

Lawyer

THE STATE BAR OF MONTANA

In service to his state

Montana just won't let an ex-justice retire

Justice Warner and the Mental Health Settlement Trust



The Court
proposes
a definition
of a
Montana
lawyer

Book Review

Author finds
a higher
constitutional
authority
than the
Supreme Court

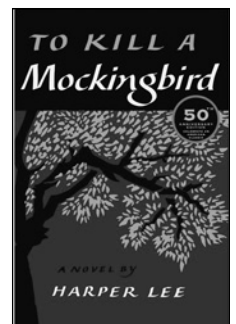


**Can a deputy
county attorney
swim the length
of Flathead Lake?**

*New Kalispell lawyer
is going to attempt it*

'Mockingbird' turns 50

Montana to join a nation of celebrants





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JUNE / JULY INDEX

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PRESIDENT'S MESSAGE

A real payoff in Bar connections

Newbies need a boost from senior partners

Cynthia Smith

The best piece of advice I received as I began my legal career was to get involved with the State Bar of Montana. I had just finished a federal clerkship, and the senior partner of my new firm pointed the way to an activity that has provided some of my most satisfying professional experiences. The senior partner was the hardest worker I have ever met, and he expected long hours from his associates, but he still saw the value that associates' Bar involvement could bring to his firm.

My boss – as hard a taskmaster as he was – did me the biggest of favors by encouraging me to do Bar work. Now that I am a senior partner in a different firm, I hope that my generation of lawyers is following the lead of my former boss and encouraging their new associates in the same way. Frankly, I am worried that today's senior partners are failing to pass on the notion that Bar service is valuable to lawyers and their firms.

For example, every year the State Bar puts on a free half-day program for new lawyers, where the new lawyers meet with judges and experienced lawyers who talk with them about the practice of law. Until this year, the program was called "Rookie Camp." This year the name changes to "New Lawyers Workshop," because new lawyers advised us they didn't like the old name or the old logo that showed a young baseball player.

We (Bar Counsel Betsy Brandborg and the Professionalism Committee) try to plan and promote the best Rookie Camp possible, in order to entice new lawyers to attend. Rookie Camp has traditionally been scheduled at a time when new lawyers can also attend a separate, free CLE. For example, for many years the program was scheduled immediately before or after the State Bar Annual Meeting. New lawyers who attended Rookie Camp were able to attend the Annual Meeting and attend a day of CLE for free. For the past few years, Rookie Camp has been scheduled with the State Bar's Road Show, which offers a free half-day Ethics CLE. So, attendees got not only the half-day program for new lawyers, they got free CLE and Ethics credits to boot.

But every year it has been a struggle to get new lawyers to attend. Betsy has to make phone calls to firms,

asking them to send their young lawyers. Enrollment is routinely low. And what's worse, many new lawyers who sign up to attend don't show.

New lawyers tell us that they can't afford to take the time to attend a half-day, free program. They say that their senior partners approve their attendance, but then still expect them to put in the same number of hours. They are apparently receiving the unspoken message that Bar involvement is just not that important.

I am astonished by this phenomenon. The State Bar is offering a free program in which a firm's associates can meet and receive mentoring from judges and experienced attorneys. The faculty at the program routinely offer help to the new lawyers, encouraging them to contact faculty members in the future when they need any kind of assistance. Those connections could be invaluable. The program also offers the associates the opportunity to network with other new lawyers. How can a firm not see that the benefit to the firm and its associates outweighs the loss of a few billable hours?

To me this speaks of a larger problem. If senior partners aren't promoting attendance at the New Lawyers Workshop, they probably aren't recommending Bar involvement, either. It's an unhealthy fixation on the bottom line. Sure, we are practicing in difficult economic times, and we all need to pay attention to the bottom line. But we also want new lawyers to enjoy the practice of law. We need to let new lawyers know that professionalism is more important than profitability, because without professionalism profitability will ultimately suffer. And we need to let them know that personal connections are also important, because those connections are a large part of the satisfaction to be found in practicing law.

The opportunity for personal connection is, of course, broader than just the New Lawyers Workshop. All members of the bar can find personal connections through Bar work – whether on committees or in sections, or service on the Board of Trustees. I encourage all members of the State Bar to consider service to their local or state bar. Yes, the service to others is important and satisfying, but the real payoff is the connections that each of can make through bar service. Try it. You will be glad you did. ○

Court proposes rules defining a Montana lawyer

When the Montana Supreme Court ordered the disbanding of the Commission on the

Unauthorized Practice of Law on April 20, it stated its intention to adopt rules for the regulation of the practice of law in Montana by attorneys at law.

On April 28, the Court attached to a new order that proposed to define an authorized attorney in Montana. The proposed Rules for the Regulation of the Practice of Law in Montana by Attorneys at Law would be adopted in addition to, and not in replacement of, other rules governing the admission to the Bar and practice of law in Montana – including the Rules for Admission to the Bar of Montana, the Rules of Procedure of the Commission on Character & Fitness, the Montana Rules of Professional Conduct, and the Rules for Lawyer Disciplinary Enforcement, the Court said.

The Court's April 28 proposal is presented below:

Proposed Rules for Regulation of the Practice of Law In Montana by Attorneys at Law

I. For purposes of these rules, "attorney at law" includes attorneys (except attorneys-in-fact acting under a valid power of attorney), lawyers, counselors at law, barristers, solicitors, and to persons acting "of counsel.

II. No person may practice law as an attorney at law in this State:

a. unless that person has graduated with a Juris Doctor or equivalent degree from a law school accredited by the American Bar Association, and

b. until that person has complied with the latest Rules for Admission to the Bar of Montana, has successfully passed review by the Commission on Character & Fitness, and has successfully passed the Montana Bar Examination, or has otherwise complied with the rules for pro hac vice practice in this State, and

c. until that person has taken a written oath to support the Constitution of the United States and the Constitution of the State of Montana and to faithfully discharge the

duties of an attorney with fidelity to the best of his or her knowledge and ability, and

d. until that person has filed with the Clerk of this Court his or her written oath described in (b) above, and signed the roll of attorneys kept by the Clerk of this Court; and

e. unless that person is a member in good standing (regardless of the category of membership) of the State Bar of Montana, has paid all dues, fees and license taxes applicable to his or her status as an attorney at law and member of the State

Bar of Montana, and has met the continuing legal education requirements prescribed by this Court, and

f. provided, however, rules II. a. and b. above shall not apply to those persons licensed to practice law in Montana and who are members of the State Bar of Montana on the date of the adoption of these rules.

III. No person may, in any form of oral or written communication, hold himself or herself out as an attorney at law unless that person has complied with II. above.

IV. No person, except an attorney at law, may appear on behalf of another or file pleadings or documents of any kind, in any court or court proceeding in this State, whether such proceeding be one in law or in equity. This rule shall not apply to persons representing themselves as individuals or to persons acting in compliance with the Water Court Rules adopted by this Court. ○

A PUBLIC COMMENT period on these proposed rules is set by the Court to last until 5 p.m., July 20, 2010. Persons or entities making comment must file an original and seven copies of the comments to the clerk of the Montana Supreme Court.

Court candidates almost even in funds

Records are showing that Montana Supreme Court candidates Nels Swandal and Beth Baker were running about even in the campaign-money race as of May 19, the Lee Newspapers State Bureau reported. "Swandal made a come-from-behind fundraising leap in the last month," the Bureau said.

Swandal, a Livingston district judge, raised \$30,100 in the reporting period running from April 6 to May 19. He

spent \$4,000 in that month and had \$39,700 in the bank. For the campaign, Swandal has raised a total of \$45,500, the State Bureau reported.

Baker, a Helena lawyer, raised \$19,000 in the same period. She spent \$9,400 and had \$37,000 in the bank. She has raised a total of \$53,000.

Filings show both Swandal and Baker received a lot of their money from lawyers. Swandal has generally received

more money from Republicans, but his support has been mixed. Among those who gave him money in the last month are Bozeman attorney Michael Cok; Portia Fonda, wife of actor Peter Fonda; and Democratic state senator Larry Jent.

Baker's support has come mostly from Democrats and in Helena and western Montana. Among her supporters in the last month are Billings attorney Cliff Edwards, former Montana Supreme Court Chief Justice Jean Turnage, and Democratic Missoula County Attorney Fred Van Valkenburg. ○

Ex-Justice Warner's quick turnaround

Mental-health trust job will help protect walleye, other golfers

By **Charles Wood**
The Montana Lawyer



Former Supreme Court Justice John Warner in his new MMHST office in Helena. "It should be an interesting challenge," he said.

When Justice John Warner retired from the Montana Supreme Court on the last day of 2009, he expected to fill in occasionally for other judges, as many retired judges do. So far this year, he has been asked to preside over eight district court cases.

But to be asked to preside over a \$9.5 million fund for Montana's mentally ill pretty much came out of the blue.

Justice Warner, 67, yanked from anticipating his newfound sports of golf and walleye fishing, was asked in February to head up the new Montana Mental Health Settlement Trust, which will distribute the funds to Montana mental-health community over the next 2-1/2 years.

