before a court, a party must allege that the arbitration provision, and not the contract as a whole, suffers from a defect, such as fraud, duress, or unconscionability. When determining whether to enforce a provision in a contract of adhesion, Montana courts will not enforce such provision against the "weaker party" if it is "(1) not within their reasonable expectations, or (2) within their reasonable expectations, but, when considered in its context, proves unduly oppressive, unconscionable or against public policy."[7]

This is the test the Court has repeatedly used to invalidate arbitration agreements in a wide range of contracts involving both consumers and merchants.

After the Court's tussle with the U.S. Supreme Court in *Doctor's Associates*, the next Montana Supreme Court decision regarding arbitration agreements in arbitration contracts was *Iwen v. U.S. West Direct*.[8] *Iwen* invalidated an arbitration agreement giving the drafter the unilateral right to bring an action for collecting a debt against the other contracting party, while requiring the party to arbitrate any dispute against the drafter. The Court made clear that "generally applicable contract law defenses may be used to set aside arbitration agreements," in contracts of adhesion that are either "not within the reasonable expectations" of the weaker party or "unduly oppressive, unconscionable or against public policy."[9] *Iwen* sparked the beginning of the Court's broad interpretation of contracts of adhesion and liberal use of unconscionability when analyzing arbitration agreements. In discussing this case, University of Montana Professor Scott Burnham pointed out that "the Montana Supreme Court, having found the concepts of reasonable expectations and unconscionability useful for avoiding arbitration clauses, seemed poised to unleash those new-found weapons rather freely."[10]

In *Kloss v. Edward D. Jones & Co.*,[11] the Montana Supreme Court solidified its post-*Doctor's Associates* approach to arbitration agreements by invalidating an arbitration agreement found in a standard investment agreement between an investor and brokerage company as outside the investor's "reasonable expectations." *Kloss* reasoned that the plaintiff investor had no "meaningful choice in accepting or rejecting" the arbitration agreement because such agreements were industry practice.[12] Interestingly, the industry practice of including arbitration agreements in investment agreements was relied upon by the Court 14 years earlier in *Passage v. Prudential-Bache Securities, Inc.*[13] to conclude that the arbitration agreement was within the investor's "reasonable expectations" and therefore, enforceable. Gaitis also pointed out that "*Kloss* represents a marked departure from the court's [] decision in *Passage.*" *Kloss*'s half-hearted attempt to distinguish *Passage* is, at best, unconvincing given the marked similarities in the contracts and facts at issue.[14]

Kloss also found salient that the plaintiff "did not read the contract and was not aware of the arbitration provision in the contract."[15] This is strange logic given the Court's repeated mantra that "one who executes a written contract is presumed to know the contents of the contract and assent to those specified terms."[16]

Perhaps the most useful aspect of *Kloss* came in the form of dicta – eight factors the Court set forth to use in determining "the issue of conscionability in the context of arbitration provisions."[18] These provisions included:

1. Whether potential arbitrators are "disproportionately employed" in one party's profession.
2. Whether arbitrators favor "repeat players" to continue getting their business.
3. Arbitration filing fees relative to district court fees.
4. Arbitrator's fees and whether such fees are prohibitive for consumers or "workers of modest means."
5. Secrecy of arbitration proceedings "so as to conceal illegal, oppressive or wrongful business practices.",
6. & 7. The extent to which arbitrators are "bound by the law" and "bound by the facts."
8. Claimants' opportunities for discovery to support claims.

Following *Kloss* the Court continued to establish a presumption that an arbitration agreement in a standardized contract is not within the weaker party's reasonable expectations. In *Zigran*g,[19] the Court said, "The mere presence of an arbitration provision in an investment agreement, though conspicuous, does not bring the provision within the reasonable expectations of an investor in every instance."

THE COURT'S MOST RECENT assault on arbitration is *Woodruff v. Bretz, Inc.*,[20] in 2009 in which the Court refused to enforce an arbitration clause between a mobile home purchaser and supplier, despite the fact that the purchaser initialed a contract provision acknowledging her acceptance of an arbitration agreement, because such agreement was outside her "reasonable expectations." Ironically, these cases suggest that the Court is more likely to void an arbitration agreement indirectly today through the unconscionability doctrine than it was prior to *Doctor's Associates*.

In the late 1980s and early 1990s, the Court repeatedly enforced arbitration agreements in contracts of adhesion.[21] The Court has broadly defined "contract of adhesion" as "a standardized form of agreement" in which the weaker party's choice is either to accept or reject the contract without negotiation of its terms.[22] A good example of the Court's willingness to define contracts with arbitration agreements as "contracts of adhesion" is *Bretz*, in which the Court found a contract of adhesion exists despite the drafting party's stated invitation to discuss the terms of the agreement, including the arbitration provision.[23] The Court does not differentiate between consumers and non-consumers when defining a contract of adhesion in cases involving arbitration provisions. This finding is contrary to Montana Supreme Court caselaw in which the court was less willing to find a contract of adhesion existed where the non-drafting party was a "sophisticated business person."[24]

The Court is more willing to find arbitration clauses unconscionable than other types of contract provisions, even outside the consumer context. As James Gaitis pointed out, "If the Court applied the new unconscionability standard established in *Iwen* and *Kloss* to contracts in their entirety, rather than solely to arbitration provisions, the Court would render unenforceable most contracts Montanans sign every day."[25]

This willingness to find arbitration agreements unconscionable is part of a larger trend by state courts nationwide

that disproportionately find arbitration clauses unconscionable. Despite the Court's last decade of caselaw consistently finding arbitration agreements unconscionable, it has rarely invalidated any other contract provision on the same grounds. Indeed, the Court has repeatedly resisted finding contract provisions unconscionable, even in contracts of adhesion.[26]

Given the Court's approach post-*Doctor's Associates*, it is not surprising that the only case in which the Court has affirmed a lower court's enforcement of an arbitration agreement in a contract of adhesion is one in which – in keeping with the MCA's arbitration-specific statutory requirements that the U.S. Supreme Court in *Doctor's Associates* voided – the arbitration agreement was on the first page of the contract in bold conspicuous lettering.[27]

Another way the Court has indirectly voided arbitration agreements is by chipping away the well-established rule that it is for an arbitrator, and not a court, to determine whether a contract exists that contains an arbitration agreement. Where a contract as a whole is challenged before a court and that contract contains an arbitration agreement, the court must refer the matter to an arbitrator. However, if a party challenges only the validity of the arbitration agreement, this is a question for courts.[28] The Court recently eroded this rule by holding that a court can hear a claim challenging the existence of a contract that contains an arbitration agreement, as opposed to a challenge to a contract. *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, A.B.N.*,[29] found in 2008 that a court may decide a claim that a contract containing an arbitration agreement never came into existence because condition precedent was not satisfied. The current state of law, therefore, allows a court to determine both whether an arbitration agreement or the underlying contract containing such agreement exists as long as the claimant artfully challenges either the existence of the underlying contract or specifically challenges the arbitration provision at issue.

When faced with a challenge to an arbitration provision specifically, the Court narrowly construes the definition of a valid arbitration agreement, and has repeatedly found no arbitration agreement exists despite the plain language of the contract specifying arbitration. In *Kingston v. Ameritrade, Inc.*,[30] in 2000, the Court found no arbitration agreement existed despite the plain language in the contract between parties because the plaintiffs "had no indication that they were agreeing to binding arbitration or that arbitration was their exclusive remedy in resolving disputes." In *Hubner v. Cutthroat Communications, Inc.*,[31] in 2003 the Court found that an employee did not agree to arbitrate disputes by signing a form agreeing to be bound by an employee handbook, which contained an arbitration provision. Similarly, the Court has repeatedly held that courts, not arbitrators, decide whether a particular dispute is within the scope of the parties' arbitration agreement.[32]

A FINAL WAY the Court has voided arbitration agreements is through a truncated choice-of-law analysis. The well-established rule used to determine whether a choice-of-law provision specifying a law other than Montana requires the choice of law provision be followed unless "1. applying the chosen law would be contrary to a fundamental Montana policy," 2. Montana has a "materially greater interest" in resolving the dispute than the chosen state, and 3. Montana law would apply in the absence of the choice-of-law provision.[33]

The Court has repeatedly found that Montana law applies to determine the validity of an arbitration agreement even in the face of choice-of-law provisions specifying another state because applying the law of the other state would violate Montana public policy against arbitration agreements.[34] Some opinions have gone as far as to link the policy disfavoring foreign arbitration clauses to the constitutional rights of access to courts, trial by jury, due process, and equal protection.[35] Within this framework, arbitration agreements don't stand a chance because Montana law will always apply to determine the validity of arbitration agreements. This again contradicts the Court's more nuanced, fact-specific choice-of-law analyses in cases not involving arbitration.[36]

THE MORAL OF THIS STORY for practitioners is this:

- When drafting an arbitration agreement in a standardized contract, the agreement must be part of the larger contract, but be separated from other contract provisions through bolder and more conspicuous font, preferably on the first page of the contract.

- The arbitration provision should require separate signature, and specify that by signing, the contracting party understands that it is knowingly waiving both its right to a jury trial and its right to access the courts to resolve disputes and knowingly agreeing to binding arbitration as the exclusive remedy available.

- The arbitration clause should be discussed directly between the contracting parties, and such discussion should be acknowledged in writing.

- If practicable, the non-drafting party should be given the opportunity to negotiate the arbitration provision.

- The arbitration clause should be written broadly to include any dispute relating to the contract, including all statutory and common law claims.

With all of these safeguards in place, an arbitration agreement still may not be enforced by the Court, but it will have to come up with a new justification for not enforcing it.

ANNA CONLEY *is a member of the State Bar of Montana living in Missoula. She is an adjunct professor at the University of Montana Law School and a senior research scholar for the McGill University Faculty of Law UNCITRAL International Arbitration Database Project.*

NOTES

1. 66 Mont. L. Rev. 139, 156 (2005).
2. See 268 Mont. 369, 382, 886 P.2d 931 (1994).

More *ARBITRATION*, Page 29

Global scammers now aiming to rip off Montana attorneys

By **Eve Byron**
Helena Independent Record

The phone call from one of Mike Coil's long-standing clients wasn't unusual, nor was his request for the Bozeman-based lawyer's legal services in a home sale.

But Coil later realized that he had narrowly escaped being part of a $650,000 international scam, and he wants to help others avoid what's the newest sophisticated scheme that targets lawyers.

"Somebody went to a lot of work to make this look pretty authentic," Coil said in early December. "It was a very concerted, focused, well-thought-out sort of a deal. They obviously knew a lot about lawyers and trust accounts."

Randy Schmautz, who investigated the case for the Bozeman Police Department, said this was an interesting twist in the world of scam artists.

"They usually try to scam the old or the elderly," Schmautz said. "I was surprised that they went after an attorney. And while I've been involved in some investigations similar to this, I've never seen anyone with that large of a check involved."

The setup started in mid November, when Coil got a call from a realtor he's been doing business with for about 20 years. The realtor said he had a Chinese client named Yang Hua, who wanted to buy a home in Bozeman. Yang Hua is the president of the Chinese National Offshore Oil Co., which is that nation's largest offshore crude oil producer.

Coil was to be paid the standard $2,500 retainer and he set out to get the paperwork in order. He needed a signature and a street address for Yang, and sent the information to him as a PDF file. It was returned, signed, but without the street address. That was the first signal to Coil that something "phishy" was going on.

"We had instructed him to fill that in, and he was supposed to wire $2,500 to a trust account," Coil recalled. "I kept getting e-mails and calls from someone with a very heavy Chinese accent, who kept asking me if I had got the money yet."

The man also gave Coil the name of his attorney in Houston, and a phone number for him. When Coil called the number, the person on the other end sounded suspiciously like the Chinese client.

"Then out of the blue, on the 17th of November, without any warning, a certified check for $650,900 shows up, and the return address is from a hotel in Toronto," Coil said. "I was wondering why they were sending me the money, and the realtor said (the client) wanted to pay for the house in advance and pay cash.

"In 33 years of practicing law, this was the first time I'd seen that. Usually they wire the money to the company a cou-

Scam e-mail examples

■ **I am Mr.Yuang Thomas,** am currently in China. I will be retiring soon and as such intend relocating to the United States for Good, after searching the USA Chamber of Commerce Profile via the Internet for a reliable Attorney/Law Firm, I found your firm and I have decided to choose your firm to represent me as regards buying my permanent home there in the USA.

