THE MONTANA
Lawyer
THE STATE BAR OF MONTANA

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Making their pro bono program *RUN*

How a unique team was formed in Silver Bow County

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Arbitrating

Montana's police & firefighters

What do you do when you're not practicing law?

Answers to your CLE questions, Pages 34-35

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Peggy Probasco

President's Message

When law firms span generations

Bar demographics show how varied the needs are

By the end of 2007, we will be talking about a clear and growing digital divide between technology-forward and technology-backward firms. It will happen slowly, barely perceptibly in some cases, but we will see growing evidence of that gap and a restructuring of the practice of law.

– Introductory paragraph to "Seven Legal Technology Trends for 2007: Widening the Digital Divide in Law Practice," by Dennis Kennedy, 2001 TechnoLawyer of the Year. *www.LRX.com*

What does this mean? I received a call the other day from the agency I work for, asking me to help create a workable product for free public access on an open source, freeware-shareware program. This occurred on the heels of an ABA mid-year meeting I attended where all materials were provided via a flash drive, and just prior to my participation in a medical-legal panel in which all materials were presented on a disk.

I was struck by how rapid advances in the technological world affects lawyers every day, and how much we are expected to know.

The practice of law is changing. Montana is certainly not exempt from these changes as we try to cope with a large geographical area, relying more and more on the electronic world to give us a presence in Choteau while actually in Butte – or when we electronically file a motion in federal court within deadline requirements that are impossible to meet with snail mail. However, the ability of individual attorneys to adapt is as varied as the Bar membership.

DESPITE A RELATIVELY SMALL Bar population, the State Bar of Montana's 2005 Membership Survey revealed a diversity that underscores the challenge of the Bar to meet members' needs, as well as the challenges faced by the members to effectively and efficiently practice law in this century. Thirty percent are sole practitioners and another 20 percent work for the government. That means 50 percent are in firms, but a majority of those firms have only two to five attorneys. Sixty-two percent of Montana attorneys are between the ages of 41 and 60. It is not surprising that in conjunction with this statistic, 30 percent of our members have been in practice 10 years or less.

From other statistics around the nation, this is the first time in history that the workforce contains as many as four generations. Consider for a moment the divergence of a law practice with one attorney with 40 years in practice looking at retirement or semi-retirement; one with 20 years in practice, juggling her work while caring for her parents and her high school senior; one attorney five years into the practice with a wife and a baby; and the brand-new associate who is single, tech savvy and able to shepardize a brief in one-fifth the time of the senior attorney. How does this firm meet the needs of each member; how does the Bar help?

How do you help a firm that has a lawyer with 40 years' experience working alongside a new lawyer with less than one year's experience?

For that matter, how does the Bar assist the sole practitioner with one assistant, as well as the county attorney trying to meet the civil legal needs of the county commissioners and address a countywide drug problem? What can the Bar provide to the lawyer in the mega-firm who has built a reputation as a successful trial practitioner, but whose personal life is a shambles? What information can the Bar offer to the three-person firm looking to expand and upgrade its practice when none are particularly computer proficient? How can the Bar help a new brave, young lawyer set up a competent office and accounting system?

The answers to those questions are: with difficulty, but with persistence; with a positive attitude, but not always with success. Without successful assistance, Bar members feel disenfranchised, hopeless, angry and anxious with themselves, their practice and the Bar.

On the basis of the Bar survey – the changing technology, the generational issues, the diversity of practices – the State Bar is looking forward to bringing you resources to

Bar's score 7-0 so far in session

With the Montana Legislature past the halfway point of the 2007session, bills actively supported by the State of Montana are still progressing through the Legislature, while the bills the State Bar has actively opposed have been killed.

As of Feb. 12, the State Bar of Montana had taken active interest in 10 bills and three resolutions introduced in the 2007 Legislative session.

Of those bills, the Bar testified in hearings in support of three of them and in opposition to four of them.

BILLS ACTIVELY SUPPORTED by the State Bar that are still alive in the legislative process are:

■ **HB 60,** titled The Montana Access to Civil Justice Act, was amended and approved by the House Judiciary Committee on Feb. 14, but failed on House floor two days later. It was sent to the House Approprations Committee for reworking. This act, introduced by House Minority Leader Rep. John Parker, D-Great Falls, an attorney, appropriates $750,000 to establish a self-help law program for Montana citizens, to be administered by the Montana Supreme Court. The act is designed to make Montana's court system more accessible by providing all Montanans with user-friendly information through technology and volunteer services, and improve court proceedings for self-represented litigants.