The request for Justice Warner to bring his two-month "retirement" to a screeching halt was made by state Attorney General Steve Bullock, whose office announced in February that Montana was receiving \$13 million in a settlement with the big pharmaceutical company Eli Lilly.

Although Justice Warner has moved into a large office in the Lamb & Carey Law Firm building at 2601 Broadway in Helena, he will have no permanent staff. But he has put together a seven-member committee to help decide how the state disburses the mental-health portion of the settlement.

He also receives temporary help for meeting note-taking and document preparation, and has turned to Lewistown District Judge Wayne Phillips, who has grant-making experience, for advice.

JUSTICE WARNER'S new job is taking up about 20 hours of his week now, while he tries to get things rolling. He expects the hours to taper off later, but now he is meeting with his committee and drafting a Request for Proposal that will be sent out to mental-health organizations statewide that may wish to apply for funds. "I hope we'll start getting requests for funding by this fall," he said, "but maybe it will be quicker."

Justice Warner said the \$9.5 million must be disbursed by December 2012. If it needs to take longer, then the state must petition the U.S. District Court of Eastern New York, the venue at which Montana sued Eli Lilly, for an extension. After the disbursement, Justice Warner will continue to ramrod the Trust while it holds a measure of accountability over the

donees. "That process shouldn't take too long," he said.

Justice Warner called the settlement "kind of a new deal" for Montana, although similar trusts have been set up around the country. The Montana Attorney General's Office filed its lawsuit against Lilly in 2007 over the marketing and sale of the antipsychotic drug Zyprexa. About forty other states sued over the drug, Lilly's best-selling pharmaceutical, and the federal government received a \$1.4 billion settlement.

MONTANA'S LAWSUIT alleged consumer-protection violations and Medicaid fraud, the *Helena Independent Record* reported. "The state claimed that although Lilly's medical experts were internally questioning the safety of Zyprexa – licensed to treat symptoms of schizophrenia and bipolar disorder – the company told its representatives to minimize and represent the drug's dangers," the *Independent Record* said. The suit also alleged that the company illegally promoted Zyprexa for "off-label" uses, including prohibited prescriptions for Alzheimer's, dementia, autism, depression, and for use on juvenile patients. More than \$616,000 of Montana's \$13 million settlement goes to the state Department of Health & Human Services for money spent through the Montana Medicaid Program which purchased Zyprexa for off-label uses.

Montana's Trust money will, among other things, finance programs to treat and prevent mental illness, train law enforcement personnel on intervention techniques, and train medical professionals on appropriate prescribing of drugs. The Trust committee, made up of seven Montanans with expert knowledge in the mental-health field, will have some discretion on how the money will be spent.

MEANWHILE, Justice Warner said his Trust job will keep his retirement from "stagnating," although he will continue to fill in for judges on court cases. He said he doesn't miss the constant pressure of being a judge, "but I do miss the give-and-take with lawyers," he said.

"Being a judge was the best job in the world." ○

Lawyers' Fund makes \$40,000 in payouts

Most goes to Toby Alback clients

The Montana Lawyers' Fund for Client Protection (LFCP) recently paid out more than \$40,000 to clients who were cheated by their attorneys.

At the last meeting of the Lawyers' Fund Board on April 22, the Board considered claims from 18 separate clients against 6 different attorneys. Of those claims, 15 were clients of Marvin 'Toby' Alback (see Alback prison-sentencing article on Page 25).

The Board paid 16 of the 18 claims for a total of \$40,296, with Alback's clients receiving \$16,550 of that amount. Six new claims from Alback's clients are currently pending for a total of \$14,750.

The State Bar of Montana established the Fund in 1976 to make monetary awards to clients in those cases in which a lawyer betrays a client's trust, misappropriating the client's funds.

The State Bar finances the Fund through an annual assessment of the active lawyers licensed to practice in Montana. An application to receive LFCP reimbursement may be filed by any person who has lost money because of the dishonest conduct or mishandling of funds by a Montana lawyer provided that (1) the accused attorney has died, been judged mentally incompetent, found guilty of a crime arising out of the dishonest conduct, relinquished practice, or has been disbarred or suspended; (2) the dishonest act occurred within an attorney-client relationship; (3) the alleged act was the mishandling or embezzling of funds, not malpractice or negligence; and (4) the claimant has made a reasonable attempt to recover from the lawyer within a reasonable amount of time.

Funds do not cover losses resulting from an attorney's negligence. Also, losses resulting from situations in which the attorney and client have entered into a personal business relationship outside the attorney-client relationship are not reimbursable from the Fund. Such matters may be reported by fil-

ing a complaint with the Office of Disciplinary Counsel for disciplinary action or may be the subject of malpractice suits.

A client may file a claim by sending in an Application for Relief available through the State Bar. (The program is coordinated by Marie Connolly at (406) 447-2204 or mconnolly@montanabar.org.) It is not necessary for the client to retain a lawyer to submit a claim. If a lawyer is retained, it is the policy of the Lawyers' Fund that no fee or other compensation be paid by the Fund to an attorney who assists in the preparation of a claim.

The Lawyers' Fund for Client Protection Board will investigate each claim filed. A Board representative may contact the claimant for further information and will attempt to contact the lawyer named in the complaint. If the claim as submitted is complete and found to be eligible under the rules listed above, it will be presented to the Board for final consideration.

In determining the amount of reimbursement allowable, various factors are considered, including the amount in the Fund at the time the claim is made. Some claims may be very large and if full reimbursement were made to the client, no one else would receive funds. By limiting the dollar amount of reimbursement provided to some individuals, the funds will not be exhausted in a short period of time. Instead, partial awards can be given to more individuals.

Payment for the Lawyers' Fund for Client Protection is not automatic. After reviewing a claim, the Board may decide against reimbursement. In that case, a written explanation is issued.

In some instances, consideration of a claim may be delayed pending pursuit by the claimant of other possible sources of recovery (e.g. forgery claims, estate proceedings) or other possible disciplinary proceedings against a lawyer. Completion of the disciplinary action can often be very helpful to the final decision on a claim.

○

CASA of Montana recently recognized the people who work for abused and neglected children in district courts around the state.

Montana Supreme Court Justice Jim Rice presented awards at the annual Prevent Child Abuse & Neglect Conference to:

● **Helena District Judge Jeffrey Sherlock** as the CASA Judge of the Year for his service on behalf of children, volunteers and the local CASA program in Helena. "Over his 21 years on the bench he's made hundreds of life altering decisions concerning children and he

District judge among CASA award winners

seems to always get them right," said CASA Director Bill Collins.

● **Program Director Ann Schilling** of the 6th Judicial District CASA/GAL as the CASA Director of the Year. She has been the driving force since the local program began in Park County 2002. Ms. Schilling supervises 31 volunteers serving 21 children in Park and Sweet Grass counties. She also has

served more than five years on the state board of CASA of Montana. And each year she arranges dinner for 40 to 50 bicyclists in the Park-2-Park Montana fundraising event.

● **Jan Butorovich** of Yellowstone CASA in Billings as the Volunteer of the Year. She first became a volunteer guardian ad litem for the court in Anaconda in 1983. She moved to Billings after accepting a position at the Billings Clinic. Ms. Butorovich joined Yellowstone CASA soon after the program was founded in 2000 and has advocated for 33 children in nine years.

Kalispell attorney to try swim of length of Flathead Lake

By Charles Wood
The Montana Lawyer

A new Kalispell attorney is planning to swim the 30-mile length of Flathead Lake – from Somers to Polson – in July, as a fundraising benefit for a girl with leukemia.

Emily von Jentzen, who recently went to work as deputy county attorney for Flathead County after serving as coordinator of the Missoula Family Law Self Help Center, may become only the third person (and the first woman), to swim the length of the lake – and her swim will be longer than those completed by two men, who swam between Polson and Bigfork and not all the way to Somers.

The 2009 graduate of the University of Montana School of Law is scheduled to do the swim on July 17. “I have to be a little flexible with the exact date to accommodate weather,” she said. She is training at Foy’s Lake about 10 minutes from her new Kalispell home and at two indoor pools in the area.

Ms. von Jentzen, who was admitted to the State Bar of Montana last October, anticipates that the swim will take between 10 and 15 hours. She will swim under USA Open Water rules, which specify that a swimmer may not touch any support boat, floatation device, or other swimmer.

Her training regimen for the swim is intense. As of mid-May, she was swimming about 40,000 yards a week – about 16 hours of swimming – at the Missoula YMCA pool. “My training will get as high as 70,000 yards a week before I taper down for the swim,” she said. She was hoping to begin to incorporate Flathead Lake training in May, even though the water is still very cold. “But even in July Flathead Lake will be cold,” she said.

The two men who swam the 28-mile



Emily von Jentzen tests the frigid Flathead Lake waters in May.

length of Flathead Lake are Paul Stelter of Kalispell, in 1988, and Ron Stevens of Kalispell, in 2005, according to the *Missoulian*.

KARMYN FLANAGAN, 3, was diagnosed with acute lymphoblastic leukemia in November. Upon diagnosis, Karmyn was life-flighted to Spokane and has been receiving treatment there ever since. Doctors expect her battle with the disease to last at least 2-1/2 years. Ms. von Jentzen has never met Karmyn, but saw a flier that friends of her family had put up promoting a silent auction. “Karmyn’s story touched me and I felt compelled to help,” Ms. von Jentzen said. “I contacted one of the organizers of the silent auction and told them that I wanted to help raise money for Karmyn.” After several conversations with the fundraiser, she began planning the details of the swim and her

own fundraising efforts.