The home will be a cash buy and I will fly to the United States for inspection of the property but before then I would like my stock broker in Canada to send the money to your firms trust account before my arrival. I intend to make the funds available in USA before coming to choose and view the said property, please I would want to retain your services as my Attorney, in a view that my stock broker can send the funds directly to you via your trust account for keeps, until I arrive in the USA for the conclusion of the purchase deal.

I intend getting a 4 bed rooms/6 bed rooms home of between $500,000.00 - $1,500,000.00 USD in a nice neighborhood in your city and state. Finally to this end I will appreciate your prompt response to my request and your assistance will be appreciated.

■ **The management of Dalian Leong Yang Trading Co. Ltd** requires your legal representation for our North American delinquent Customers. We are of the opinion that a reputable attorney is required to represent us in North America in order for us to recover monies due to our organization by overseas customers, and as well follow up with these accounts. In order to achieve these objectives a good and reputable law firm like yours will be required to handle this service.

We understand that a proper Attorney Client agreement must be entered into by both parties.This will be done immediately we receive your letter of acceptance.Your questions regarding this proposal are welcome.

ple of days before closing."

The check looked authentic, right down to the watermark and the French writing on the back of it. It was remitted by the Royal Crown Ventures, a Canadian mining firm, and drafted from a Citibank branch in Delaware.

By now, though, Coil wasn't sure what was going on, and he asked a local bank to look at the check They called Citibank, which had no record of it.

Meanwhile, Coil continued to exchange e-mails with the Chinese client, asking when the retainer would be wired into an account, but didn't mention the $650,000 check The client didn't say anything about it either, but wondered whether Coil was putting any money into the account.

Then, Coil received a *second* check for $650,900.

"So here I am, sitting here with $1.3 million that this guy wants us to do something with," Coil said.

He theorizes that if the check had been deposited in the trust account, the sale would fall through, the law firm would write a check back to the client and be taken for $650,000. "The other possibility was that since they had instructed me to take my fee retainer ($2,500) out of the deposit, they would then tell me that they had decided not to proceed, but I was welcome to keep the $2,500 but they would then demand that I return the rest of the money to them," Coil said. "We are not sure if that would have been $650,000 or $1.3 million, but regardless they would have made a pile of money.

"None of the law enforcement people I had contact with had ever seen anything quite this sophisticated, so they weren't sure what the next step would have been."

Instead of depositing the checks, Coil called the Bozeman police and the FBI. The FBI declined to pursue the case, but Schmautz decided to look into it. He was able to trace the telephone numbers for the Chinese client to Nigeria, and Coil said they think the person who mailed the checks from Toronto was just a mailing service that probably didn't know what was going on.

Coil also sent an e-mail to the Chinese client, saying he had better identify himself by the close of business on a certain day, but never heard back from him.

The American Bar Association notified its members in August of scams like these, and noted that the best protection against this and similar e-mail scams is extreme caution.

Clients should be carefully vetted and all received payments should be given ample time to clear, the ABA noted. The organization adds that simply waiting for the funds to become available may not be enough, though, and that attorneys should proceed cautiously.

Schmautz added that it's easy to verify if a check is real by calling the bank where it originated.

"And never, ever, ever, deposit it into your own account and draw money out until it completely clears and you know the check's amount is in there," Schmautz said. "If they want you to deposit a check and send some money back to them, it's a scam."

Many versions of e-mail con jobs

From the **Florida Bar News**

Scammers are also shifting to divorce and family law setups to lure lawyers. According to the *Florida Bar News*, Tallahassee attorney Bill Gwaltney had a recent example.

Gwaltney said he was contacted via e-mail Nov. 12 by a woman who claimed to be a Florida resident but was vacationing in England. The woman said she and her husband had agreed to a divorce and how their $20 to $30 million of assets would be split. (Gwaltney once practiced in Broward and Palm Beach counties, so the value of the assets didn't seem out of line.) The woman said a U.S. company owed the couple money, and would forward a check to Gwaltney, who could deposit the $28,700 check in his trust account. The "client" instructed that $2,500 was to be sent to her via Western Union, and $20,000 wire-transferred to her travel agent in Chicago, with the remainder being his retainer.

"These are all plausible things in a high-end situation," Gwaltney said. "What these people actually did was send me a check from a legitimate company and a legitimate account." It also arrived via UPS when promised.

The client continued to follow up with e-mails and eventually phone calls. Gwaltney said his suspicions were raised, by a number of issues.

"Really the thing that tipped me off significantly was the reluctance to answer questions," he said, including such things as where the divorce was to be filed and other information. He conceded, though, that many people have an understandable reluctance to put too much personal information in e-mails.

Gwaltney checked the address from which the check was mailed and found it was real, as was the "client's" address in England. But the address of the travel agent didn't check out.

The scheme collapsed when he contacted both Wachovia Bank, where the account in question was, and the company, located in New Jersey. This investigation verified that while the company and the account were real, the check wasn't. Furthermore, Gwaltney said the company was actively investigating several other cases where, in effect, its identity had been stolen as part of similar Internet scams.

Scam e-mail example

■ **I'm Shen-Ling Young,** presently studying in my home country Hong Kong. I was married to Mr. David Young but separated. Now, am contacting your law firm in regards to a divorce settlement with my ex-husband who is from your jurisdiction.

Now, we had an out of court agreement for him to pay me the sum of USD$375,850 plus legal fees. But unfortunately he has only paid me USD$55,000 since then. I am hereby seeking your law firm to represent me in collecting the balance from him.

- The Clallum County (Washington)

More *SCAMS*, Page 31

The 'critical issues' now facing attorneys

By the **Montana CLE Commission**

Thoughts from a summit conference

ALI/ABA and the Association for Continuing Legal Education (ACLEA) joined forces to host a Critical Issues Summit in October in Scottsdale, Ariz. Titled, "Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century," the summit was another in a series of high-level reviews of lawyer education and preparedness that has included the Arden House series of reports, the MacCrate Report, and the recent Carnegie Report. These self-critical assessments of law school education and continuing legal education (CLE) have enabled the profession to evaluate a series of course corrections.

The Critical Issues Summit brought together practitioners, bar administrators, judges, law school deans and professors, CLE developers, state CLE administrators, and law firm CLE administrators, as well as the authors.

Prior to the Summit, a copious amount of research material was sent to the attendees to read, including nearly three dozen articles that examined law schools, bar admissions, continuing legal education, the future of the legal profession, and the new 2009 Survey of Lawyer CLE Preferences, Practices & Expectations.

In three days of meetings, the group avoided finger pointing, while focusing on how effective the current structures are in meeting the needs of the public, the judiciary and law firms. A central premise of the Summit was that the quality of legal education affects equal access to justice. Law librarians brought to the discussion another perspective – different from that of educators and those who employ lawyers.

The Summit began with two plenary sessions: "The Future of the Legal Profession" and "The Impact of Technology on Lawyer Development." They provided background for the two days of intense, small discussion groups that looked at bar admissions, generational issues, CLE, in-house professional development, and law school education.

Fast and agile is better than big

The introductory panel on the Future of the Legal Profession was moderated by Tsan Abrahamson. The provocative panelists were Professor Harry Arthurs of Osgoode Hall Law School (Toronto), Ward Bower from Altman Weil, Corinne Cooper, a former law professor who consults for Professional Presence, and Stuart Forsyth, The Legal Futurist from the Los Angeles County Bar Association. Among their recommendations were that lawyers must be nimble navigators of change, and must be ready for the impending regulatory revolution that will affect the profession.

Forces such as technology, the government, globalization of commerce, and forms of property are driving change, they said. Attorneys must respond to the need for specialization and expertise in non-law fields. Multidisciplinary practices will grow, where lawyers and non-lawyers work together generating revenues for the same business. Knowledge must be broken down to the point where it will be available and understandable to clients, who are increasingly sophisticated. The billable hour is tumbling, and firms must find another way of billing for services. One speaker said that fast is better than big, and that small and agile will be just as good from the client's perspective.

Law-school changes demanded

Ms. Cooper predicted that law firms will start acting like the clients of law schools, and will demand the delivery of a product that is more useful to them. She said, "Those days of the Ivory Tower being a manufacturing plant that was largely immune to [outside sources] are over." She was adamant that the formal law school education should be merely a two-year program, and that the current third year should be used as an apprenticeship experience, similar to the old "reading for the law" practice that led to bar admission. Millennial law students challenge current teaching methods, and ask why they need to memorize, when all they have to know can be looked up on the Internet. Cooper maintained that they should be taught how to find information when they need it, rather than memorizing case references. Her most inciteful comments were that the law school is a cash cow for the university, and tenure provisions and the cost of the law library are barriers to the law school's ability to be nimble.

Still ignorant about technology

The second panel addressed the question of what is next for technology and its application to legal practice and professional education. The panelists were attorney Craig Ball, Barbara Bichelmeyer from Indiana University, Todd Flaming of Schopf & Weiss LLP, and Barron Henely of HMU Consulting. They asserted that technology has exploded the concept of space, and further that the technology necessary for a successful law practice is not really understood by the law class of 2010. Databases, online searching, document assembly, and spreadsheets are still beyond the expertise of those who think they are savvy because they use Facebook and texting.

Technology has altered what people need to know. This technology-driven environment values a skill set that allows lawyers to use their knowledge in a subject specialty. Henely declared that engagement and interactivity, now requirements for the classroom, must be built into online education. The panel concluded that education, whether in the law school or secured through continuing legal education, should focus on increasing capability; the blending of practical experiences with feedback and information presentation.

Following the two introductory panels, the attendees broke

More *CRITICAL ISSUES*, Page 32

Summary of December Board meeting

This is a summary of the minutes from the Dec. 4 meeting of the State Bar of Montana Board of Trustees, held in Helena:

By **Jill Diveley**
State Bar membership coordinator

PRESIDENT'S REPORT – *Cindy Smith*

The ad hoc committee looking into the interstate reciprocity issue had its first meeting. Ms. Smith added past Bar Presidents Bob Carlson, Bob Sullivan, Andy Suenram, and Ed Bartlett as members.

Susan Gobbs and Judy Meadows recommended that the CLE Institute create an ad hoc committee to work on ideas to improve the substance and presentation of the CLEs.

SECRETARY-TREASURER'S REPORT – *Paul Stahl*

Mr. Stahl said the proposed Bar budget for the next fiscal year was first calculated by increasing expenses by 5 percent and revenues by 3 percent and then revising those preliminary figures based upon prior use and need. He said that revenue from dues amounts to less than 50 percent of the revenue of the Bar.

PRESIDENT-ELECT'S REPORT – *Joe Sullivan*

The Board will hold its Strategic Planning meeting on May 21-22 at the Gallatin Gateway Inn near Bozeman.

BOARD CHAIR'S REPORT – *Shane Vannatta*

Mr. Vannatta held an orientation meeting for newer trustees prior to the Board meeting, focusing on essentials including the bylaws and governance of the Bar. Secretary-Treasurer Paul Stahl made a budget presentation at the meeting.

BAR MEMBER COMMENT – *Linda Osorio St. Peter*

Ms. St. Peter, a Helena attorney, stated her concerns over a panel discussion on diversity that occurred during the May Strategic Planning meeting. She felt the Board was taking one side in a same-sex couple's child custody case. Trustee Vicki Dunaway of Billings responded that the Board was merely hearing a presentation on diversity and made no endorsement of either side in the litigation.

REPORTS REQUIRING BOARD ACTION

■ **Proposed budget for 2010-2011**

The Board discussed the proposed budget and ways to reduce costs. President-Elect Joe Sullivan reminded the trustees of the ad hoc budget committee's report from the previous year that contained recommendations.
The Board approved three motions:

- To raise the budget line item for training and travel of the Bar executive director to $10,000, an addition of $2,000.
- To raise the money budgeted for the Board of Trustees annual retreats to $10,000, an increase of $4,000. The retreat budget had been decreased by $3,000 for 2009-2010.
- To adopt the FY 2010-2011 budget as amended.

A motion eliminat the annual $10,000 Bar donation to the *Montana Law Review* was rejected by the Board.

Following the budget review and approval, Scott Knutson with Wells Fargo provided an update on the Bar's current investments.