■ **HB 361,** introduced by Deborah Kottel, D-Great Falls, would revise the law on proxy marriage, requiring one party to be a member of the U.S. Armed Forces on federal active duty or a resident of the U.S. The bill was passed by the House and transmitted to the Senate on Feb. 7. It is now in the Senate Judiciary Committee.

■ **SB 202,** provides candidates for election to the Montana Supreme Court with the option of a publicly financed election campaign. It was passed by the Senate and transmitted to the House on Feb. 27. This bill was introduced by Sen. Jesse Laslovich, D-Anaconda, an attorney. The Bar testified in support of the bill at a hearing in the Senate Judiciary Committee on Jan. 25.

ALL FOUR BILLS ACTIVELY OPPOSED by the State Bar have died:

■ **HB 165,** requiring a candidate for the office of district judge to meet certain minimum civil or criminal trial experience qualifications, failed to make it out of the House by the Feb. 27 deadline by which the House was required to transmit it to the Senate. Inroduced by Rep. Ken Peterson, R-Billings, an attorney, the bill was tabled by the House Judiciary Committee on Jan. 22.

■ **HB 229,** which would require disqualification of a judge from a case when an attorney in the case has made a reportable campaign contribution to the judge, also missed the Feb. 27 bill-transmittal date after it was tabled by the House Judiciary Committee on Jan. 30. The bill was introduced by Scott Mendenhall, R-Clancy. The State Bar testified against the bill in a hearing before the Judiciary Committee.

■ **SB 476,** a bill by Sen. Jerry O'Neil, R-Columbia Falls, to make the unauthorized practice of law a crime, died when it was tabled by the Senate Judiciary Committee on Feb. 23. It was argued that Sen. O'Neil, who lost a case in Montana courts in which he was charged with the unauthorized practice of law, was using this bill, as he did in a failed effort in 2005, to change the regulation of the practice of law.

■ **SJ 8,** also introduced by Sen. O'Neil was a resolution urging the Montana Supreme Court to allow any person to take the examination for

More *LEGISLATURE*, Page 19

improve your practice and address your concerns.

The Board retreat in June will focus on the changing practice of law, so we can make programs and information available to all members. Short CLEs on specific topics for individual sections will continue to be available by telephone over lunch hours at a reasonable cost. Technological information of for the protection of your electronic files will be shared both in seminars and on the State Bar web pages. We will explore options to address the needs of the 40 percent of attorneys who find the practice less rewarding. But if you did not see yourself in any of the categories mentioned here, contact the Bar with your particular needs and concerns.

As noted at the beginning of this message, the practice of law is changing – technologically and personally. We can watch or participate or simply close up shop and call it a day. Your choice should be driven by your own circumstances and desires.

Whatever you choose, be honest and open, first with yourself and then with your family and colleagues. We cannot stop the changes that are occurring, but we can choose the best path for ourselves in response to those changes. ❍

Driving the Butte pro bono program

Started by local attorneys, this revolutionary activity is steered by district judges

By **Ryan Hazen**, coordinator
State Bar Modest Means Program

There are many things that make Butte the most unique city in Montana. It was the site of one of the richest copper finds in history, boasts a wealth of authentic turn-of-the-century architecture, and is home to one of the largest statues of the Virgin Mary in the world. It also happens to have a pool of attorneys that reported more pro bono work in 2006 than any other city in the state. It is, however, no coincidence that these attorneys provide so much pro bono service. It is actually very easy to find pro bono work in Butte, because, more often than not, qualified clients in Butte literally find you.

This phenomenon is the result of one of the most progressive pro bono programs in Montana.

Fifteen years ago this program was little more than a loosely organized volunteer group comprised of a few dedicated members of the local bar association. Today, it is a fully developed pro bono program administered by the courts of the 2nd Judicial District, complete with a new pro se section and biennial CLEs to keep local attorneys up to speed on the areas of law that need the most attention.

So where exactly did this program begin, and how did it grow into the program it has become today?

For some time, the program thrived as an all-volunteer organization, staffed and administered by the attorneys themselves. These attorneys took referrals from Montana Legal Services Association and volunteered their time to provide those clients with free legal representation. It was a diverse group of lawyers, ranging from private family-law attorneys to corporate attorneys employed by the Montana Power Company. Though many of them did not practice family law regularly, they could rely on one another to provide advice and guidance in various areas of family law, thereby increasing the number of attorneys available to help with these cases.

SOMETIME IN THE MID-1990s, this loose pro bono committee realized that the need for free legal representation was simply too great to handle alone. They did, after all, have families to support and fee-generating cases to attend to. They decided to approach the judges in Silver Bow County with a revolutionary idea.