MS. VON JENTZEN’S swimming career began at the age of nine in Lake Stevens, Wash. “I chose swimming mostly because it was the only sport I could beat my sister at,” she said. In high school, she competed at the state level and was the captain of the team in both her junior and senior years. She swam at regional competitions in Fresno, Calif., and Maui, Hawaii, for the Pacific Northwest Swimming team.

For college, she moved to Ellensburg, Wash., and swam on a small swimming scholarship at Central Washington University. “Unfortunately, at the height of my collegiate swimming career, CWU cut its swimming team,” she said. “My teammates and I then created a club team (Central Washington Swim Team) to allow the swimmers to continue competition.” She competed on the team for her senior year and also served as president. Also, around this time she began competing in triathlons (running, swimming, and bicycling in a single competition) – “but swimming was always my true passion,” she said.

MS. VON JENTZEN moved to Missoula in the fall of 2006 to begin law school, at which time she joined the UM Triathlon Team. She competed with the UM team from 2006-2008 and competed with the team at Collegiate Nationals in 2007 and 2008, as well as the Wildflower Triathlon in 2007.

No stranger to endurance events, she traveled to Aurora, Colo., and completed the Newton’s 24 Hours of Triathlon in the fall of 2008. “I competed for 24 hours straight, completing 11 sprint triathlons with 5 extra swim legs.”

Ms. von Jentzen served as president and swim coach of the UM Triathlon Team from 2007-2008. Since fall of 2008 she had been coaching adult swimming at the Missoula YMCA. She is a certified USA Triathlon and USA Swimming coach – and may soon be making Montana history.

DONATIONS to Karmyn Flanagan can be made to the “50K Benefit for Karmyn” account at any Missoula Federal bank location or to Ms. Von Jentzen at PO Box 3601, Missoula MT 59803.

More probable than not?

By **Steven Johnson**

Using statistical tests to enhance Rule 26 damage-claim reports

In a recent commercial damage lawsuit, we were asked by defense counsel to evaluate the plaintiff expert damage claim. On first reading, the amount of the claim seemed excessively optimistic. Projected post-incident revenues (and profits) appeared to be too high compared to what the business had done in the past, and there were no fundamental changes to the business that could explain the projected growth.

Essentially, the claim projected high levels of early growth, building an overstated base that was carried to all subsequent years of the projection period, plus relatively high sustained growth.

We statistically evaluated the claimed damages in terms of the plaintiff's actual revenue/profit history and industry data. We were able to statistically opine that the probability of the plaintiff achieving the revenues projected in the claim was less than 3 percent. This low level of probability defused much of the plaintiff's thunder and the case settled for a reasonable amount.

There are a number of opportunities to use statistical tests in Rule 26 Reports that opine on economic damages. The insight that these tests provide, when used correctly, cannot be understated. In certain situations, a statistical test can provide probabilities to assist a judge or jury in determining if a loss exists. In other instances, statistical standardization can give a reference point as to the reasonableness of assumptions used to make an economic damage computation. Finally, certain statistical tests can help justify the exclusion of highly influential observations to calculate damages. This article describes three situations where a statistical test may be appropriate:

THE FIRST SITUATION involves commercial damage cases in which the plaintiff claims lost profits as a result of another party's actions. Typically, these types of damage computations connect the action of one party directly to the damages of another. However, in certain situations this connection is not made and the plaintiff generally seeks lost profits against the defendant. One type of test that can assist in this situation is a Chow test for a structural break. A Chow test simply calculates the linear coefficient of profits over time, both before and after the date of the incident. It then tests the coefficients to determine if they are statistically different. If they are, a structural break may exist and the general profitability of the business will be less after the incident than it was before the incident.

If the test determines that the coefficients are not statistically different, then a structural break has not occurred and the decrease in profits is reasonable given the historical perform-

ance of the business.

Although the Chow test can assist in determining if a loss exists, it should not be the sole determinant and other factors should be considered.

THE SECOND SITUATION also involves commercial damages and lost profits, but in this situation, the damage computation requires a projection of business growth into the future as described in the introduction to this article.

To make this computation, CPAs or economists may rely on the recent growth of the business and use that as the basis for future growth. By doing so, they may fail to recognize that this basis for growth is not reasonable compared to the performance of the industry. By comparing the performance of the industry with the business growth rate used to make the projection and by using statistical standardization, one can opine on the probability of seeing that rate as actual growth, given the performance of the industry.

In this case, the use of statistics can provide the finder of fact a probability to help determine if the given damage computation is reasonable.

THE FINAL SITUATION where a statistical test may be appropriate relates to the exclusion of outliers in making a damage computation.

An outlier is an observation that is much higher or lower than the rest of the observations. Actual averages are frequently used to make damage computations in both commercial and personal-injury cases. A drawback of using an average is that it may be highly influenced by one or two outliers. Although the rationale for excluding an outlier is obvious to the CPA or economist, it may be difficult to justify such an exclusion to a judge or jury.

The Grubbs test for outliers is a generally accepted statistical test that can help justify the exclusion of a highly influential observation.

THE CHOW TEST for a structural break, statistical standardization, and the Grubbs test for outliers are generally accepted methods that can be used in Rule 26 Reports. These techniques can provide valuable information to help the finder of fact understand damages and other issues in the case. They also show a heightened level of analysis beyond simple methods.

The use of statistical tests should be considered when the circumstances of the case present the opportunity.

STEVEN JOHNSON is an economist in the Valuation & Litigation Consulting Dept. of the Anderson-ZurMuehlen CPA and business advisor firm in Helena.

Groups join forces to work on access-to-justice issues

The access-to-justice entities in Montana have joined forces to raise awareness, develop programs, and enhance funding for access-to-justice issues and programs in Montana.

The participants in this joint effort are the State Bar of Montana's Access to Justice Committee, the Montana Supreme Court's Equal Justice Task Force, and the Court's Commission on Self Represented Litigants.

Five working groups were formed from the joint effort, including members from each of the three access-to-justice organizations listed above. The working groups are: Legal Needs, Communications, Native American Legal Needs, Legislative, and Limited Task Representation. Each group outlines its specific projects, with advice and assistance from existing equal-justice entities and oversight by the Equal Justice Task force. The advisory entity for the Limited Task Representation group is the Access to Justice Committee.

The final product of the working groups will be presented for approval at the next joint meeting of the access-to-justice entities to be held Sept. 15 in conjunction with the State Bar Annual Meeting in Great Falls:

■ **The Legal Needs Working Group** will update the 2004 Legal Needs Study using the University of Montana polling service. Group members are soliciting funds for this project.

■ **The Communications Working Group** said that the central communications challenge is to "overcome the anonymity of civil legal aid among the public in order to develop a base of support . . ."

The Montana Justice Foundation created a WordPress blog that provides a forum for conversation among the various participating ATJ entities. The tool also has an ATJ calendar and provides document-sharing, and links to other resources.

■ **The Native American Legal Needs Working Group** concluded that Montanans know so little about the barriers to access to justice for Indians both on and off the reservation that concentrated information gathering is necessary. The group teamed with students in Deb DuMontier's Law School clinic at the University of Montana to identify community members who can articulate the legal needs and gaps in access to justice. The group is working with Montana Legal Services on this "tribal legal needs survey" to develop an access-to-justice plan unique to each tribe.

■ **The Legislative Working Group** met with staff from the Office of the Court Administrator and other access-to-justice leaders to develop a legislative strategy. This month they meet with the Communications Working Group to come up with a plan for the session. The groups will have talking points ready for use during the general election to educate candidates and identify supporters. The goal is to assist the Court in its efforts to obtain full funding for the self-help law centers, the self-help coordinator, and the pro bono coordinator.

■ **The Limited Task Representation Working Group** created a preliminary document explaining the need for limited representation of clients and recommending changes to the Rules of Professional Conduct and the Rules of Civil Procedure. Once the document is vetted by the access-to-justice community and State Bar leaders, it will be distributed more widely for input.

MONTANA'S working groups' efforts were highlighted in the ABA's national *ATJ Headlines* publication. Access-to-justice leaders from across the U.S. met in Phoenix in May. Montana was represented at that meeting by Judy Meadows, Janice Doggett, Amy Sings In The Timber, Dan McLean, Klaus Sitte and members from his staff, as well as AmeriCorp representatives from

Equal Justice Task Force:

Andrew King-Ries (co-chair), Bernadette Franks-Ongoy (co-chair), Rep. Shannon Augare, Richard Bartos, Pamela Bucy, Debra DuMontier, Ann Gilkey, Mary Jane Knisely, Hon. Kurt Krueger, Judy Meadows, Robin Meguire, Alison Paul, Tammy Plubell, Klaus Sitte, Cynthia Smith, Nancy Sweeney, Janice Frankino Doggett.