■ **Proposed State Bar bylaw revisions**

Board Chair Shane Vannatta said the Bar is required to review the trustee area districts every 10 years. Because the bylaws as a whole have not been reviewed in quite some time, the Board approved the creation of a committee to review all the bylaws, which include the trustee distribution.

ABA DELEGATE REPORT – *Bob Carlson*

Mr. Carlson highlighted several agenda items for the 2010 ABA midyear meeting of the ABA House of Delegates. They included requests to consider: a report with recommendation regarding the ABA dues structure; the impact of incarceration on mother-child relationships; and alternatives to incarceration for pregnant or new mothers.

LAWYERS ASSISTANCE PROGRAM – *Mike Larson*

Mr. Larson noted an increase in lawyers calling about their own mental or addiction problems. He believes these calls were generated from his speaking during the Annual Meeting and Road Show programs.

The support groups in Billings and Missoula continue to be attended on a regular basis.

OFFICE OF DISCIPLINE COUNSEL – *Shaun Thompson*

Mr. Thompson said that 333 complaints had been filed against lawyer through the end of November.

Mr. Thompson also expressed his concern regarding the State Bar's proposed amendments to the advertising rules in the Rules for Lawyer Disciplinary Enforcement and the impact those amendments would have on the Office of Discipline Counsel. His office does not have the resources to handle such

a dramatic change in the lawyer discipline process, he said.

EXECUTIVE DIRECTOR'S REPORT – *Chris Manos*

Mr. Manos reported that the Board's priorites in this year's strategic plan were being met.

BAR COUNSEL'S REPORT – *Betsy Brandborg*

The Bar has filed a petition regarding lawyer advertising (see the December/January *Montana Lawyer*; find the petition at *www.montanabar.org*). The Supreme Court has issued an order providing a comment period (see story on Page 14 of this issue).

The Montana secretary of state may create a working group with the Bar to draft a model rule regarding notary journal confidentiality. The working group would provide its recommendations to the Legislature.

The Supreme Court has created a working group to discuss dissolving the Unauthorized Practice of Law Commission.

EQUAL JUSTICE COORDINATOR REPORT – *Janice Doggett*

Members from the Access to Justice Committee, Equal Justice Task Force, and the Commission on Self-Represented Litigants held a joint meeting in September. The members created five working groups to identify challenges in access to justice.

New VISTA volunteer Brendan Kelley will start in January and will work to create scripts for videos that will be provided to pro bono attorneys and the self-help law centers (see story below).

NEW LAWYERS' SECTION – *Dwight Schulte*

New board members were elected for the Section in September during the Bar's Annual meeting.

The New Lawyers held their annual CLE on Nov. 13. The Section scheduled its retreat for Jan. 23-24.

PARALEGAL SECTION – *Barbara Bessey*

The Paralegal Section will hold its annual CLE on March 26 in Billings.

The Section elected new board members in September during the Bar's Annual Meeting. The Section intends to work on encouraging past members to rejoin.

THE NEXT MEETING of the State Bar Board of Trustees is set for April 16 at the UM Law School in Missoula.

New Bar VISTA has added duties

By **Joe Sullivan**
Law-Related Education Committee

Over the last three years, the Law Related Education Committee has had the help of three different VISTA volunteers to conceive, initiate, and complete different law-related education projects. These projects include the "Legal Guide To Turning 18" and the upcoming "Guide To The Courts."

Since the VISTA program is set up on three-year cycles, the Bar's use of this particular VISTA volunteer position came to an end this summer. State Bar Executive Director Chris Manos and the LRE Committee's chair, Brenda Wahler, have been working to fill this void.

The solution has come in the form of collaboration. Judy Meadows and the Commission on Self-Represented Litigants have been working on some areas in public education. The Commission also has a VISTA volunteer position. That VISTA position has been working with the Bar's VISTA collaboratively on the "Guide To The Courts." It appears that this cooperative effort will continue. Although there now will only be one VISTA between the Self-Represented Litigants Commission and the State Bar, the Commission's VISTA will be housed at the Bar's offices and there will be a sharing of this VISTA's talents, especially in light of the ongoing common efforts of the Commission and the Bar.

BRENDAN KELLEY IS that new VISTA. With the joint titles of Equal Justice Outreach Coordinator and Law-Related Education coordinator, Mr. Kelley will work for both groups through 2010.

Since January 2009, Mr. Kelley has been a Montana Legal Services Association VISTA, working as the Community Outreach facilitator with Rural Dynamics Inc. (RDI) in Great Falls. At RDI he collaborated on the creation of many publications, worked on press relations, created a strategic plan for social media, and aided in the creation of their website and contact resource management program.

Brendan Kelley

Mr. Kelley grew up in the heart of the Catskill Mountains, in Oneonta, N.Y. He moved to New Jersey and attended Brookdale Community College. Later, he transferred to the University of Mary Washington in Fredericksburg, Va. He graduated with a bachelor's degree in English in May 2008.

After graduation Mr. Kelley moved back to New Jersey and worked in the communications department for New Jersey State Senator Sean T. Kean and for the 11th District office of the New Jersey legislature.

THE SCHEDULING of this new VISTA for this year was delayed based

on when an eligible candidate was available. This resulted in no VISTA from July through December of this year. The new VISTA arrived on Jan. 19.

With a new VISTA in place to help facilitate the Law-Related Education Committee, Chair Brenda Wahler intends to reinitiate monthly committee meetings. The intent is to work closely with Judy Meadows and the Commission on Self- Represented Litigants. This further means assessing the needs of the courts, especially at the justice court level.

Also, this means review of the concerns regarding public education on legal issues raised at the Access to Justice Forums. The intent is to define methods of education that break down into greater detail the information in the "Guide To Turning 18" and the "Guide To The Courts." This may mean production of specific brochures and creating web-based content.

All of this is a natural outgrowth of these prior publications, the needs of the Commission on Self-Represented Litigants, the issues identified at Access to Justice Forums, and the help requested by the courts. Hopefully, this will help Montana citizens to know what to expect if and when they come in contact with the judicial system. ❍

Ad rule comment period set

On Jan. 8, The Montana Supreme Court ordered a 90-day comment period on the State Bar petition to revise rules on attorney advertising in the Rules of Professional Conduct. The comment period would end March 8.

The petition by the Bar and its Ethics Committee can be found under "Front Burner" at *www.montanabar.org*.

Bar members and members of the public may send their comments or suggestions about the petition to the Clerk of the Supreme Court, PO Box 203003, Helena MT 59620.

Dues statements coming

The State Bar of Montana will mail annual dues statements to attorneys on Feb. 26.

Payments for all fees are due April 1st and can be made by check or online with a credit card.

CLE affidavits will be mailed separately in April as **the filing deadline is now May 15th**.

STATE BAR CALENDAR

February 10
- **News and advertising content deadline** for March issue of *The Montana Lawyer* magazine

February 12
- **Annual Real Estate CLE & Ski**, Fairmont Hot Springs
- **State Bar Executive Committee** meeting, 10 a.m. State Bar offices, Helena

February 17
- **Law-Related Education Committee** phone meeting, 10 a.m.

February 19
- **Annual Bench-Bar Conference**, Hilton Garden Inn, Missoula

February 22-24
- **Bar Exam**, Colonial Hotel, Helena

February 26
- **Eminent Domain Update CLE**, GranTree Inn, Bozeman
- **Dues statements** will be mailed to State Bar members.

March 1
- **Application deadline** for July Bar Exam.

March 5
- **Energy Law Update CLE**, Holiday Inn, Great Falls

March 9
- **Access to Justice Committee** meeting, 10 a.m., Bozeman, location to be announced.

March 10
- **News and advertising content deadline** for March issue of *The Montana Lawyer* magazine

March 12
- **Basic Office Practice CLE** (Annual St. Patrick's CLE), War Bonnet Hotel, Butte

March 19
- **Family & Elder Law Update CLE**, Colonial Hotel, Helena
- **State Bar Executive Committee** meeting, 10 a.m., State Bar offices, Helena

March 26
- **Attorney-Paralegal Practice Tips CLE**, Holiday Inn Grand Montana, Billings

April 1
- **Bar dues** payment deadline

April 12
- **Board of Bar Examiners** meeting, 10 a.m., State Bar offices, Helena
- **Equal Justice Task Force** meeting, 10 a.m., office of Disability Rights Montana, 1022 Chestnut, Helena

CLE filing deadline extended

Affidavits will no longer be mailed with dues statements

Beginning this spring, a recent change to the Montana Supreme Court's Rules for Continuing Legal Education will allow Montana attorneys an additional two weeks in which to file their CLE affidavits.

The adjustment to the reporting schedule is intended to more effectively assist the membership in complying with the CLE requirement.

The reporting year itself will remain the same (April 1 through March 31) but the deadlines for submission of affidavits will be amended. (See chart at right).

For the past several years, State Bar members have received their CLE affidavits and Bar dues statements by mail around March 1. This schedule required that affidavits be printed in mid-February, approximately six to seven weeks before the end of the reporting cycle. As a result, the CLE affidavit forms provided to attorneys did not reflect attendance for the entire reporting year.

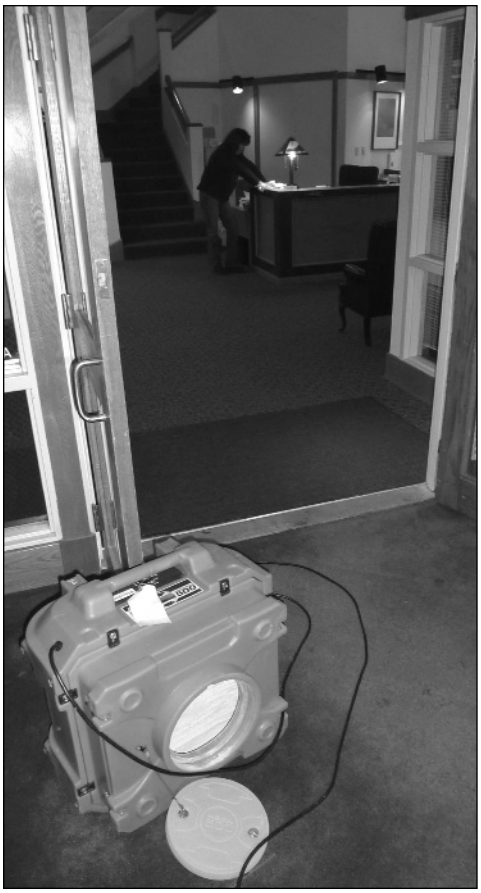
The new schedule will provide a more complete record by delaying the distribution of CLE affidavits until reporting cycle has ended and all available attendance information has been recorded for the full year.

The schedule for payment of Bar dues and assessments will not change. Members will continue to receive their dues statements on March 1 with payment due by April 1.

CLE affidavits will no longer be sent with State Bar dues statements, but will be mailed separately on April 15.

The new deadline for CLE filing is May 15.

CLE Reporting Year	April 1 - March 31
Affidavits sent to attorneys	April 15
Affidavits due at State Bar ($50 late fee after this date)	May 15
Non-compliance notices sent	June 1
Attorneys removed from active status	July 1



Bar staffer Kathie Lynch scours soot off the reception desk, background, as a mega-filtering fan scours the air just outside the Bar's front door.

Fire, smoke disrupt Bar work

An electrical fire in Helena's Power Block – the downtown building that houses the State Bar of Montana offices – disrupted State Bar business for at least a week.

The fire, discovered at 2 a.m. on Saturday, Jan. 23, by workers leaving a nearby bar, gutted a portion of the basement and filled the entire six-story building with thick black smoke. The State Bar is on the second floor of the building, and just below it a hole was burned between the basement and first floor. The building was evacuated by fire officials for three days.

The fire came just two weeks after the Power Block was evacuated because of Styrene gas fumes from a downtown Helena sewer-lining project. Those fumes had only recently exited the Bar offices.

When two members of the State Bar staff inspected the office two days after the fire, they found the air full of smoke and everything was covered with a thin layer of greasy black soot. The Bar phone and computer systems were not effected, however.

Bar staff gathered at the office on Tuesday, Jan. 26, to plan its clean-up strategy. Many books, less-than-vital documents, and other items were thrown away because of smoke damage. Vital member documents, however, had been shut in file cabinets during the fire and were not damaged.