2nd Judicial District Pro Bono Program Coordinator Marijo MacDonald

'It is not mandatory; it's alphabetical.' She sends a letter to the next lawyer on the list when a pro bono attorney is needed. Exemptions for attorneys are short-lived.

The committee approached then-sitting District Judges James Purcell and John Whelan to recommend that the court administer a pro bono program in Butte. It would be very simple: MLSA would refer qualified cases to the court, which would then assign the cases to attorneys in the area on a rotating basis. If it worked properly, this system would require a minimal amount of pro bono activity from each lawyer while meeting the legal needs of everyone in Butte. Most importantly, it would be done without overburdening any of the attorneys practicing in the 2nd Judicial District.

After careful consideration, the judges agreed to support the program. They sent letters to the entire membership of the local bar, informing the attorneys that they could expect to be assigned a pro bono case in the coming year. The day-to-day administration of the program was assigned to Marijo MacDonald, a law librarian already working in the courthouse. She was able to take the program in stride, and has been helping it grow ever since.

When asked about the pro bono program she administers, Ms. MacDonald insists that, "it is not mandatory; it's alphabetical."

When she receives a referral from MLSA, Ms. MacDonald

consults her attorney list, a database containing the names, phone numbers, and addresses of each attorney in Silver Bow County. She then selects the next lawyer on the list and sends a letter notifying him that he has been assigned a pro bono case and is expected to accept it.

There are, of course, reasonable exceptions made for attorneys who are preparing for trial, going out of town, or otherwise unable to accept a case at that time. These exceptions, however, are short-lived – new cases will be assigned to those same attorneys in the following months.

Silver Bow County District Judge Kurt Krueger

'If it's a real complex matter, it goes to a lawyer that has had more experience.' No attorney is thrust into a case that is clearly out of his depth.

IN ORDER FOR THIS SORT of program to function properly, the court must see to it that all attorneys in its district have access to the type of continuing legal education necessary to represent these "alphabetical" pro bono assignments. The local bar association, in conjunction with the attorney-staffed pro bono committee, provides a low-cost family-law CLE about every two years. This CLE is very simple, designed specifically to prepare Butte attorneys to represent various types of family law clients in court. It is composed of a broad cross-section of attorneys from Silver Bow County that understand the pro bono program and the precise nature of its most commonly assigned cases. The CLE is highly Butte-specific, and well attended among lawyers practicing in the 2nd Judicial District.

It should not be said, however, that the courts in Butte expect all of their attorneys to be family-law experts. They require only a basic competency in those areas of law addressed by the program, and provide the training necessary for every attorney in the city to develop that competency.

Referring to the manner in which they distribute these cases, now-sitting Judge Kurt Krueger assures us that, "If it's a real complex matter, it goes to a lawyer that has had more experience." No one is thrust into a case that is clearly out of his depth.

Lack of experience in family law, however, is not an excuse for lack of participation in the program. On top of the low-cost CLEs, MLSA also provides these pro bono attorneys with free malpractice insurance when working as part of the program. Thanks to the local CLEs and MLSA's malpractice umbrella, everyone in Butte is more than able to participate in the program.

THE SUCCESS OF THIS program is the result of many interdependent factors. The first is a local bar membership that is willing and able to represent their neighbors who can't afford regular attorney fees. Like almost every effective pro bono program, the Silver Bow Pro Bono Program was started by a small group from the local bar that voluntarily approached the 2nd Judicial District bench with the idea.

Judicial support is absolutely crucial to the health of this, or any, pro bono program. When the local judiciary expects to see its attorneys fulfill the pro bono publico obligations outlined in rule 6.1 of the Supreme Court's Rules of Professional Conduct, it tends to get results. According to Judge Krueger, "If you are going to appear in the courts of the 2nd Judicial District, you have to participate in our pro bono program." It really is that simple.

Talented and creative coordination also is necessary for a program like this to function. No matter whom you speak to in the 2nd Judicial District, they always make sure to give Marijo MacDonald extra credit for her work on the program. As newly-elected Judge Bradley G. Newman explains, "Left to their own devices, attorneys have an awful lot of thoughts and cases going on, and it's hard to juggle all those balls … Once you get somebody to coordinate that effort, attorneys are more than willing to do the work."

While the judges can offer a great deal of support for the program, they cannot administer it themselves. The real engine driving this program is definitely Marijo MacDonald.