Commission on Self Represented Litigants:

Hon. Russell Fagg (co-chair), Judy Meadows (co-chair), Peg Allison, Shirley Faust, Edward Higgins, Corbin Howard, Monte Jewell, Hon. Michele Snowberger, Hon. Mike McGrath, court liaison.

Access to Justice Committee:

Patricia Fain (co-chair), Peggy Probasco (co-chair), Deborah Anspach, Ed Bartlett, Hon. John C. Brown, Gary Connelley, Tammie Fagan, Susan Gobbs, Stacey Gordon, Julie Johnson, Travis Kinzler, Meghan Lulf-Sutton, Christine Mandiloff, Douglas Marshall, Hon. Brian Morris, Klaus Sitte, Nancy Sweeney, Marjorie Thomas, Tara Veazey, Pamela Bucy, Bar liaison, Janice Frankino Doggett, Bar staff.

Beth Baker is a member of the Legislative Working Group and Amy Sings In The Timber is a working group member and leader.

Montana.

Ms. Meadows, who spoke at the conference, said, "People from other states marvel at how we can create partnerships in Montana to get things done." She mentioned in particular positive feedback about the Self-Help Law Center in Helena. The Center, housed at the State Law Library, uses Helena attorneys and students from Carroll College, working through Campus Corp.

IF YOU ARE INTERESTED in providing legal services or to be involved in these efforts please contact Janice Doggett, the State Bar's Equal justice coordinator, at jdoggett@montanabar.org or at (406)-447-2201.

Summary of April Board of Trustees meeting

The following summary is from the minutes of the April 16 State Bar of Montana Board of Trustees meeting, held at the University of Montana School of Law in Missoula:

By Jill Diveley

State Bar membership coordinator

PRESIDENT'S REPORT – Cindy Smith

The reciprocity working group may be asked to consider removing the safe-harbor rules (Rule 5.5 and 8.5 of the Rules of Professional Conduct) from the petition before presenting it to the Court.

UM School of Law Dean Russell agreed to be a member on the professional development group.

Ms. Smith recently attended the Western States Bar Conference.

SECRETARY-TREASURER'S REPORT – Paul Stahl

Mr. Stahl recommended a reduction up to \$100,000 from next year's budget unless more revenue can be generated. The Trustees were asked to consider what's important for the Bar to be responsible for and whether that responsibility should be geared towards the profession or the public. A request has been made to have the Bar's audit done in time for the September Board meeting for use in determining next year's budget.

PAST PRESIDENT'S REPORT – Chris Tweeten

The Past Presidents Committee is planning its meeting to select this year's recipient of the Jameson and Haswell Awards.

PRESIDENT-ELECT'S REPORT – Joe Sullivan

The focus of the Strategic Planning meeting on May 21-22 will be more involvement by the Trustees. Several topics will be discussed by working groups who will then bring their discussion to the group as a whole.

REPORT OF THE CHAIR – Shane Vannatta

Mr. Vannatta, Paul Stahl, and Chris Manos attended the ABA Bar Leadership Institute conference.

Mr. Vannatta reminded the Board of its responsibility to determine the recipient of the George L. Bousliman Professionalism Award. The Pro Bono and Karla Gray Access to Justice awards also will need nominations.

UM LAW SCHOOL REPORT – Professor Greg Munro

Professor Munro explained the concept of an alternate admission program to replace taking the Bar Exam. Justice Patricia Cotter, Professor Munro, and Cindy Smith will meet with the New Hampshire Bar Association to look at the proposed program and whether it would be suitable for Montana to adopt.

UM LAW SCHOOL REPORT – Dean Irma Russell and Shelley Hopkins

Construction on the new law school building is complete.

The Advanced Trial Advocacy Program has scholarship money available for those who may be interested in attending.

A fundraiser in honor of Margery Hunter Brown will go through December 2010. If the fundraiser successfully raises \$100,000, the Indian Law Clinic in the law school building will be named The Margery Hunter Brown Indian Law Clinic.

The ABA will be at the Law School for the seven-year onsite inspection.

The dean highlighted the goals and actions of the Law School's 2009-2014 Strategic Plan.

Presentations also were given to the Trustees by members of the following student organizations:

- **Montana Law Review.** The *Law Review* is publishing legal short summaries on important court decisions on its website (linked to from the home page at www.montanabar.org) and in the back of each *Law Review* publication.

The *Law Review* will host a major symposium on the Montana Constitution in the fall of this year. The symposium, on the UM campus, will be open to the public and will feature a long list of impressive speakers.

- **Native American Law Students Association**

(NALSA). With sponsorship from the State Bar's Indian Law Section, NALSA presented Indian Law Week: Indian Education For All in April with keynote speaker State Superintendent of Public Instruction Denise Juneau.

NALSA is supporting the Empowering, Enriching & Encouragement of American Youth grant application that is being developed by the State Bar's New Lawyers' Section.

- **Student Bar Association** – The Barristers' Ball featuring Dancing with the Professors generated \$1,000 that will be used toward the providing of legal services in Montana.

The noon-hour panel presentations with the students and the State Bar are effective and well-received, the students said. The students would like to see more topics geared towards the "right now," such as legal jobs in non-traditional settings and the process of succeeding in law school.

REPORTS REQUIRING BOARD ACTION

- **Proposed SBM by-law revisions committee.** The by-laws of the State Bar have not been reviewed for several years. Trustee Shane Vannatta requested volunteers for a subcommittee that would review the by-laws and the distribution of trustees across the state. Chris Tweeten, Randy

Snyder, Lynda White, and Mr. Vannatta will be on this committee.

■ **Annual Meeting changes.** The Trustees discussed the city rotation schedule of the Annual Meeting. The Board confirm Kalispell as the site for the 2011 State Bar Annual Meeting.

The Trustees agreed that alternatives to the Annual Meeting should be looked into. The Trustees voted to create a committee to study the continuation and feasibility of the Annual Meeting. Volunteering to serve on the committee were Trustees Shane Vannatta, Olivia Norlin, Paul Stahl, and Pam Bucy. A representative from the New Lawyers' Section may also be asked to participate.

ABA REPORT – Damon Gannett

Mr. Gannett attended the ABA Mid-Year Meeting in Orlando.

The ABA has created a search committee to replace former Executive Director Hank White.

Mr. Gannett highlighted several resolutions, including the expansion of initiatives that facilitate communication between parents in correctional custody and their children; addressing the special needs of veterans; urging the ABA president to examine the efforts of *U.S. News & World Report* to publish a ranking of law firms; and urging Congress to protect people subjected to pay discrimination.

A new ABA dues structure is being proposed that would reduce the amounts for solo and government lawyers.

MONTANA JUSTICE FOUNDATION – Amy Sings In The Timber

The Foundation's revenue figures for January and February continued to be grim because of low interest rates.

The Foundation continues to support the Lunch for Justices events. An AmeriCorp Vista member has been hired to assist with the revitalization of leadership campaign efforts. An update to the Legal Needs Study is also being planned.

The Foundation received 13 grant requests at a total of \$324,000.

STATE BAR EXECUTIVE DIRECTOR'S REPORT – Chris Manos

The Bar has partnered with the state Department of Health & Human Services for the Governor's Conference on Aging.

The Public Law Section of the State Bar appointed a new chair and is considering instituting \$10 dues per year.

BAR PUBLICATIONS UPDATE – Charles Wood

The "Montana Citizen's Guide to the Courts" is completed and available for download or in print. Humanities Montana provided a \$3,000 grant that assisted with the printing costs.

A "Real Estate Transaction Guide," authored by UM Professor Chuck Willey is being edited and is slated to be available this summer.

A "Civil Procedures Forms Manual" is being developed for Bar publication by UM Professor Cynthia Ford.

A revision to the "Civil Jury Instructions Manual" by the

Commission on Civil Jury Instructions will be available in the next year or so.

BAR COUNSEL'S REPORT – Betsy Brandborg

A structure or protocol on how to close down a law practice is being created.

The petition on proposed changes to attorney advertising was submitted to the Court with two responses received so far.

The Bar is working to create an improved mentor program. Dean Russell said the Law School is interested in partnering with the Bar on the program.

LOCAL BAR, COMMITTEE & SECTION REPORTS

■ New Lawyers' Section – Mike Talia

Incoming Section President Mike Talia would like to see the Section used as a way to introduce new lawyers to involvement with the Bar. The Section has created a Facebook page that is directly linked from its web page.

■ Paralegal Section – Barbara Bessey

The Section held its annual CLE in Billings on March 26. There were 41 attendees: 17 paralegals and 24 attorneys.

The Section has begun discussions with the State Bar regarding in-person CLE alternatives, such as telephone, video, and webinar CLEs.

The Section is discussing with organizations, such as the Modest Means Program, how it can assist those organizations.

■ CLE Institute – Gino Dunfee

The Institute sponsored or co-sponsored 27 CLEs around Montana between April 1, 2009, and March 31, 2010. Of the 27 CLEs, 18 were all-day programs.

The Institute also hosted three two-hour mini CLEs and six one-hour phone CLEs.

Attendance was down at the all-day CLEs held in January through March, 2010. The Institute normally sees an average of 75-80 paying registrants, but averaged around 60 paying registrants per CLE this past three months. The Annual CLE & Ski and Bench-Bar Conference were the only two with normal attendance; all others were down anywhere from 10-15 percent.