For the rest of the week, because the smoke smell was still bad and because plumbing and toilets were damaged and shut down, Bar staff worked limited hours or worked from home. Crews from professional cleaning services arrived in the Bar offices by Wednesday, Jan. 27. The cost of those outside services are to be borne by the Power Block's landlords.

The Helena fire marshal said the fire was sparked in a junction box in the basement. Fire officials said they would meet with the building representatives to discuss methods to prevent this type of incident from recurring.

Meanwhile, at *Montana Lawyer* press time on Friday, Jan. 29, office cleaning was continuing, and Bar staff was still working limited hours at the Bar and the place still stank. Bar meetings continued to be held at other locations, and much work was being accomplished at home.

The fire put *The Montana Lawyer* three days past its deadline. ❍

Montana Justice Foundation
Issues Call for Grant Proposals

The Montana Justice Foundation (MJF) announces its call for grant proposals. The MJF funds and supports organizations committed to ensuring that all Montanans, especially the vulnerable and underserved, have meaningful access to the civil justice system. One way in which the MJF strives to fulfill its mission is through its grants program. The MJF awards grants to qualified non-profit organizations qualified to carry out the following charitable objectives of the Foundation:

Support and encourage the availability of legal services to vulnerable and underserved populations;

Increase public understanding of the law and the legal system through education;

Promote the effective administration of justice; &

Raise public awareness of and access to alternative dispute resolution.

The deadline for submission of grant proposals is Wednesday, March 31, 2010. Funding decisions will be made in May.

To download an MJF grant application or for further information on the application process, please visit our website at: www.mtjustice.org.

MONTANA JUSTICE FOUNDATION

Making Justice Accessible to All Montanans

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

February 11 Billings – MSU Billings downtown
Understanding the Drug Court Model 7.50 CLE credits, including 1.0 Ethics (no SAMI) credit. Presented by Billings area drug courts, (406) 248-7111

February 18 Missoula – Missoula Courthouse
The Law, the Guardian & the Long Lunch 1.0 CLE credit, including 1.0 Ethics (no SAMI) credit. Presented by the 4th Judicial District Court, (406) 258-3461

February 19 Missoula – Hilton Garden Inn
Bench-Bar Conference 7.0 CLE credits, including 4.50 Ethics (no SAMI) credits. Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. Details of program, speakers, and registration at *www.montanabar.org*

February 26 Bozeman – GranTree Inn
Eminent Domain Update 6.50 CLE credits, including 1.0 Ethics (no SAMI) credit. Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. Details of program, speakers, and registration at *www.montanabar.org*

March 5 Great Falls – Holiday Inn
Energy Law Update 6.0 CLE credits, including 1.0 Ethics credit (which meets 1.0 SAMI credit). Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. Details of program, speakers, and registration at *www.montanabar.org*

March 10 Billings – Wingate Hotel
Montana Labor & Employment Law 6.75 CLE credits, including 1.0 Ethics (no SAMI) credit. Presented by The Seminar Group, (206) 463-4400

March 12 Butte – War Bonnet Hotel
Basic Office Practice (Annual St. Patrick's CLE) 6.25 CLE credits, including 2.0 Ethics credits (which meets the 1.0 SAMI credit). Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. Details of program, speakers, and registration at *www.montanabar.org*

March 12 Helena – Metcalf Building, Capitol Complex
State Ethics Law 3.0 CLE credits, including 3.0 Ethics (no SAMI) credits. Present by the state Personnel Division, (406) 444-3985

March 17 Helena – Colonial Hotel
Evidence & Expert Testimony 6.0 CLE credits, including 1.0 Ethics (no SAMI) credit. Presented by the National Business Institute, (800) 930-6182

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*

March 26 Great Falls – Hilton Garden Inn
Montana Trial Lawyers Spring Seminar 6.50 CLE credits, including 2.0 Ethics credits (which meets the 1.0 SAMI credit). Presented by the Montana Trial Lawyers Association, (406) 443-3124.

All other CLEs

February 1 Lewistown – City Hall
Regional Training: Contract Issues 6.0 CLE credits. Presented by MMIA, (406) 449-7440

February 2 Glasgow – City Hall
Regional Training: Contract Issues 6.0 CLE credits. Presented by MMIA, (406) 449-7440

February 2 Teleconference
The Unlawful Internet Gambling Enforcement Act 1.50 CLE credit. Presented by Lorman, (800) 679-3940

February 3 Havre – City Hall
Regional Training: Contract Issues 6.0 CLE credits. Presented by MMIA, (406) 449-7440

February 8 Teleconference
Current Issues in Real Estate Title & Title Insurance 1.50 CLE credits. Presented by Lorman, (800) 678-3940

February 9 Teleconference
Montana Landlord Tenant Law Update 1.50 CLE credits. Presented by Lorman, (800) 678-3940

Web design help added to benefits

The State Bar of Montana has added *EsqSites123.com* as a new benefit for Bar members.

EsqSites123.com, a San Diego, Calif. company, provides web design and hosting services to its members. As part of its ongoing effort to provide affordable online access to solo and small firm practitioners, *EsqSites123.com* offers discounts on setup fees of 25 percent to State Bar members who need a web page built.

The company's web-based software allows lawyers to market their services on the Internet inexpensively. Legal professionals can register their domain name and create a website in under 10 minutes.

Since September 2005, *EsqSites123.com* has formed relationships with state and local bar associations across the U.S., which represent more than 500,000 attorneys nationwide.

For more information, you can visit the website at *www.EsqSites123.com* or view an online demo at *http://esqsites123.com/presentation.php*.

February 10 Helena – Metcalf Building, Capitol Complex
Writing Administrative Rules of Montana 10.0 CLE credits. Presented by the state Personnel Division, (406) 444-3985

February 12 Fairmont Hot Springs
Real Estate CLE Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. Brochure mailed to members and details posted at *www.montanabar.org*

February 12 Teleconference
Paralegal Seminar on Advanced Use of Medical Records 1.0 CLE credit. Presented by the Institute for Paralegal Education, (800) 793-5274

February 12 Teleconference
Paralegal Seminar: Understanding Business Entity Options & Pre-Filing Procedures 1.0 CLE credit. Presented by the Institute for Paralegal Education, (800) 793-5274

February 19 Teleconference
Understanding Bankruptcy Code Section 503(b)(9) 1.50 CLE credits. Presented by Lorman, (800) 678-3940

February 23 Live phone CLE
Update on the Americans with Disabilities Act 1.0 CLE credit. Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206.

February 23 Teleconference
Creating Wealth Through Legal Means 1.50 CLE credits. Presented by Cannon, (800) 676-0734

February 24 Teleconference
Lobbying & Political Campaign Activities of 501-c(3) Organizations 1.50 CLE credits. Presented by Lorman, (800) 678-3940

February 25 Kalispell – Location to be announced
Montana's Wrongful Discharge Act 3.0 CLE credits. Presented by the state Personnel Division, (406) 444-3985
March 4 Helena – Metcalf Building, Capitol Complex
Preventing Harassment 3.0 CLE credits. Presented by the state Personnel Division, (406) 444-3985

March 4 Missoula – Location to be announced
Employment Law Fundamentals 7.0 CLE credits. Presented by Sterling Education Services, (715) 855-0495

March 11-12 Billings – Wingate Hotel
Montana Agriculture: Legal Issues 12.0 CLE credits. Presented by The Seminar Group, (206) 463-4400

March 12 Teleconference
Paralegal Seminar: Drafting Incorporation Documents 1.0 CLE credits. Presented by the Institute for Paralegal Education, (800) 793-5274

March 16 Missoula, – Location to be announced
Deeds, Descriptions & the Law 7.0 CLE credits. Presented by PESI, (715) 855-5292

March 18 Billings – Location to be announced
Deeds, Descriptions & the Law 7.0 CLE credits. Presented by PESI, (715) 855-5292

March 19 Helena
Elder Law Update Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. Brochure to be mailed to members and details to be posted at *www.montanabar.org*

March 24 Helena – Metcalf Building, Capitol Complex
Privacy & the Right to Know 6.50 CLE credits. Presented by the state Personnel Division, (406) 444-3985

March 26 Billings
Attorney-Paralegal Tips Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. Brochure to be mailed to members and details to be posted at www.montanabar.org

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

2008 Guide to Montana's Local and County Community Foundations
2008, 54 pages
Print only, free

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

2010 Lawyers' Deskbook & Directory
Book, $40
See order form on Page 15

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

Public Discipline Under MT Rules of Professional Conduct
2006, 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
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Changes to the Federal Rules of Civil Procedure

By **Christopher Fagan**
Missoula attorney

Time computations among most notable revisions for federal practitioners

On March 26, 2009, the U.S. Supreme Court approved considerable changes to many of the Federal Rules of Civil Procedure. These changes took effect on Dec. 1, 2009, and are substantive, making it important for all federal practitioners to carefully review the new rules so as to avoid making filing mistakes while improperly adhering to the previous, unrevised rules.

The overhaul is primarily isolated to time computation provisions with the stated goal of making the process of calculating time periods "simpler, clearer, and more consistent."[1] The principal simplifying innovation is to "count all days," including intermediate weekends and holidays, with the exception that if a deadline falls on a weekend or holiday the deadline becomes the next business day that is not a weekend or holiday.[2]

With the "days are days" approach, calculating time theoretically becomes less complicated. The hope is that any confusion between deadlines made by practitioners and the courts will be dramatically decreased.

In addition, all deadlines in the rules were reviewed, and most short periods were extended to offset the shift in time-computation to ensure that each period is reasonable.[3] For example, most 10-day periods that previously did not include weekends or holidays have now been extended to 14 days to compensate for the discrepancy caused by the "days are days" approach.

WHAT FOLLOWS is a brief overview of a selection of notable changes. Not each and every change is addressed and thoroughly analyzed here. Of course, there have also been recent changes to the local rules in Montana that will not be discussed. Also, please note that substantial revisions have been made to federal appellate, bankruptcy, and criminal rules of procedure, none of which are reviewed here. For a complete set of outlines regarding revisions and the advisory committee notes, please visit the Federal Rules page on the U.S. Courts website, *www.uscourts.gov/rules/index.html*.

The Civil Rules Advisory Committee chose Fed. R. Civ. P. 6(a) as the umbrella "template" for implementing the time-computation project. As such, the old Rule 6(a) has been replaced by the new Rule 6(a) which reads as follows:

> (a) **Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.
>
> (1) **Period Stated in Days or a Longer Unit.** When the period is stated in days or a longer unit of time:
> (A) exclude the day of the event that triggers the period;
> (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
> (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.
>
> (2) **Period Stated in Hours.** When the period is stated in hours:
> (A) begin counting immediately on the occurrence of the event that triggers the period;
> (B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and
> (C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.
>
> (3) **Inaccessibility of the Clerk's Office.** Unless the court orders otherwise, if the clerk's office is inaccessible:
> (A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or
> (B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.
>
> (4) **"Last Day" Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:
> (A) for electronic filing, at midnight in the court's time zone (emphasis added); and
> (B) for filing by other means, when the clerk's office is scheduled to close.
>
> (5) **"Next Day" Defined.** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.
>
> (6) **"Legal Holiday" Defined.** "Legal holiday" means:
> (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence

Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;
(B) any day declared a holiday by the President or Congress; and
(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

The new Fed. R. Civ. P. 6(a) is a default rule, applicable when a time period must be computed, and does not necessarily apply when a fixed time to act is set by court-order, statute, or otherwise.[4] Again, all deadlines are stated in days, and the day of the "event" that triggers the deadline is not counted.[5] Also, it is important to note that the deadline to file an electronic document ends at midnight in the court's time zone.[6]

With some exceptions, most of the new deadlines are typically divisible by the number 7. For example, many previous time periods of 3, 5, 10, and 20 days have been changed to 7, 7, 14, and 21 days, respectively. Of course, there are important exceptions. For example, the deadlines for renewed motions for judgment as a matter of law (Rule 50(b)), motions for amendment of the court's findings (Rule 52), and motions for a new trial (Rule 59) have all been changed from 10 days to 28 days.

Some of the other noteworthy changes to specific rules are as follows:

■ Rule 13(f) has been deleted, leaving amendments to add counterclaims to be governed exclusively by Rule 15.

■ Under the new Rule 15, the right to amend once as a matter of course terminates 21 days after the service of a Rule 12(b), (e), or (f) motion.[7] Also, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading.[8] The rules now permit a party to amend its pleadings once in response to a responsive pleading.[9] The time to respond to an amended pleading has been increased from 10 days to 14 days.

■ Deadlines associated with Rules 56(a) and (c) Motions for Summary Judgment have been changed so that, in the absence of statute or local rule, summary judgment motions can now be filed at any time from the commencement of the action until 30 days after the close of discovery.[10] If a motion for summary judgment is field before a responsive pleading is due, the time to respond to the motion is 21 days after the responsive pleading is due.[11]

FOR FEDERAL PRACTITIONERS, careful attention to these rule changes is imperative and could lead to a much easier effort in correctly setting, and therefore making, deadlines in federal court. Of course, the converse is also true as the pitfalls of continuing adherence to previous versions of the rules could result in missed deadlines, defaults, and other costly errors.

Looking ahead, there are further rule revisions slated for 2010, including changes to the discovery of expert witnesses, work-product protection, and summary judgment rules, so stay tuned. Until then and above all, remember, "count all days."

NOTES

1. *See* "Excerpt from the Report of Judicial Conference Committee on Rules of Practice and Procedure", 1:1.
2. *Id.* at 1:3.
3. *Id.* at 1:1.
4. *See* "Report of the Civil Rules Advisory Committee," May 9, 2008, 7:1
5. *Id.*
6. Fed. R. Civ. P. 6(a)(4)(A).
7. *Id.* at 54:3
8. *Id.*
9. *Id.* at 55:2
10. *Id.* at 31:1-2
11. *Id.* at 31:4

ORAL ARGUMENTS

The following arguments will be heard by the Montana Supreme Court in February.

■ Case No. DA 09-0471 – STATE OF MONTANA, Plaintiff and Appellee, v. JAYDEE HAAGENSON, Defendant and Appellant.

Oral argument is set for Wednesday, Feb. 24, at 9:30 a.m. in the courtroom of the Montana Supreme Court, Helena.

■ Case No. DA 09-0389 – BRET McKENNEY and NORTH STAR AMUSEMENTS, INC., Plaintiffs and Appellants, v. COOPER POWER SYSTEMS, Defendant and Appellee.

Oral argument is set for Wednesday, Feb. 24, at 1:30 p.m. in the courtroom of the Montana Supreme Court, 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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Failure to communicate gets attorney disbarred

The Montana Supreme Court, in a Jan. 13 order, disbarred Bitterroot Valley lawyer Marla J. Drozdz following a long-running case where she failed to communicate with a client and with lawyer-discipline authorities.

According to a complaint filed by the Office of Discipline Counsel ODC), the attorney's misattention to her client began in 2008. The complaint alleged that:

In about April 2008, Henry Kanner, of Darby, Mont., hired Ms. Drozdz, of Lolo, to evaluate potential claims against an electrical contractor. Mr. Kanner paid Ms. Drozdz a retainer of $500. In June 2008, Mr. Kanner sent Ms. Drozdz a letter informing her that the problems with the electrical contractor had been corrected. Mr. Kanner wanted to know the results of Ms. Drozdz's findings as well as her recommendations. Mr. Kanner informed her he wanted to close "this episode" in his life and requested the return of the documentation that he provided her. Mr. Kanner stated, "I trust that we have not consumed the entirety of the $500 retainer. . . ."

Mr. Kanner did not receive a response to the letter.

Two weeks later, he wrote Ms. Drozdz terminating his attorney-client relationship, requesting return of paperwork that he gave her and requesting a refund of unearned fees. Mr. Kanner sent the letter via certified mail and the letter was returned unclaimed.

On July 2, 2008, Mr. Kanner sent Ms. Drozdz an e-mail indicating that she had not responded to his prior e-mails, telephone calls or letters.

On July 11, 2008, Ms. Drozdz sent Mr. Kanner an e-mail in which she stated that she had not received any other e-mails from him, had received no telephone messages, and had received no letters from him, registered or otherwise. She further stated that she sent Mr. Kanner a letter in May asking for additional information, had reviewed the documents he left with her, and had started writing the demand letters awaiting the remainder of the information. Ms. Drozdz contended that her husband mentioned the previous day that Mr. Kanner had called him and that he left a return message for Mr. Kanner.

On July 17, 2008, Ms. Drozdz e-mailed Mr. Kanner stating that she sent Mr. Kanner's paperwork with her husband to deliver to him because of their problems with the mail service. She also stated that her notes, retainer refund, and accounting would come under a separate cover, which she would get to him either in person or in another secure manner.

Mr. Kanner sent Ms. Drozdz an e-mail on July 29, 2008, stating that he was awaiting the notes, retainer refund, and accounting. Mr. Kanner e-mailed her again on Aug. 6, Aug. 27, Sept. 4, Sept. 8, and Oct. 1 in 2008 requesting she respond to both his e-mails and his several telephone calls. Ms. Drozdz did not respond and Mr. Kanner submitted an informal complaint to ODC in October 2008.

In a letter to Ms. Drozdz dated Oct. 16, 2008, ODC requested that she provide ODC a response to Mr. Kanner's informal complaint within 21 days from the date of the ODC letter. The letter was not returned to ODC, but Ms. Drozdz did not respond. ODC sent a second letter to her on Nov. 18, 2008, via certified mail, return receipt requested and via regular mail. This letter requested that Ms. Drozdz provide a written response to the complaint within 10 days. The letter was returned unclaimed.

The ODC charged that "In violation of Rule 1.16 (d), Montana Rules of Profess Conduct, Ms. Drozdz failed to take steps to the extent reasonably practicable to protect Mr. Kanner's interests including returning the documents to which Mr. Kanner was entitled and refunding unearned fees." The ODC also charged that "Respondent's failure to promptly and fully respond to inquiries from Disciplinary Counsel is, in accordance with Rule 8A(6), Rules for Lawyer Disciplinary Enforcement (RLDE), a ground for discipline."

On March 25, 2009, the Montana Supreme Court suspended Ms. Drozdz from the practice of law indefinitely for not less than seven months, directing her to notify opposing counsel of the suspension within 10 days. On April 24, 2009, ODC contacted three attorneys who had open district court cases in which Ms. Drozdz was opposing counsel. None of them had been notified by Ms. Drozdz of her suspension.

On Sept. 18, 2009, the Commission on Practice held a hearing on the complaint against Ms. Drodz, but she failed to appear either in person or represented by counsel. On Nov. 23, the Commission recommended disbarment to the Court. ❍

Group gives up death penalty work in frustration

By **Adam Liptak**
of the New York Times

Last fall, the American Law Institute, which created the intellectual framework for the modern capital justice system almost 50 years ago, pronounced its project a failure and walked away from it.

There were other important death penalty developments last year: the number of death sentences continued to fall, Ohio switched to a single chemical for lethal injections, and New Mexico repealed its death penalty entirely. But not one of them was as significant as the Institute's move, which represents a tectonic shift in legal theory.

"The ALI is important on a lot of topics," said Franklin E. Zimring, a law professor at the University of California, Berkeley. "They were absolutely singular on this topic" – capital punishment – "because they were the only intellectually respectable support for the death penalty system in the United States."

THE INSTITUTE IS made up of about 4,000 judges, lawyers, and law professors. It synthesizes and shapes the law in restatements and model codes that provide structure and coherence in a federal legal system that might otherwise consist of 50 different approaches to everything.

In 1962, as part of the Model Penal Code, the Institute created the modern framework for the death penalty, one the Supreme Court largely adopted when it reinstituted capital punishment in *Gregg v. Georgia* in 1976. Several justices cited the standards the Institute had developed as a model to be emulated by the states.

The Institute's recent decision to abandon the field was a compromise. Some members had asked the Institute to take a stand against the death penalty as such. That effort failed.

Instead, the Institute voted in October to disavow the structure it had created "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."

That last sentence contains some pretty dense lawyer talk, but it can be untangled. What the institute was saying is that the capital justice system in the United States is irretrievably broken.

A STUDY COMMISSIONED by the Institute said that decades of experience have proved that the system cannot reconcile the twin goals of individualized decisions about who should be executed and systemic fairness. It added that capital punishment is plagued by racial disparities; is enormously expensive even as many defense lawyers are underpaid and some are incompetent; risks executing innocent people; and is undermined by the politics that come with judicial elections.

Roger S. Clark, who teaches at Rutgers School of Law in Camden, N.J., and was one of the leaders of the movement to have the Institute condemn the death penalty outright, said he was satisfied with the compromise. "Capital punishment is going to be around for a while," Professor Clark said. "What this does is pull the plug on the whole intellectual underpinnings for it."

The framework the Institute developed in 1962 was an effort to make the death penalty less arbitrary. It proposed limiting capital crimes to murder and narrowing the categories of people eligible for the punishment. Most important, it gave juries a framework to decide whom to put to death, asking them to balance aggravating factors against mitigating ones.

THE MOVE TO COMBAT arbitrariness without giving up sensitivity to individual circumstances is known as "guided discretion," which sounds good until you notice that it is a phrase at war with itself.

The Supreme Court's capital justice jurisprudence since 1976 has only complicated things. Justice Harry A. Blackmun conceded in 1987 that "there perhaps is an inherent tension between the discretion accorded capital sentencing juries and the guidance for use of that discretion that is constitutionally required."

That was an understatement, Justice Antonin Scalia said in 1990. "To acknowledge that 'there perhaps is an inherent tension,' " he wrote, "is rather like saying that there was perhaps an inherent tension between the Allies and the Axis powers in World War II."

Justice Scalia solved the problem by vowing never to throw out a death sentence on the ground that the sentencer's discretion had been unconstitutionally restricted.

In 1994, Justice Blackmun came around to the view that "guided discretion" amounted to "irreconcilable constitutional commands." But he drew a different conclusion than Justice Scalia had from the same premise, saying that "the death penalty cannot be administered in accord with our Constitution." He said he would no longer "tinker with the machinery of death." The Institute came to essentially the same conclusion.

SOME SUPPORTERS of the death penalty said they welcomed the institute's move. Capital sentencing "is so micromanaged by Supreme Court precedents that a model statute really serves very little function," Kent Scheidegger of the Criminal Justice Legal Foundation wrote in a blog posting. "We are perfectly OK with dumping it."

Mr. Scheidegger expressed satisfaction that an effort to have the institute come out against the death penalty as such was defeated.

But opponents of the death penalty said the Institute's move represents a turning point.

"It's very bad news for the continued legitimacy of the death penalty," Professor Zimring said. "But it's the kind of bad news that has many more implications for the long term than for next week or the next term of the Supreme Court."

Samuel Gross, a law professor at the University of Michigan, said he recalled reading Model Penal Code as a first-year law student in 1970. "The death penalty was an abstract issue of little interest to

New Indian Law portal is now open

By **Judy Meadows**
State law librarian

The State Law Library of Montana is pleased to announce that the Montana Indian Law Portal is now open at

www.indianlaw.mt.gov

This website was originally proposed by Denise Juneau, who at the time was director of the Office of Public Instruction's Indian Education Division. Identifying and acquiring Montana's tribal legal documents had always been a challenge for the Law Library, thus this offer of funding provided the resources and momentum we had always needed.

A steering committee was appointed that included me and Ms. Juneau – who is now state superintendant of public instruction – as well as representatives from the governor's office, the Indian Law Resource Center, the University of Montana School of Law, the Office of Public Instruction, the Montana Historical Society, and the Department of Administration's Information Technology Services Division. The Committee agreed on the required elements for the portal, the necessity of cataloging and permanently preserving the legal heritage of the tribes, and the desired qualifications of the project manager.

Daniel Belcourt was the successful applicant for the position of project manager. As an enrolled member of the Chippewa Cree and a practicing attorney, he offered the skills and contacts that were perfect for the project. During the length of the contract his biggest challenge was getting letters of understanding signed with each of the tribes, so that documents would continue to be added to the website as they were developed. The information that was already digital was harvested from trusted sites and captured for permanent public access and preservation. Other documents were digitized in situ, to demonstrate the project's respect for the ownership of the information.