LOCAL BAR REPORTS

■ Area C – Ann Shea

The 5th Judicial District generally holds two functions a year along with an annual Christmas party. The 2nd Judicial District will sponsor a luncheon to try and reactivate the local bar.

■ Area F – Pam Bucy, Tom Keegan, Bruce Spencer

The local bar continues to meet monthly and recently held a CLE that featured SAMI credit presentations.

TRUSTEE LIAISON REPORTS – COMMITTEES

■ Access to Justice Committee – Pam Bucy

New Lawyers' Workshop, Road Show to be held in Bozeman on June 25

The name of the State Bar of Montana's award-winning Rookie Camp has been changed to the New Lawyers' Workshop, and this year's event will be held on Friday, June 25, at the Holiday Inn in Bozeman.

The New Lawyers Workshop runs from 8 a.m. to 1:15 p.m., and will be followed by the State Bar Road Show CLE at the same venue.

The Workshop brings together newly admitted lawyers (even those practicing for years in other jurisdictions) with experienced practitioners and judges in small groups to discuss the practical aspects of the practice of law.

The Workshop is free and provides 3.0 Ethics credits, including 1.0 SAMI credit. Attendees receive a free, full registration to the State Bar's Annual Meeting in September, courtesy of ALPS.

The Workshop includes a lunch, at which Montana Supreme Court Chief Justice Mike McGrath will give a keynote address.

THE ROAD SHOW presentation for all State Bar members will begin at 1:30 p.m., also in the Bozeman. The Road Show, given at various points across the state, offers 3.0 free CLE credits, including 1.0 SAMI credit. The Road Show will end at 4:30 p.m.

A RECEPTION for Workshop and Road Show attendees, and for all other attorneys and judges who wish to attend, will be held in the Holiday Inn's Dry Fly saloon from 5 p.m.-7:30 p.m., sponsored by the New Lawyers Section.

Resolutions due at Bar Aug. 3

State Bar members are asked to submit proposed resolutions to the State Bar by Aug. 3 for consideration during the State Bar's Annual Meeting in September.

A copy of the resolution must be submitted to the Bar by Aug. 3 for inclusion on the Bar website and in *The Montana Lawyer*. By Sept. 13, 100 copies must be submitted to the Bar for distribution at the Resolutions Committee meeting and the Bar's Annual Business Meeting.

More detailed Rules for Submission of Resolutions can be found in Section 1-108 of the Policies of the Board of Trustees on Page 211 of the 2010 State Bar Deskbook & Directory.

Send proposed resolutions to Resolutions, State Bar of Montana, P.O. Box 577, Helena MT 59624.

The five working groups remain active and committed to obtaining funding for access to justice programs.

TRUSTEE LIAISON REPORTS – SECTIONS

■ Health Care Law Section – Bruce Spencer

The Health Care Law Section presented a two-part webinar series to Bar members in April on the HITECH Act. The Health Information Technology for Economic & Clinical Health Act, enacted Feb. 17, 2009, provides additional protections for the privacy and security of patient health information.

■ Indian Law Section – Ryan Rusche

The Section has begun working with UM Law Professor Elizabeth Kronk and acting Indian Law Clinic Director Debra DuMontier to organize the publication of a quarterly section newsletter. The first issue is scheduled for this summer.

The Section circulated a draft petition – to make Indian law a testable subject on the Montana Bar Exam – among its membership.

The Section continues to sponsor Indian Law Week events at the University of Montana School of Law, and will begin a CLE series in the fall of 2010.

Until now, the Section has managed Indian law practitioner referral requests through general posts to its listserve. This

summer, the Section intends to create a Montana Indian law practitioner referral bank.

Over the past two years, the Section has provided informal mentoring opportunities for student interns of the Indian Law Resource Center's Helena office. The success of these experiences has encouraged the Section to consider implementing a more formal mentoring program pairing new Indian law practitioners with more seasoned professionals.

■ Women's Law Section – Paul Stahl

The section will hold its annual spring dinner, featuring a silent auction.

■ Family Law Section – Lynda White

The Section donated funds to the Billings Self Help Law Center to help the Center pay its rent.

The Section again provided its annual CLE program for child and family law attorneys, and continues to provide a Section website where, among other things, the Section highlights current Supreme Court case updates in family law.

THE NEXT MEETING of the State Bar Board of Trustees will be Sept. 15 in Great Falls.

The Montana Justice Foundation Board of Directors gratefully acknowledges the following donors for their support of the MJF and the access to justice cause*.

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To learn more about MJF and our work or to make a tax-deductible contribution, please visit us at:
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STATE BAR CALENDAR

June 11

Clerk of Court training, Missoula District Court.

Subject: The difference between legal information and legal advice

June 14

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

June 16

Employee Benefits (VEBA) trustee meeting, 9:30 a.m., Mountain West Benefits conference room, 3390 Colton St., Suite A, Helena

June 23

Equal Justice Task Force working groups meeting, 11 a.m., Disability Rights Montana office, 1022 Chestnut St., Helena

June 25

New Lawyers' Workshop (formerly Rookie Camp), 8 a.m., Holiday Inn, Bozeman

State Bar Road Show, 1:30 p.m., Holiday Inn, Bozeman

July 1

Final Call: CLE affidavits due. Failure to meet this deadline results in \$200 fine, transfer of attorney to inactive status.

July 20

Equal Justice Task Force meeting, 10 a.m., Disability Rights Montana office, 1022 Chestnut St., Helena

July 26-28

Bar Exam, Missoula

August 6

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

September 16

State Bar Executive Committee meeting, Holiday Inn, Great Falls

State Bar Board of Trustees meeting, Holiday Inn, Great Falls

September 16-17

State Bar's 36th Annual Meeting, Holiday Inn Hotel, 400 10th Ave. South, Great Falls

Upcoming CLE seminars for Montana lawyers

CLEs with Ethics & SAMI* credits

**Substance Abuse / Mental Impairment*

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

June 9-12 Bozeman – Christus Collegium, 714. S. 8th
Fundamentals of Mediation 32.0 CLE credits, including 1.50 Ethics (no SAMI) credits. Presented by the Center for Collaborative Solutions, (406) 587-2356

June 26 Missoula – Ruby's Inn
Negotiation for Professionals 7.0 CLE credits, including 1.50 Ethics (no SAMI) credits. Presented by Montana Mediators, (406) 839-3323

July 7 Kalispell – Hilton Garden Inn
County Attorney Summer Training 14.0 CLE credits, including 1.50 Ethics (no SAMI) credits. Presented by the Montana County Attorneys Association

July 8 Billings – Call sponsor for location
Fundamentals of Employment Law 6.75 CLE credits, including 1.0 Ethics (no SAMI) credit. Presented by Sterling Education Services, (715) 855-0495

July 23 Bozeman – Christus Collegium, 714 S. 8th
Mediation Training (5th Day) 8.0 CLE credits, including 1.50 Ethics (no SAMI) credits. Presented by the Center for Collaborative Solutions, (406) 587-2356

July 27 Teleconference
Fiduciary Mistakes & Learning From Them 1.50 CLE credits, including 1.50 Ethics (no SAMI) credits. Presented by Cannon, (800) 775-7654

All other CLEs

June 11 Helena – Gateway Center, 1710 National Ave.
Human Resources: Advanced Issues & Answers 6.0 CLE credits. 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=brokseLive

■ 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

June 14 Baker – Fallon County Courthouse
The Montana Subdivision & Platting Act 4.0 CLE credits. Presented by Fallon County, (406) 778-3006

June 15 Teleconference
GRITs & GRATs for Traditional Family Planning 1.50 CLE credits. Presented by Cannon, (800) 775-7654

June 18 Virginia City – Madison County Courthouse
Roads, Easements & Rights of Way 3.0 CLE credits. Presented by David F. Kelley, Esq., (406) 682-3059

June 24 Billings – Call sponsor for location
Landlord-Tenant Law Update 7.0 CLE credits. Presented by Sterling Education Services, (715) 855-0495

August 17 Teleconference
Suing Estate Planners 1.50 CLE credits. Presented by Cannon, (800) 775-7654

September 16-17
State Bar Annual Meeting CLEs, Holiday Inn, Great Falls. More information coming.

Montana's Lawyers Assistance Program Hotline

1-888-385-9119

Call if you or a judge or attorney you know needs help
with stress and depression issues or drug or alcohol addiction

State Bar of Montana Bookstore

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Finding the highest constitutional authority in the land

By Mark Parker,
Billings attorney

In law school, most classes had a pain – a student with off-point befuddling questions, arm in the air more than most, but not quite smart enough for law review. Some of my friends reported that they had classes without any such creature, but I had one in every one of my classes. That it was actually I who occupied the role didn't make it any less annoying.

The People Themselves Popular Constitutionalism and Judicial Review

By Larry D. Kramer
Published December 2005
Oxford University Press
Paperback, \$22
amazon.com

So at 55 years old, in Las Vegas, with my own wife and a banquet of culinary and entertainment delights within walking distance, I summoned a cab, schlepped across the UNLV campus (in the rain and on crutches), and secured a front-row seat to a constitutional law lecture by Stanford

Law School Dean Larry D. Kramer. His theme – I think – was that, well, let me quote what the *Wall Street Journal* said about his theory:

Mr. Kramer is to be applauded for reminding us that the courts do not enjoy a monopoly on the Constitution's true meaning and the senators and presidents alike should take the Constitution seriously in the confirmation process and at other times as well.