After the documents (such as tribal court opinions, constitutions, water rights compacts, gaming compacts, fish and game regulations, and codes) were delivered to the Law Library, a contract was signed with the Information Technology Services Division to design the portal for us. The Law Library staff began cataloging the documents and putting them into software for worldwide access at any library computer, as well as the Montana Memory Project. The latter will allow researchers to access legal information about a Montana tribe at the same time as they are searching for water rights or maps digitized by the University of Montana.

The portal was developed for Montana's Indian nations, for the citizens of the state, and for educators and students. We believe it is the first comprehensive Indian law site for one state that includes all basic and controlling documents of the tribes. The tribes feel that the portal gives them and their legal standing more legitimacy with the commercial sector, particularly as it relates to economic development.

The portal will be updated as documents are discovered and sent to us. The project has involved more than half of our staff, and we all are excited about what it should accomplish: the eventual understanding of all that our Indian nations are unique and sovereign realms. ❍

me or my fellow students," he said. But he remembered being impressed by the Institute's work. "I thought in passing that smarter people than I had done a sensible job of figuring out this tricky problem." Things will look different come September, Professor Gross said.

"Law students who take first-year criminal law from 2010 on," he said, "will learn that this same group of smart lawyers and judges – the ones whose work they read every day – has said that the death penalty in the United States is a moral and practical failure."

❍

Law Review provides latest cases in new web list

The staff of the *Montana Law Review* is posting a new feature on the *Law Review* website, called "Legal Shorts." Legal Shorts will provide a synopsis of the latest important decisions handed down from the U.S. Supreme Court, the 9th Circuit Court of Appeals, and the Montana Supreme Court.

Legal Shorts will be updated regularly by the *Law Review* editors. The direct link to Legal Shorts is:

www.montanalawreview.com/id2.html

There also will be a link to the Legal Shorts on the *Law Review*'s home page at *www.montanalawreview.com* and the State Bar's home page at *www.montanabar.org* (lower right column).

Here are the cases for which summaries are provided in the inaugural publication of Legal Shorts:

Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth, 556 F.3d 1021 (9th Cir. 2009).

- **Constitutional law: campaign financing**

Arizona v. Gant, 129 S. Ct. 1710 (2009).

- **Criminal law: search incident to arrest**

Brown v. State, 203 P.3d 842 (Mont. 2009).

- **Criminal law: investigatory stops**

Oregon Natural Desert Assn. v. Bureau of Land Management, 531 F.3d 1114 (9th Cir. 2008).

- **Public land law**

State v. Ellis, 210 P.3d 144 (Mont. 2009).

- **Criminal law: consent to search**

State v. Kalal, 204 P.3d 1240 (Mont. 2009).

- **Criminal law: restitution**

State v. Rickman, 183 P.3d 49 (Mont. 2008).

- **Criminal law: sentencing**

Mary J. Baker Revocable Trust v. Cenex Harvest State Cooperatives, Inc., 164 P.3d 851 (Mont. 2007).

- **Contract law**

Olson v. Shumaker Trucking & Excavating Contractors, Inc., 196 P.3d 1265 (Mont. 2008).

- **Tort law**

State v. Hilgendorf, 208 P.3d 401 (Mont. 2009).

- **Criminal law: investigatory stops**

Kulstad v. Maniaci, 2009 MT 326 ❍

Letter

Reciprocity shouldn't threaten Montanans

I'm a member of the bars of Montana, Nevada, and California. I respectfully urge the membership of the State Bar of Montana to reconsider the offer of reciprocity with Oregon, Idaho, Washington, et al. It will not likely take money away from local practitioners, but may enhance your practices.

Many people (like me) with Montana licenses never compete with the locals. One Montana blizzard was enough to deter me from moving there. I've had only two clients approach me with Montana cases in the last 20 years. Both times I referred them to local counsel in Bozeman and Missoula – and asked for zero referral fee. I paid for the long-distance phone calls, so there was not even incidental "out-of-pocket"costs to the two local brethren.

My motive in encouraging your reconsideration is that at age 65, I don't want to have to take the Oregon bar exam. I live 20 miles from the Oregon border. If Montana accepts reciprocity, I can have the Oregon license because I passed the Montana exam in the 80s. Montana's acceptance of reciprocity is my only hope because Nevada and California don't recognize full reciprocity with Oregon. At 65, I'm afraid I'd flunk the Oregon bar.

I know that logic will eventually prevail, but I fear that in the meantime if you dawdle too long, I'll croak!

– Jim Fallman, attorney
Crescent City, Calif.

ARBITRATION, from Page 8

3. See Aaron-Andrew P. Bruhl, "The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law," 83 NYU.L. Rev. 1420, 1461 (2008). See also Charles L. Knapp, Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device, 46 San Diego L. Rev. 609 (2009).
4. Susan Randall, "Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability," 52 Buff. L. Rev. 185, 194 (2004).
5. 517 U.S. 681, 687 (1996).
6. *Id.*
7. *Zigrang v. U.S. Bankcorp Piper Jaffray, Inc.*, 329 Mont. 239, 123 P.3d 237, ¶13 (2005).
8. 293 Mont. 512, 977 P.2d 989 (1999)
9. *Id.* at 519-50.
10. Burnham, supra at 180.
11. 310 Mont. 123, 54 P.3d 1 (2002)
12. Id. at ¶¶27-29.
13. 223 Mont. 60, 727 P.2d 1298 (1986)
14. 310 Mont. 123, ¶27.
15. *Kloss*, 310 Mont. 123, ¶28.
16. *Quinn v. Briggs*, 172 Mont. 468, 565 P.2d 297, 301 (1977); Denton v. First Interstate Bank of Commerce, 333 Mont. 169, 142 P.3d 797, ¶34 (2006)
17. *Id.*
18. 310 Mont. 123, ¶30.
19. 329 Mont. 239, ¶23
20. 353 Mont. 6, 218 P.3d 486 (2009)
21. *See Passage*, 223 Mont. 60; *Chor v. Piper, Jaffray & Hopwood, Inc.,* 862 P.2d 26 (1993).
22. *Zigrang*, 329 Mont. 239, ¶14.
23. 353 Mont. 6, ¶¶21, 28.
24. See e.g., *Denton*, 333 Mont. 169.
25. Gaitis, supra at 28.
26. See e.g., *National Casualty Co. v. American Bankers Insur. Co. of Florida*, 304 Mont. 163, 19 P.3d 223 (2001) (finding escape clause in standardized insurance contract not unconscionable); *Arrowhead School District No. 75 v. Klyap*, 318 Mont. 103, 79 P.3d 250 (2003) (finding liquidated damages clause not unconscionable); *Highway Specialties, Inc. v. Mont. Dept of Transportation*, 351 Mont. 527, 215 P.3d 667 (2009) (finding liquidated damages clause within reasonable expectation of weaker party).
27. *See Larsen v. Western States Insur. Agency*, 33 Mont. 407, 170 P.3d 956 (2007).
28. *See Martz v. Beneficial Montana, Inc.*, 332 Mont. 93, 135 P.3d 790 (2006).
29. 343 Mont. 392, 185 P.3d 332 (2008)
30. 302 Mont. 90, 12 P.3d 929, ¶20 (2000)
31. 318 Mont. 421, 80 P.3d 1256 (2003)
32. *See* e.g., *Higgins Development Partners, LLC v. Skanska U.S.A. Building, Inc.*, 352 Mont. 243, 216 P.3d 199 (2009); *State v. Philip Morris, Inc.*, 352 Mont. 30, 217 P.3d 475 (2009).
33. *See Keystone, Inc. v. Triad Systems Corp.*, 292 Mont. 229, 971 P.2d 1240, ¶10 (1998).
34. *See* e.g., *id.*
35. *See Kortum-Managhan v. Herbergers NBGL*, 349 Mont. 475, 204 P.3d 693 (2009); *Bretz*, 353 Mont. 6, ¶14.
36. *See* e.g., *Tenas v. Progressive Preferred Insur. Co.*, 347 Mont. 133, 197 P.3d 990 (2008) (finding Nevada law applied to determine validity of anti-stacking provision in insurance contract).

Two judges appointed to Sentence Review Commission

The Montana Supreme Court has appointed two new members to its Sentence Review Commission to replace two district judges whose terms expired.

The Court named District Judge Ray J. Dayton of the 3rd Judicial District Court in Anaconda to a three-year term on the Commission, replacing Kalispell District Judge Stewart Sadler.

The Court also named retired Montana Supreme Court Justice John Warner as the altenate member on the Commission, replacing Butte District Judge Kurt Krueger. Justice Warner also will serve for a three-year term.

Red Mass Ethics CLE in Great Falls Feb. 25

The Third Annual Red Mass Ethics CLE featuring University of Montana School of Law Professor Martin Burke will be Thursday afternoon, Feb. 25, at the Parish Hall of Holy Spirit Catholic Parish in Great Falls.

As has been the practice in the past, the CLE will be followed by a Red Mass celebrated by Bishop Michael Warfel. Judges, lawyers, and public officials attend.

The Red Mass is offered to invoke divine guidance in connection with the dispensing of justice in the courtroom and the offices of individual lawyers. All attendees are invited to attend the Mass no matter what their religious preferences may be.

Following the brief Mass, an optional catered dinner will be served at the Parish Hall to which CLE attendees and their spouses or guests are also invited. The meal cost will be $20 per person.

For more information, contact Great Falls attorney Patrick L. Paul at (406) 761-1830.

Lawsuits overrated as drivers of health care costs

By **Russ Doty**
Billings attorney

If I had an ounce of decency, I would apologize. I'm an attorney accused of driving health care costs up because we file medical malpractice cases.

But before my mea culpa, let's examine attorneys' contribution to rising medical costs. Including legal fees, insurance costs and payouts, the cost of all U.S. malpractice suits comes to less than one-half of 1 percent of health care spending. The Economic Policy Institute found that even when the Congressional Budget Office uses the insurance industry's unverifiable and inflated malpractice costs, it concludes that "a reduction of 25 percent to 30 percent in malpractice costs would lower health care costs by only about 0.4 to 0.5 percent."

The last year I took medical negligence cases, I rejected 30 of them — all but one. If doctors had spent a little more time showing empathy, their patients would not have sought legal redress. While some treatment was negligent, damages were too small to justify a case.

The claim I would have taken was for a fellow in his mid-80s. His vision was severely damaged by botched laser surgery. He had a loving relationship with a good wife. So I advised him to nurture that instead of spending his last years dealing with the stress of a lawsuit. This experience fits with Harvard studies that found only 4 to 12 percent of negligent medical injuries end up as malpractice claims.

Medical negligence claims are expensive to file, so few are frivolous. To develop a case, in addition to weeks of legal time, attorneys must front tens of thousands to obtain medical records, a nurse's case evaluation, and credible medical experts.

Judges often reduce jury verdicts. Large verdicts are infrequent unless lawyers attract big cases by employing large advertising budgets. Eighty percent to 90 percent of medical malpractice cases are lost.

Even when medical negligence is present, an injured person may not be awarded money damages. It happened to a nice young woman I represented. She continued bleeding after a spontaneous miscarriage. She almost died when her doctor failed to perform a D&C. That had been malpractice since around 1910. Therefore, the doctor couldn't get an expert to testify for him.

However, the jurors in that little town wanted to keep their doctor. They found him negligent, but awarded my client nothing. Why? The jury held an irrelevant abortion against her — one she had gotten in Canada 10 years previously after her Catholic church's choir director had impregnated her when she was in the eighth grade.

Then there was the woman who told me her breast implants were lopsided. They weren't. A nurse checked for me. No driving up of insurance costs there.

"Reform" doesn't cause costs to fall as much as possible. Texas tort reform produced $600 million in savings. Nevertheless, liability policy rates stayed flat while the fraction of each policy dollar not paid out to cover losses rose from 29.9 cents in 1993 to 41.8 cents in 1998 — a windfall for insurance companies. More recently, Texas enacted additional reform. Since then Texas's medical malpractice lawsuits have fallen by half. However, malpractice premiums are down only 30 percent.

Many things drive health care costs — like the 20 to 50 percent of administrative costs and profit that are in private health insurance plans. Those revenues could fund universal coverage via a public plan that would incur 4 percent administrative costs.

Some advocate capping medical malpractice awards at $250,000. Ironically, no call for capping the salaries of health insurance company CEOs like Aetna's Ron Williams's ($24.3 million in 2008). No lobbying either for reducing United Healthcare's CEO Stephen Hemsley's 2009 exercise of $127 million in stock options. He still has $744.2 million in unexercised options.