Kramer's enthusiasm for the proposition that the current notion of judicial supremacy had no historical, legal, or textual roots was, for this nerd, the best show in town on this rainy Vegas night. First, he knew his stuff. Second – he believed it. None of this “on-one-hand-this-but-on-the-other-hand-that” kind of stuff. And lastly, I didn't need to tip any goons to get a front-row seat.

Kramer made a strong argument for the central theme of his controversial book “The People Themselves,” a work that ends with the line “The Supreme Court is not the highest authority in the land on constitutional law. We are.”

Thus, I bought the book, read it, and commend it to those interested in such things, as almost everyone seems to be from time to time in their life – especially when the court makes a disagreeable decision. My recommendation is not just because

it established a legal and historical foundation for my visceral discomfort when lawyers feel compelled to grab pitchforks and shake them in defense of judges who have become unpopular

because of their decisions. A well respected roster of lawyers came to the rescue of the rule of law when they defended Judge Molloy's handling of the *Grace* case. The problem with this we-must-as-lawyers-defend-judges-no-matter-what ethic is that it masked the truth – Judge Molloy correctly and courageously stuck to the law and not the script in the *Grace* case. But, we don't get there if we chant the catechism of judicial supremacy by reflex. I could not care less if the unlearned tore the skin off Judge Molloy in the blogosphere – I doubt he cares either.

KRAMER'S REFERENCE to the Supreme Court's “grab for power” and rhetorical inquiry “will we let them get away with it?” should stir cerebral cortices beyond the halls of academia – well, like in Montana, for instance. The Montana Supreme Court has held, “Constitutional issues are questions for the courts and not administrative agencies.” *Stuart v. Department of Social and Rehabilitation Services*, 247 Mont. 433, 438, 807 P.2d 710, 713 (Mont., 1991) Oh, really? So, the police department doesn't have to worry about making unreasonable searches anymore? The prison doesn't have to worry about being cruel and unusual? All of this gets sorted out later? No, no, no. We all have the right, and, we are told, the

We all have the right, and, we are told, the duty, to make constitutional decisions daily. But we don't, we let the Supreme Court do the heavy lifting.

duty, to make constitutional decisions daily.

But we don't, we let the Supreme Court do the heavy lifting. The Supreme Court even decides who gets to attend legislative political caucuses. *Associated Press v. Montana Senate Republican Caucus* 286 Mont. 172, 951 P.2d 65 Mont., 1997.

“The People Themselves” lets us take a respite from the Small Tract Financing Act and the Appellate Mediation Rules. We can ponder again, as some of us did over coffee late at night years ago, positive law as opposed to or in conjunction with natural law. Kramer argues for the appreciation, or at



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least the recognition of the Customary Constitution – a constitution untethered to the text of the Constitution itself. He tells us about English Constitutional Law which is found everywhere but in a written constitution because the English do not have such a thing. He argues, somewhat convincingly, that we cannot ignore the 9th Amendment as it was part of the deal, but did not ask us to revert to natural law, but the Customary Constitution. The 9th Amendment preserves other rights retained by the people. He does not credit his former boss, Justice Brennan, with this thinking, but it should not be lost on the reader that many think that the United States Supreme Court reached into the shadows (or, as the court called it, “the penumbra”) of the “Customary Constitution” to find *Roe v. Wade*. *Roe v. Wade*, as *Griswold v. Connecticut*, fished its legal support, in part, from the 9th Amendment.

I would even commend the book to professors teaching such things as constitutional law, jurisprudence, and the like. If it displaces Rawls or Tribe on the syllabus, so much the better. Although Kramer pushes for more popular control over constitutional jurisprudence, I would submit that he may not quite recognize the gravitational effect it already has. Popularly elected senators have turned every Supreme Court nomination into a mini-constitutional convention. Although Roosevelt did not pack the court, it turned out the threat of it had the same effect. The study of *Brown v. The Topeka Board of Education* is far more interesting as a political science project than a legal one. And, even here in Montana, chief-justice candidate McGrath’s public criticism of the Supreme Court provoked a public debate resulting in a referendum on the court’s timeliness. We don’t know if that

was the exact issue which triggered his landslide victory, but we see decisions coming out of our Supreme Court at a much faster clip. (See, “Justices Winning Battle with Their Backlog,” *Montana Lawyer*, p. 5 (Vol. 35, No. 6, June / July 2010))

KRAMER DOES NOT make the mistake of romanticizing the mob as noble, but he doesn’t treat it as vulgar, ignorant, and a simple political nuisance. He recognizes it as what it always has been and always will be – a whole bunch of people with all sorts of ideas, concerns, passions, and desirable and undesirable attributes. He just thinks the mob, including people like me, have been far too complacent.

Kramer’s book is a good ingredient for the debate of whether we are a nation of laws or men. At a hearing in the Freeman case, Leroy Schweitzer scolded Judge Coughenour, “The only reason you have jurisdiction over me, and I don’t have jurisdiction over you is because the marshals with the guns take orders from you and not me.” Judge Coughenour said, “You’re right, sit down.” We can say what we want about the law, but Leroy was right. If you’ve got the guns, you get to say what the law is. We attorneys, especially on Law Day, love to spread the fiction that we are a nation of laws, not men. But “The People Themselves” reminds us that all of this fantasy only holds so long as it enjoys “the consent of the governed.”

MARK PARKER practices with Parker, Heitz & Cosgrove in Billings, and is a member of the State Bar of Montana Board of Trustees.

A classic lawyer tale turns 50, and many parties are planned

From the **New York Times**

In Santa Cruz, Calif., volunteers will re-enact every word and movement in the famous courtroom scene. In Monroeville, Ala., residents dressed in 1930s garb will read aloud from memorable passages. In Rhinebeck, N.Y., Oblong Books will host a party with mocktails and a performance by the indie band the Boo Radleys.

All summer “To Kill a Mockingbird” will be relived through at least 50 events around the country, in honor of the 50th anniversary of the publication of a book that became a cultural touchstone and an enduring staple of high-school reading programs.

Its publisher, HarperCollins, is trying

to tap into what appears to be a near-endless reserve of affection for the book by helping to organize parties, movie screenings, readings and scholarly discussions. The publisher has recruited Tom Brokaw and other authors to take part by reading from the novel — which tells the story of the small-town lawyer Atticus Finch, who defends a black man accused of rape, and his family — in their hometowns.

Of course, there is also the hope that the events, which are scheduled to run through Sept. 22, will drum up more sales of the book. HarperCollins plans to issue four new editions of the novel next month, each with a different cover and all to be placed on special “Mockingbird” themed floor displays in book-

stores.

Perhaps the largest concentration of celebrations for the book are in Monroeville, which calls itself the “literary capital of Alabama” after its most famous resident, the “Mockingbird” author Harper Lee. The city is planning four days of events, including silent auctions, a walking tour of downtown, a marathon reading of the book in the county courthouse and a birthday party on the courthouse lawn.

THE FESTIVITIES are not expected to attract an appearance by the mysterious Ms. Lee, who is 84 and still living quietly in Alabama after never publishing another book. “Harper Lee has always been a very private person,” said Tina Andreadis, a spokeswoman for HarperCollins. “The legacy of ‘To Kill a Mockingbird’ speaks for itself.”

Few novels have achieved both the mass popularity and the literary cachet of “To Kill a Mockingbird.” The book



"To Kill a Mockingbird"
author Harper Lee
in 2007.

was originally published in 1960 by J. B. Lippincott & Company (now part of HarperCollins), won a Pulitzer Prize and has not been out of print since. It has sold nearly one million copies a year and in the past five years has been the second-best-selling backlist title in the country, beaten out only by the novel "The Kite Runner."

Interest in the book intensified after the 2005 film "Capote," in which Catherine Keener played Ms. Lee, and grew even stronger the next year, when Sandra Bullock played her in "Infamous."

Sales of the book are especially robust in the South, including Kentucky, Mississippi, the Carolinas, Tennessee and Florida, and in the Midwest, particularly Illinois, Indiana and Ohio.

MR. BROKAW, WHO WILL read from the novel in a bookstore in Bozeman, Mont., on July 11, said he vividly recalls reading it as a 20-year-old college sophomore in South Dakota in 1960. "I just remember being utterly absorbed by it, and inspired by Atticus, and very taken by Scout," Mr. Brokaw said. "Those are very powerful characters. And I don't remember another book about the South that treated race in quite that fashion."

Mary McDonagh Murphy, a writer and documentary director whose book, "Scout, Atticus & Boo: A Celebration of 50 Years of 'To Kill a Mockingbird'," will be published in June, called "Mockingbird" "our national novel."

"I can't name another book that is this popular, that tells such a good story, has such indelible characters and makes a social statement without being preachy," Ms. Murphy said. "It is plain in the very best sense of the word."

Less plain is Ms. Lee's response to the unceasing popularity of her one and only book. Executives at HarperCollins said they began planning the summer-long celebration of "To Kill a Mockingbird" on the assumption that Ms. Lee would not take part.