Do you suppose insurance CEOs will apologize for driving health care costs up? Let's cap their salaries and stock options at the same level as malpractice awards so an apology will not be necessary.

RUSS DOTY *of Billings is a member of the bar in Montana and Colorado, but is mostly retired from the practice of law. He now works in the wind energy business. This commentary first appeared in Guest magazine in November.*

SCAMS, ***from Page 10***

Bar Association recently warned its members about a similar scam. Lawyers received an e-mail, supposedly from a woman claiming to be working in Japan and asking for help in collecting a $300,000 out-of-court divorce settlement. The association noted that one lawyer had apparently lost hundreds of thousands of dollars in the scams.

- Earlier this year, the *California Bar Journal* reported that lawyers in that state had lost between $75,000 and $2 million in various scams, according to bankers.

- Scammers sometimes pretend to be a real lawyer by sending out an e-mail using a real attorney's name. This scam usually is done in the context of referring a "client" to the recipient attorney, typically for a debt collection matter. The *California Bar Journal* recounted how one woman, whose identity had been used in such a scam, was able to track down the sender and get a website used in the con taken down, but only after dozens of lawyers in other states had been sent e-mails using her name.

- Another scam involves cashier's checks, apparently from well-known banks. Scammers obtain the special magnetic inks used on such checks and alter the nine-digit number identifying the bank. The check is printed under one bank's name, but the number will identify another bank. The alteration holds up the processing of the check for several days.

- Scams can take advantage of the way some banks handle clearing checks. Banks typically know the time it takes such a check to clear and may advise a lawyer that the funds are "available" without specifically verifying that the check has or has not cleared and, in fact, while the check is being processed and hasn't been identified as fraudulent because of the altered numbers.

If you are a target . . .

Lawyers who think they might be the target of a scam can make a report to the Internet Crime Complaint Center at

www.ic3.gov.

The agency is a partnership between the Federal Bureau of Investigation, the National White Collar Crime Center, and the Bureau of Justice Assistance.

- Banks also have a habit of making funds from a check available for good customers before the checks have actually cleared. Also, a check-clearing isn't a one-step process. Often a check will clear the lawyer's bank, but the bank on which it was drawn has additional time, and the fraud won't be detected for several days. Experts advise lawyers to absolutely make sure that the check has cleared before funds are disbursed from a trust account.

- The State Bar of Michigan, in warning its members about the scams, gave this advice:

If you suspect you have encountered a similar situation, two steps that may be helpful are: a) independently verifying the names and contact information provided to you, making contact with appropriate persons to verify the representation; and b) not disbursing the deposited funds until the bank on which the cashier's check is drawn clears the check; in some cases it is possible that could take up to a week or more, but if you keep a copy of the check, you could call the bank on which it is drawn to see if they will advise you when it will be or was paid.

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CRITICAL ISSUES, **from P. 11**

into their pre-assigned discussion groups to debate and suggest solutions and programming for the following topics.

Generational issues

The discussion of generational issues focused on learning styles, noting the technological expectations of the current generation of law students. A secondary issue is the need for employers to recognize a range of professional career paths.

A 2009 survey of lawyers' CLE preferences and expectations by ALI-ABA illustrates the challenges in offering training to recently admitted lawyers. Lawyers in practice for three or fewer years are more likely to select online on-demand programs or use electronic publications for CLE. They are less likely to attend live in-person seminars, or to watch a video replay of one than any other group. The draft recommendations from the summit encourage CLE sponsors to train CLE instructors in effectively using technology in teaching and in accommodating different learning styles.

The discussion of career paths took place as the economic downturn has reduced employment opportunities for lawyers and as the associate-to-partner track in the law firm is seemingly less relevant. Participants discussed the different tracks many newer lawyers are pursuing, with a lesser commitment of hours. In this context, there is a need to offer training in law school, or through CLE, that will recognize different career paths and focus on professional goals that are relevant to the career path.

In-house professional development

In-house CLE programs are recognized by most states and offer what can be cost effective options for employers and, perhaps more importantly, the opportunity to tailor content.

The desire for Summit participants is that in-house training should meet high standards. The draft recommendations encourage the convening of a national forum to develop models for both competency training and bridge-the-gap programs designed for the lawyer immediately post-law school. The Summit encouraged in-house developers to identify competency models and present programs that match those competencies. Specific suggestions include using client input to identify needs, applying adult learning research, and partnering with law schools and commercial CLE providers.

The recommendations also suggest that in-house programs at large firms should be resources that solo lawyers and lawyers from small firms could attend. This recommendation would need strong support to encourage large firms or corporations to extend the fruits of their investment to others.

The concern for quality in-house programming led to the recommendation that mandatory CLE regulators permit in-house programming to be accredited when it meets standards for effectiveness that are equivalent to those applied to other CLE providers.

Law schools

The Summit looked at how well law schools are equipping lawyers for practice – much the same dialogue as the MacCrate report provoked. The ongoing question is how prepared law students are to practice on day one following their graduation or bar exam. The accepted answer is that they probably are not adequately prepared to work independently.

The recommendations in this area begin with the fundamental one that exhorts law schools to define their learning outcomes, design curriculum with those outcomes in mind, use teaching methods that lead to the outcomes, and then evaluate the success of their teaching. While some law schools may have engaged in this self-evaluative process, it was clear from the discussion that many have not done so.

The Summit participants also saw a role for law schools in career-long competency training, and encouraged law schools to partner with the bench and bar to develop programs. Such programs should include training in the competencies described in the ABA Model Rules of Professional Conduct, such as how to protect client confidentiality in the era of Web 2.0 and beyond.

There was discussion throughout the Summit of the responsibility of the profession and individual lawyers toward underrepresented minorities. This concern is expressed in a summit recommendation that encourages law schools to include access to justice in the curriculum, and encourages exposure to the legal needs of minority groups throughout the law school experience. That recommendation also encourages the entire legal community to address the needs of under-served communities by designing curriculum for working with these communities, by developing self-help programs, and by strengthening bar association self-help programs.

Bar admission and exams

Another breakout group discussed bar admissions, and what competencies should be required for entering practice. This group concluded that regulatory authorities should be encouraged to reformulate bar examinations. They recommended that all parts of the examination not be administered at once, but instead the examination of legal practice skills could come later, and testing on some topics could come early in law school.

There was considerable discussion of

models for mentoring, whether mandatory or voluntary . The group that discussed new models for CLE concluded that credit for training in professional skills should be given, even if the skills are not directly related to substantive law. They also recommended that efforts be made to measure the effectiveness of mandatory CLE and that appropriate accreditation standards for all varieties of CLE should be developed.

Some aspects of the discussion were particularly noteworthy. First, there was general agreement that the profession needs a set of competencies, to benchmark education for both pre and post-admission, and to enable employers to set expectations for lawyer competency at several practice stages.

In one of the sessions, the question was posed, "What is a competent lawyer?" Law librarians saw the need for competencies more than a decade ago, and through use of specialists in this field developed competencies that enunciated key skills and abilities. The absence of an agreed-upon structure for the legal profession makes discussion of the quality of legal education more difficult.

Second, the discussion of continuing legal education has spanned more than five decades, beginning with Arden House I in 1958; however, the recommendations and concerns remain the same. Arden House III in 1987 recommended that CLE use more delivery systems, engage in quality evaluations of presentations, evaluate the effectiveness of mandatory CLE structures, and establish uniform standards. Those recommendations are also reflective of the discussions in Scottsdale.

There are now draft final recommendations for these topics that are undergoing review and comment. It was suggested that this model of investigation and discussion be conducted at the state level by legal educators, CLE providers and regulators, and the practicing bar. Law librarians should remain alert to the possibility of being involved if or when this discussion becomes local. We have knowledge of most of these topics and offer a broad and sophisticated point of view that would strengthen local discussions. ❍

WHEAT, COTTER, from Page 5

cuting violent crimes, especially those involving felons possessing weapons and drug trafficking.

The *Independent Record* also quoted Mr. Cotter as saying:

- "Economic crimes, whether it's mortgage contracts or health care, also is important but first and foremost is terrorism. Nationally, it's of the highest priority for this administration; to disrupt and thwart those people interesting in harming citizens of the United States."
- "Specific to Montana are issues in Indian Country, issues that are specific to the reservations, and that's also the focus of the administration."
- "The other area is crimes against children, and we'll continue to focus on protecting them, whether that's on the Internet (such as child pornography) or physical."

Mr. Cotter's family hails from Miles City, but he was raised in Washington and Minnesota, the *Independent Record* said. He received a law degree from the University of Notre Dame, and specialized in personal injury lawsuits and representing white-collar criminal defendants. He is the father of a 23-year-old son and 20-year-old daughter, who both attend the University of Montana. His wife is Montana Supreme Court Justice Patricia Cotter.

Mr. Cotter will oversee a staff of about 23 assistant U.S. attorneys. He said that while he'll travel regularly to other cities – especially Missoula, Butte, Great Falls, and Billings, which have federal courthouses and U.S. Attorney offices – he'll continue to live in Helena.

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MERCER, from Page 5

assistant U.S. attorney to be able to prosecute cases both ways," Mr. Light said.

"Having a Crow tribal prosecutor who is also a special assistant U.S. attorney is a very important step," said Sherry Matteucci, a Billings attorney who preceded Mr. Mercer as U.S. attorney for Montana from 1993-2001.

Mr. Ashcroft named Mr. Mercer chair of the U.S. Attorney General's Advisory Committee of U.S. Attorneys. Mr. Mercer was active in creating a national drive against child pornography and sexual abuse of children. "A couple of U.S. attorneys around the country said we were not doing enough and asked for an initiative focusing on crimes against children, including child exploitation and child porn online," said Mr. Mercer, adding that those discussions became the genesis for Project Safe Childhood, launched in 2005.

Midway through his term of office, Mr. Mercer divided his time between Billings and Washington, D.C., a split responsibility that began to create political problems for him in Montana. He had hoped that the split time would lead to a full-time job as Mr. Ashcroft's chief deputy. "A big part of my desire to be the chairman of the attorney general's advisory committee and to be the principal deputy to the attorney general is that history has shown that U.S. attorneys can come to Washington and make sure that the national organization understands the needs in the field," he said. "I went back for a year and got nominated but didn't get confirmed."

Still, Mr. Mercer had a lot of influence in Washington, Ms. Matteucci said. "Both those positions and the stature he held in the department gave him the opportunity to be a strong advocate for the way Indian Country law enforcement is conducted," said Ms. Matteucci, who has worked closely with the Crow Tribe since leaving the federal post.

Dozens of residents packed four community forums that Mr. Mercer held in 2005 on reservations along the Hi-Line to express their frustration with high crime rates, shoddy investigations and a lack of information in

ongoing cases involving their relatives. Mr. Mercer got further evidence of the severity of the problems in a report by Gary R. Leonardson of Dillon who looked at Native American crime in the Northwest from 2004 through 2008.

Although it can be confusing to know who has jurisdiction to prosecute a crime on or around an Indian reservation, Mr. Mercer began stressing that some agency has jurisdiction over every crime committed in Indian Country. He directed that cases of domestic abuse be prosecuted and taught people how to do it. And Mr. Mercer hired a member of the Blackfeet Tribe, Dawn Bitz-Running Wolf, to be an assistant U.S. attorney specifically overseeing Native American issues.

One of Mr. Mercer's most important innovations was a crime tracking system – a website where victims can download a form that can then be used to notify the U.S. Attorney's Office of a reported crime. The form is then used to track the case's progress through federal or tribal courts.

Mr. Mercer "encouraged and personally developed a program, along with our office, to train local law enforcement officers throughout the state on federal laws for prosecuting gun crimes," recalled Ken Bray, the Alcohol Tobacco & Firearms resident agent in charge in Montana. "Prior to Bill, the U.S. Attorney's Office in Montana was prosecuting 10 to 15 firearm cases per year. We now run from 50 to 70 per year, and that's because Bill changed it dramatically."

MR. MERCER SAID his biggest disappointment was the acquittal of W.R. Grace executives for alleged environmental law violations and obstruction of justice, which was one of the largest environmental criminal cases in the nation's history. But he is proud of the successful prosecution of Rhodia Inc. The company was ordered to pay a $16 million fine for illegally storing hazardous waste at its shuttered phosphorus plant west of Butte, which was the second largest criminal penalty nationwide under the federal Resource Conservation & Recovery Act.

MR. MERCER FOUND himself in the crosshairs of both U.S. District Judge Donald Molloy and Sen. Jon Tester, who called for his resignation as Montana's U.S. Attorney because he was spending so much time in Washington, D.C., in his associate positions.

Judge Molloy also scolded Mr. Mercer in federal court in 2006, accusing him of mishandling cases and pursuing convictions not for justice but to bulk up statistics. Published reports during last year's W.R. Grace trial also noted the judge's long-standing disdain for Mr. Mercer, and questioned whether that had anything to do with some of the rulings against the prosecution in the case.

Andrew Schneider, a former *Seattle Post-Intelligencer* investigative reporter, wrote in his blog about the trial that when Mr. Mercer tried to announce the W.R. Grace indictments, Judge Molloy wouldn't allow him to do so in front of the federal building in Missoula.

"Mercer, who is openly hated by Molloy, had to hold his press conference on the steps of the county courthouse," Mr. Schneider wrote.

Mr. Mercer also found himself in the midst of a national scandal involving the firing of eight Department of Justice attorneys in 2006. The department initially claimed the lawyers were fired for failing to support Bush administration priorities such as immigration enforcement or the death penalty, but later admitted that one of the attorneys was removed so a former aide to White House political adviser Karl Rove could get the post and others were let go so different lawyers could get experience in those positions to help their resumes.

Mercer wasn't found to have had a role in the firings, but was called upon to answer hours of questions in a closed-door session with congressional investigators. His former boss, U.S. Attorney General Alberto Gonzales, eventually resigned, due in part to the firing scandal.

MR. MERCER, WHO recently celebrated his 46th birthday, called his tenure as U.S. attorney "a very enjoyable ride."

"I'm going to take a little time off, take a little vacation, and as we get in deeper to this year I'll be back to work," he told the *Independent Record*. "I was so lucky to have the chance to get this job when I was 37; I'm sort of an addict to public policy.

Generous gifts from Great Falls lawyer


Zander Blewett

Great Falls trial lawyer Alexander "Zander" Blewett donated $500,000 to the Montana State University athletics program for a facilities upgrade, it was announced recently. He also donated $10,000 each to the Boys & Girls Clubs of Cascade County and Big Brothers Big Sisters of Great Falls.

Mr. Blewett, who was recently elected to a second term on the MSU Foundation board. The money he donated to MSU will go toward an indoor training facility that will be added on to the Brick Breeden Fieldhouse in Bozeman.

Mr. Blewett earned a degree in mathematics at MSU before earning a law degree from the University of Montana. He was a member of the Bobcats' wrestling team in the 1960s.

Mr. Blewett has a history of giving:

- $1,000 Top Student/Wrestler Scholarships.
- $25,000 to Great Falls Youth Soccer Complex in 2004.
- $150,000 to the UM School of Law in 1998, along with law firm partner John Hoyt.
- $300,000 to build a wrestling facility at Great Falls High in 1997, along with son Andy.

Craig D. Charlton, a Helena native, has joined Hinshaw Law Firm in Helena. Mr. Charlton graduated from Concordia College in 1997 with degrees in Social Studies Education and Political Science. He received his juris doctorate from the University of Montana School of Law in 2001. Mr. Charlton served as a law clerk for Montana Supreme Court Justice Jim Rice, and has been engaged in private practice since 2003. Mr. Charlton is licensed to practice law in the Montana state and federal district courts. His general practice areas includes real estate, business and commercial transactions, wills and estates, and general civil litigation.

Patrick Holt (JD 1983) has taken over management of the Auckland, New Zealand, office of Dispute Resolution Services Limited. He had his own solo practice in Lolo and Seeley Lake for over 20 years and served in Missoula Justice Court after the death of Judge Michael Morris. He was a founding board member of the Bitterroot Valley Bank and was on the Missoula County Fair Board for many years. He moved to New Zealand in 2003 with his family and was admitted as a barrister and solicitor of the High Court of New Zealand in 2006. He also qualified and was admitted as a barrister and solicitor of the Supreme Court of Victoria (Australia) in 2008 when he worked as a consultant to help with a law firm expansion in Melbourne, Australia. He returned to New Zealand to join Dispute Resolution Services Limited in early 2009 as national manager of adjudication. He also was recently asked to assume the duties of management of the Auckland office, which handles 50 percent of the entire company dispute resolution cases. He resides with his family on the South Island, in Canterbury, and commutes to the North Island for the new office management role. His e-mail is *phphnz@yahoo.com*.

The law firm of Crowley Fleck announced the following new partners in the firm.

■ **Steven Jennings** graduated from Ohio State University in 1986. Upon graduation, he was commissioned a 2nd Lieutenant in the Marine Corps, where he served as an active duty infantry officer from 1986-1991 and as a reservist from 1991-1999. He graduated with honors from the University of Montana School of Law in 2003. Mr. Jennings's practice focuses on workers' compensation law and insurance defense with an emphasis on title insurance and real estate issues in the Billings office.

■ **Bruce F. Fain** joined the Billings office on Nov. 1, 2008. He is a member of the commercial department and practices in the areas of bankruptcy, commercial litigation, commercial transactions, employment, real estate, banking, and construction law. Mr. Fain graduated from the University of Idaho College of Law in 1990 with honors, where he was the judicial survey editor of the *Idaho Law Review*. From 1995 until joining the firm, Mr. Fain practiced with the firm of Murphy, Kirkpatrick & Fain.

■ **Stewart R. Kirkpatrick** joined the Billings office on Nov. 1, 2008. He is a member of the commercial department and practices in the areas of health care, business and business associations, commercial, and real estate law. He graduated from Brigham Young University in 1983 and obtained his law degree in 1986 from Creighton University School of Law. From 1990 until joining the firm, Mr. Kirkpatrick practiced with the firm Murphy, Kirkpatrick & Fain.

Aimee Grmoljez joined the Helena office of Crowley Fleck on Dec. 15. Ms. Grmoljez was raised in Billings and graduated from Boston College in 1994 with a BS in English and the University of Montana School of Law in 1998. Ms. Grmoljez clerked for U.S. District Judge Donald Molloy in 1999. She served as the chief legal counsel for Gov. Marc Racicot from1999-2001. In 2001 she joined the law firm of Browning, Kaleczyc, Berry & Hoven and was a partner representing various governmental affairs and litigation clients during her nine years at the firm. Ms. Grmoljez's principal areas of counsel are government affairs and insurance defense litigation. Ms. Grmoljez is also a member of the State Bar of Colorado and is the president of the Lewis & Clark Community Foundation. ❍

Art Gorov, Labor Dept. counsel

Arthur Myles Gorov, 77, died of heart-related complications at his home in Polson on Jan. 12.

Before coming to Montana, Mr. Gorov had spent his life in Chicago, except for a stint in the Army. A graduate of DePaul University Law School, he practiced with Berkson, Gorov & Levin in downtown Chicago. Later he headed up legal research for the Circuit Court of Cook County, Ill.

At age 70, after a life in the Midwest and much traveling back and forth to Montana, Mr. Gorov made the move. He landed in Helena, and found a job as chief trial counsel with the Montana Department of Labor. That work, which ended recently due to health issues, enabled him to travel the state handling cases and come to adore his adopted home even more.

Mr. Gorov loved camping across the West, working with injured raptors to help their return to the wild, sailing, and live opera. In addition to his work with groups that fed the hungry and his support of wildlife organizations, he devoted many years to helping women with ovarian or breast cancer win the right to treatments that their insurers were attempting to deny them. He represented them pro bono.

He is survived by his wife, Billie Lee, a community organizer for Lake County, a daughter and a stepson.

Ronald McPhillips, retired district judge

Ronald Dale McPhillips, 77, retired judge of the Montana 9th Judicial District died of cancer on Jan. 4 at his home in Shelby

Judge McPhillps was born in Great Falls and grew up in Shelby. After graduating from high school in 1950, where he was captain of the football and basketball teams, he attended Montana State University in Missoula majoring in pre-veterinary science. After two quarters, he decided to take a job as a lineman for the Marias River Electric Co-operative. Several months later, he enrolled in the Landig College of Mortuary Science in Houston, Tex. He was 20 years old when he earned his certificate to become a licensed mortician and embalmer. He was drafted into the Army in 1952, and became a telephone repairman. He taught Koreans how to repair telephone switchboards for a couple of months before he took charge of a graves registration group and ran an Army morgue north of Seoul for 10 months.

In 1954, he went back to Montana State University and in 1956, earned a BS degree in Business Finance. While attending business administration school, he discovered he liked to study Business Law.

Judge McPhillips decided to go to law school, but he needed to figure out how to pay for it. So, through the help of a friend, he got an emergency certificate from the state of Illinois and taught junior high English and mathematics for one year. He began law school at Vanderbilt University in Nashville, Tenn. and transferred to Valparaiso University in Indiana.

While working as a lineman for Marias River Electric over Christmas vacation in 1957, a pole fell, smashing his left leg and lower back. After six weeks in a hospital, he was discharged with the leg amputated just below the knee. But he was back at Valparaiso Law School in February on crutches.

He married his wife Bernice in 1958. At the end of the school year, they moved back to Missoula where he graduated from the University of Montana Law School in 1960. While a senior in law school, Judge McPhillips ran for Toole County attorney and won. While serving as county attorney, he worked in private practice with G.C. Hoyt.

In 1963, he was appointed by Gov. Tim Babcock to fill the unexpired term of Judge W.M. Black who died on Christmas Day, and he was elected to serve as judge of the 9th Judicial District, which covers Teton, Toole, Pondera, and Glacier counties, until his retirement in 1994.

Despite a diagnosis of terminal multiple myeloma in 1993, Judge McPhillips lived another 17 years filled with new interests and experiences. He was a lifelong fisherman, hunter, oilman, rancher, and farmer. He enjoyed spending several winters in Arizona and Nevada. His two most favorite places to go were his cabin that he built by Babb and fishing on Two Medicine Lake.

Judge McPhillips belonged to many civic and charitable organizations including Toole County Red Cross, where he served as chairman; the Shelby Lion's club, where he served as president; the VFW, the Masonic Lodge in Galata, a life member of the Elks Lodge, the Glacier Penguins RV club, the Shriners, and a charter and golden member of the Sons of Norway in Cut Bank.

Survivors include his wife, Bernice, of Shelby, and three daughters.

William Douglas, Libby attorney

Attorney William August Douglas died in Libby on Dec. 1.

Born in Wabasha, Minn., he grew up in Kalispell and Missoula. After graduating from Missoula County High School in 1955, he studied engineering for two years at Montana State College in Bozeman. He then transferred to Montana State University (now the University of Montana) in Missoula to complete his undergraduate degree in Business Administration and attend law school. Upon graduating from law school in 1963, he worked as a contract administrator in the Minuteman missile program for the Boeing Co. in Minot, N.D., and was later appointed as counsel for the Montana Board of Equalization in Helena.

In 1967, he moved to Libby to become the Lincoln County attorney. He served in that capacity for 20 years before going into full-time private practice. Mr. Doublas's greatest passion was the law, his obituary said, and the battles he enjoyed best were the ones taking on corporate interests on behalf of working people in his community. He was proud of the fact that he tried a case in federal court on his 70th birthday. And despite his health challenges, he attended the

Montana Trial Lawyers Convention in Big Sky in August.

In addition to practicing law, Mr. Douglas enjoyed fishing in Alaska, taking his boat out on lake Koocanusa, and traveling everywhere from New York City to the Panama Canal.

Mr. Douglas is survived by a daughter and two sons.

Other deaths

- **Mary Veronica Hunt,** wife of former Montana Supreme Court Justice William Hunt, died Dec. 29 in Helena at age 79. Ms. Hunt had been a longtime registered nurse and also worked in her husband's law office.

- **Paulette "Pat" Smithers**, 60, who worked for several Missoula attorneys and for the Missoula County Clerk of Courts office, died on Dec. 5 in Missoula.

- **Louisa Rothfus,** who retired after working many years on the staff of the Corrette Law Firm in Butte, died on Dec. 13 in Helena.

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