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O'Neil deception-practice complaint dismissed

From the **Kalispell Inter Lake**

The state Attorney General's Office has agreed to dismiss a complaint that alleged Flathead Valley paralegal and former state Sen. Jerry O'Neil had been "deceptive" in his practice.

The charges were filed against O'Neil in June 2007, contending that O'Neil had violated the state's Unfair Trade & Consumer Protection Act.

Helena District Judge Jeffrey Sherlock denied a state request for summary judgment in April and gave the Attorney General's Office until May 24 to respond to several of O'Neil's discovery requests, including a request to identify a single person who claimed to have been deceived by O'Neil's advertising.

The state did not respond to his requests and on May 24, an assistant attorney general signed an agreement dismissing the case. O'Neil said the case is settled except for his claims against the state for attorney fees.

O'Neil said he is "very pleased" with the outcome, as well as the Montana Supreme Court's recent decision dissolving the Commission on Unauthorized Practice of law.

The Commission was overseen by the Court for years, but

the April 20 order found that the Court has no constitutional authority to define the lawful practice or the unlawful practice of law.

"This win, along with the Montana Supreme Court disbanding their Commission on the Unauthorized Practice of Law, will make it easier for people of modest means to receive legal services," O'Neil said.

O'Neil has tangled with the state and the commission over his status as an "independent paralegal" for years.

In 2006, the Commission pursued litigation that resulted in Polson District Judge Kim Christopher affirming an injunction that prohibited O'Neil from practicing law or advertising that he is capable of doing so. That resulted in O'Neil making some changes to his business cards and advertisements and in his business practices. O'Neil has since contended that he has complied with the injunction.

O'Neil is also pursuing litigation at the federal level, asking the 9th U.S. Circuit Court of Appeals to increase the scope of paralegals' abilities to help the public get access to the judicial system.

O'Neil is a Republican candidate for House District 3.

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Missoula lawyer draws suspension

The Montana Supreme Court has ordered that Missoula attorney Diane Keefauver be suspended from the practice of law for 30 days for failing to communicate with disciplinary authorities.

The Commission on Practice told the Court, while recommending the suspension, that Ms. Keefauver is indigent and is no longer practicing law.

Two formal complaints had been filed against her in 2006. The Commission concluded that the evidence presented at a hearing was insufficient to establish any violations of the Rules of Professional Conduct — except for violation of Rule 8.1(b) as a result of Keefauver's failure to respond to the Office of Disciplinary Counsel's multiple communications and inquiries.

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Billings attorney Alback sentenced to prison, again

By **Clair Johnson**
of the Billings Gazette

A former lawyer who admitted stealing money from his bankruptcy clients will be going to federal prison for a year and a half.

Marvin Earl "Toby" Alback, 62, of Billings, offered little explanation during his sentencing hearing on May 26 for why he stole about \$17,000 from two clients for his personal use.

"I'm just very sorry for what I did," he said.

Chief U.S. District Judge Richard Cebull sentenced Alback at the high end of the guideline range, imposed a \$5,000 fine and ordered 60 hours of community service. Restitution is to be determined later. The sentence followed the government's recommendation [see Page --- for payouts to Alback's clients by the Lawyers Fund for Client Protection].

Alback apparently thought he was "so above reproach he could get away with it," Cebull said.

THE FEDERAL CASE was the second time Alback has been convicted of misappropriating clients' funds. In the late 1980s, Alback was convicted in state court of felony theft for taking more than \$95,000 from two clients while he worked in Bozeman. Alback was sentenced to 16 years in state prison, with 13 years suspended.

Alback was disbarred, then was reinstated in 2000. He permanently resigned his license in September.

The state conviction was too old to count against him for sentencing in the federal case.

ALBACK PLEADED guilty in February to wire fraud and bankruptcy fraud.

In the bankruptcy fraud, Alback was hired by a family in March 2008 to represent them in a bankruptcy case. When the family had trouble making their mortgage payment, Alback told them to write their settlement

and mortgage payments to him and he would deposit the money with the bank.

Alback deposited the money into his trust account and never made the mortgage payments. Although he eventually paid back the money, he caused significant back payments and late fees to avoid foreclosure, said Assistant U.S. Attorney Ryan Archer.

Alback also obtained the family's \$557 tax refund check and used the money for personal expenses. The refund check belonged to the bankruptcy estate.

In the wire fraud, Alback represented another client in a lawsuit that was settled for \$12,500 in August 2009 and a check was written to his client. While Alback was entitled to a share of the settlement, he forged his client's name without her knowledge, deposited the \$12,500 into his account and used it for his personal benefit. The client received a check for her settlement in October 2009, but it bounced and she has not received any money that was paid to settle the suit.

Archer called Alback's actions "an extreme abuse of trust" because he stole money from bankruptcy clients who

already were in financial trouble. "The message needs to be sent that this is unacceptable behavior," Archer said. "It's almost inexplicable why Mr. Alback stole \$17,000 and yet he did."

ALBACK'S ATTORNEY, Mark Parker, asked for mercy with a low-end sentence because of Alback's cooperation in the case.

In preparing a sentencing recommendation, Parker said Alback would list his accomplishments in counseling people with alcohol addictions and the hundreds of clients he had helped. "But midway through this reminiscence, Toby was always overwhelmed by the fact that it does not matter. He messed up. Not only did he mess up, but he 'messed up again,'" Parker said in court records.

Parker offered an explanation based on what his father told him when he was a boy: that there are some people who are hard-working, otherwise honest and congenial, but who cannot be around money or they'll take it.

Cebull allowed Alback to report to prison when assigned to a facility.

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Take justice off the ballot

A New York Times op-ed
by former Justice **Sandra Day O'Connor**

Although our attention as a nation is focused on the selection of a new justice to the Supreme Court, another judicial process that is also extremely important is happening across the country: the selection of state court judges. But in too many states, citizens are being shortchanged by the way these judges are chosen.

Each state has its own method of choosing judges, from lifetime appointments to partisan elections. But judges with a lifetime appointment are not accountable to voters. And elected judges are susceptible to influence by political or ideological constituencies.

A better system is one that strikes a balance between lifetime appointment and partisan election by providing for the open, public nomination and appointment of judges, followed in due course by a standardized judicial performance evaluation and, finally, a yes/no vote in which citizens either approve the judge or vote him out. This kind of merit selection system — now used in some form in two-thirds of states — protects the impartiality of the judiciary without sacrificing accountability.

STATE COURTS RESOLVE the most important legal matters in our lives, including child-custody cases, settlement of estates, business-contract disputes, traffic offenses, drunken-driving charges, most criminal offenses and most foreclosures. More than 100 million cases are filed in state courts each year. When you enter one of these courtrooms, the last thing you want to worry about is whether the judge is more accountable to a campaign contributor or an ideological group than to the law.

In our system, the judiciary, unlike the legislative and the executive branches, is supposed to answer only to the law and the Constitution. Courts are supposed to be the one safe place where every citizen can receive a fair hearing.

IN A MERIT SELECTION system, a nonpartisan nominating commission interviews and investigates applicants for judicial vacancies, and ultimately recommends a few candidates to the governor. The governor appoints one from the list. Regular “retention” elections are held to allow voters to decide whether to keep the judge in office.

There are those who assert that this system benefits legal insiders, because lawyers will inevitably dominate the nominating commissions, which would hold their meetings in secret. But to the extent that this could be a real problem, Arizona has already demonstrated how to avoid it. In that state, nominating commissions are dominated by non-lawyers, and their meetings are open. Candidates’ applications are available online, and the public is invited to comment.

Another argument against this system is that it deprives voters of the chance to choose their judges. But the truth is, in those states that elect judges, candidates often run unopposed, so voters are left with no options, and little information about the people who are on the ballot. In a system where judges are evaluated before they are put on the ballot, voters can make their decisions more knowledgeably — with relevant information about the judges’ performance on the bench.


THIS YEAR, 16 STATES [including Montana] will hold contested elections for seats on their highest courts, and candidates will raise and spend millions of dollars for their campaigns. In 2008 alone, nearly \$20 million was spent on TV advertising in contested elections for 26 state supreme court seats.

Some states where judges are still elected are considering constitutional changes to a merit selection system. The Minnesota Legislature has considered asking voters to weigh in on such a change, and may do so again next year. And in Nevada (a state ranked eighth in campaign spending on judge-ships), two legislators — the Senate minority leader, William Raggio, a Republican, and Assembly Speaker Barbara Buckley, a Democrat — pushed through a ballot question that citizens will vote on this November on whether to institute a merit selection system for judges.

We should cheer Minnesota and Nevada as they pursue impartial courts and create for their citizens that one safe place. Other states should soon follow suit.

SANDRA DAY O’CONNOR was a U.S. Supreme Court justice from 1981 to 2006. Her op-ed appeared in the *New York Times* on May 23.

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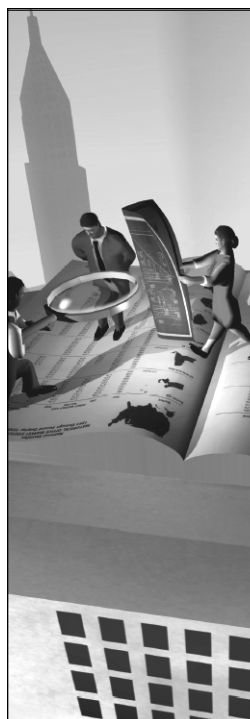
UM Law School honors 3 departing professors

The University of Montana School of Law celebrated with a reception on May the distinguished service to the school of three professors who are leaving the faculty. They are:

■ **Prof. Scott J. Burnham**, who has accepted an offer to be the Frederick N. and Barbara T. Curley Professor in Commercial Law at the Gonzaga University School of Law beginning in the fall. Professor Burnham, aka "Mister Contracts," has been on the UM Law faculty for 29 years, principally teaching contracts, commercial law, and copyright law.

■ **Prof. Rob Natelson**, who retired at the end of this academic year to accept a position with the Independence Institute, a policy institute based in Colorado. Prof. Natelson has been a member of the faculty since 1987. He recently received a publication offer for his second book on the U.S. Constitution, a survey for the general reader of the Constitution's legal force immediately after adoption of the Bill of Rights in 1791.

■ **Prof. Peggy Tonon**, who, in her 20 years at the School of Law, has served as professor, clinical director, director for Student Affairs, and clinical supervisor. She has served on several Montana Supreme Court commissions, including the Commission on Courts of Limited Jurisdiction and the Commission on the Rules of Evidence. Prof. Tonon and her husband have planned extensive international travel and she will continue to pursue her interest in clinical legal education.



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NEWS ABOUT MEMBERS

Former U.S. Attorney for Montana **Bill Mercer** has joined the Energy, Environment & Natural Resources practice group of the multi-state Holland & Hart Law Firm. Mr. Mercer served in the U.S. Department of Justice for 20 years as a U.S. attorney (2001 to 2009) and as an assistant U.S. attorney (1994 to 2001). As acting associate attorney general, he served as the third-ranking official in the U.S. Department of Justice. Mr. Mercer earned degrees from the University of Montana, Harvard University, and the George Mason University School of Law.

Montana Alberta Tie Ltd. announce the appointment of **Harley R. Harris** as vice president and general counsel, and the opening of an office in Helena. Montana Alberta Tie Ltd. is a subsidiary of Toronto-based Tonbridge Power Corporation and is constructing an electric transmission line from Great Falls to Lethbridge, Alberta. Mr. Harris will have responsibility for U.S. and Montana legal, regulatory, and governmental affairs, right-of-way acquisition and management, project management, and strategic project development. Mr. Harris is a 1984 graduate of the University of Montana School of Law, and most recently has been a partner in the Helena law firm of Luxan & Murfitt. He and Lisa Gallegos-Thompson, CLA, also formerly with Luxan & Murfitt, have opened the MATL Montana office in the Great Northern Towne Center, 30 West 14th Street, Suite 204, Helena MT 59601.

In May, the Montana Game Wardens Association awarded Senior Trial Attorney with the U.S. Department of Justice **Robert Anderson** with its annual "Support Award," in recognition of his work in *United States v. Bergtoll, et al*, a Lacey Act

big-game trafficking case involving the multi-year illegal interstate sale of outfitting services for the unlawful taking of big game. The case resulted in state citations to many unlawful hunters as well as Lacey Act convictions of three members of a Montana ranching family and their Louisiana booking agent. Along with fines, probation, and suspension of hunting privileges, Mr. Anderson negotiated special community-service conditions requiring the ranchers to open their property for five years to the Montana public hunter-access program and the "Wounded Warrior Project," a Veterans Administration-affiliated program helping severely wounded veterans to engage in outdoor experiences, including hunting.

Assistant U.S. Attorney **Ryan M. Archer** ran the 114th annual Boston Marathon on April 19. Mr. Archer completed the 26.2 mile race in 2 hours, 52 minutes and 9 seconds, with an average per mile pace of 6 minutes and 34 seconds. Mr. Archer graduated from the University of Montana School of Law in 2003. Before prosecuting white-collar crime in the Billings U.S. Attorney's Office, he worked for the U.S. Attorney's Office in Portland, Ore., and clerked for 9th Circuit Court of Appeals Judge Sidney Thomas.

Montana Legal Services Association recently welcomed a new attorney, **Flint Murfitt**, to its Consumer Law Unit in Helena. Mr. Murfitt was born and raised in Helena and started his education at the University of Montana. He earned a BA in Business from the University of Washington in 1982. After working in the business field for such companies as AT&T, he attended UM Law School and obtained his JD in 1991. He was law clerk to the Montana Supreme Court Justice John C.

Harrison. Mr. Murfitt's private practice began with Shulkin Hutton Inc. in Seattle, in bankruptcy reorganizations, business law, commercial law, and representation of both debtors and creditors. As in-house counsel for The Hartford, he primarily practiced in the area of construction defect and general civil litigation. He continued to work for other firms and as a solo practitioner in Washington and California in all aspects of civil law. At MLSA, he is the director of the Low Income Taxpayer Clinic (LITC) and a staff attorney for the Consumer Law Unit. Mr. Murfitt is a member of the Montana, Washington, and California State Bar Associations as well as the federal bar.



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Hugh Kidder, Missoula attorney

Missoula attorney Hugh Gerald Kidder, 84, died at his home on May 8.

Mr. Kidder was born in Kalispell; his mother is believed to be the first white woman born in the Flathead Valley. After graduating from Whitefish High School, Mr. Kidder joined the Navy and served two tours in World War II in the South Pacific. He continued his service as a member of the Army National Guard for 20 years, and was a recipient of the Navy's Bronze Star.

Upon returning home, Mr. Kidder enrolled in law school at the University of Montana and graduated in 1953. While at the University, he was an active member of the Sigma Nu fraternity. Mr. Kidder worked his way through law school as an insulator and member of the Heat & Frost Insulators & Asbestos Workers Local 97, Anchorage, Alaska.

In 1955, Mr. Kidder began practicing law in Missoula, where he practiced for more than 50 years. He was a member of the State Bar of Montana and the Western Montana Bar Association. "Hugh was known by many in the profession as compassionate, professional, and always the gentleman," his obituary said.

Mr. Kidder was an excellent horseman and a member of the Backcountry Horseman Association for many years. He was also a mentor to the Campfire Girls and Rattlesnake Riders.

"Hunting and fishing were more than a hobby to Hugh; they were a way of life," his obituary said. He, along with the "Group of 8," built the Fish Creek cabin famously known as the North Fork Lodge. Family and friends enjoyed packing up horses and escaping into the wilderness. "The family cabin at Placid Lake became Hugh's Walden Pond."

Mr. Kidder was preceded in death by his first wife, Mae Owen Kidder. He is survived by his wife Margo A. Kidder, two sons and two daughters.

Marvin Smith, Great Falls, past Bar president

Longtime Great Falls attorney Marvin Smith, 88, who was a past president of the Montana Bar Association, died on May 9 at a Great Falls care facility.

Mr. Smith graduated in 1940 from Great Falls High School, where he played varsity sports for the Bison. He continued his education at the University of Washington, where he was a member of the SAE fraternity and played football for the Huskies in the 1944 Rose Bowl.

He joined the Marine Corps as a 2nd lieutenant and served in World War II until it ended. After returning to Missoula, he received his law degree from the University of Montana Law School and married Elaine Palagi in 1948.

In 1949, Mr. Smith began his law career with the Graybill Bradford law firm, and soon after opened his own firm with Jim Paul. He later worked with Robert Emmons and Bill Baillie and lastly started the firm Smith Walsh Gregoire, from which he retired in 1993. After his official retirement, he continued to work at his son Gregg's law firm until he was 87 years old.

Mr. Smith was a lifetime member of the Elks Club, a Shriner, and served on the board of directors for the local YMCA. He was an ardent handball player and reigned many years as doubles champion with Ted Greely.

Mr. Smith is survived by his wife, three daughters, and two sons.

Paul Cresap, Sidney attorney

Longtime Sidney, Mont., attorney Paul Haven Cresap died May 6 at his home in Adel, Iowa, at age 91.

Mr. Cresap was born in Kendall, Iowa. He graduated from Fergus High School in Lewistown, Mont., and then studied law under Judge H.L. DeKalb for three years. The day after Pearl Harbor, Mr. Cresap joined the Marine Corps and became a master technical sergeant, specializing as a demolition expert. He served in Guadalcanal and participated in the consolidation of the Northern and Southern Solomon Islands as well as the surrender of Japan. He returned to the U.S. for a short furlough and during that time married Rose Ellen Berry, also of Lewistown in 1944. He completed his military duty serving on the USS Vella Gulf.

The Cresaps moved to Missoula where he earned his juris doctorate at the University of Montana in 1949. After graduation, he and his wife moved to Sidney where he joined the law firm of Tad Sanders. Mr. Cresap continued to practice law in Sidney until his retirement in 2004. He served as president of the Chamber of Commerce and as exalted ruler of the Elks Lodge.

Mr. and Mrs. Cresap moved to Laramie, Wyo., for four years and then to Adel, Iowa, in 2009. He is survived by his wife and two daughters.

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