WITHOUT EVERY ONE of the elements listed above, the Silver Bow County Pro Bono Program would not attend to the community's needs as thoroughly as it does today. The attorneys need the judiciary to control coordination and distribution of these pro bono cases, keeping the burden evenly spread across the legal community. The judiciary needs the program administrator to coordinate and drive its success. The administrator and judiciary need attorneys to provide CLEs and actual pro bono representation.

It is an inspiring example of cooperation and teamwork that transcends individual interest in order to enrich the lives of an entire district. This program truly is greater than the sum of its parts. ❍

Interest arbitration

Its effects on collective bargaining in Montana's protective services

This article finds its genesis in the author's service as a keynote speaker at the 2006 Board of Personnel Appeals Collective Bargaining & Arbitration Conference in Bozeman in September 2006, as well as his training of Montana advocates both in this subject area and in certain elements of grievance arbitration.

By **Ronald Hoh**
National labor & employment arbitrator

During the 2005 session, the Montana Legislature passed and the governor signed into law what became Sections 39-31-502 through 39-31-505, Montana Code Annotated (MCA). Those statutory sections provided non-supervisory Montana police officers represented by a certified bargaining representative the right to have any collective bargaining contract impasse disputes submitted for final and binding resolution to a mutually selected interest arbitrator, in the absence of a voluntary contract agreement between the Montana city employer and that certified bargaining representative.

Represented non-supervisory Montana firefighters have had the right to interest arbitration as a final impasse dispute resolution procedure step since 1973. While the specific procedures of these statutes differ significantly, both raise several questions, including questions relating to the impact of interest arbitration upon the bargaining process itself.

This article addresses the impact of interest arbitration on the bargaining process and the pros and cons of dispute settlement under such statutory provisions. It further includes the author's comments on the similarities and differences in the two statutes and their potential impact upon the bargaining process, and makes suggestions on steps the Montana Board of Personnel Appeals (BPA) can take to make the interest arbitration process work more effectively under these statutes.

The Great Experiment: the role of interest arbitrators nationwide

As state, county, municipal and education sector employees have over the past thirty-five years increasingly achieved collective bargaining rights, the procedures used in resolving impasses in contract negotiations with their public employers have been viewed as a major concern. Although most jurisdictions traditionally outlawed public employee strikes, job actions nonetheless have occurred. Mediation, factfinding, and other nonconclusive and nonbinding impasse resolution procedures have often proven unsatisfactory as strike alternatives, particularly in the case of police officers and firefighters, whose continued service is almost universally deemed essential to public health and safety, and who are normally statutorily forbidden from striking. As a result, many state legislatures across the country have passed laws calling for binding arbitration of new contract terms for such public employers and employees.

Interest arbitration laws have long been the preferred strike right dispute-resolution alternative in the large majority of non-Southern states, particularly as they relate to disputes involving police and fire personnel. By 1990, 35 states and the District of Columbia had adopted some form of interest arbitration as a means of resolving disputes over new contract terms for some or all of their public employees.[1] By that time, such systems existed in each of the most populated Midwest and East Coast states, as well as in Washington, Oregon, Hawaii, Alaska and Nevada.[2] A few jurisdictions, specifically the cities of New York and San Francisco, also maintain interest arbitration provisions via city ordinances.

Many of these jurisdictions have functioned under interest arbitration laws or ordinances for nearly 30 years. Virtually without exception, these state laws give a centralized state board or commission jurisdiction over interest arbitration procedures and the adjudication of unfair labor practices disputes, with neutral-agency decisions subject to review by state courts.[3]

The general theoretical construct behind such interest arbitration statutes is that strikes and lockouts by public safety personnel such as police and firefighters should be illegal, and that public policy, sound employer-employee relations, and good employee morale make appropriate the right to interest arbitration in order to re-equalize the bargaining power relationship that would exist in public safety jurisdictions had the strike or lockout economic weapon still been in place. The general intent of interest arbitration laws is to re-equalize that bargaining power between the parties, and yet, like the right to strike or lockout, be utilized by the parties only as a last resort.

In the public and legislative debates over these statutes,

emphasis has generally been placed upon the search for statutory frameworks that are equitable to the interested parties, while simultaneously providing impasse-resolution procedures that encourage voluntary settlements and minimize the disruption of public-service functions. It is thought that such a bargaining power re-equalization, particularly when the law is administered by a centralized state or local neutral labor relations agency, will produce more mutually acceptable, voluntary contract settlements.

Supporters of the right to interest arbitration view it as an equitable way to balance the often competing interests of all groups: management, employees, and most nebulous of all, the "public interest." They further argue that – since in today's society, disputes between private citizens are not resolved by self-help but are adjudicated before neutral tribunals – labor and management disputes should likewise be submitted to similar bodies, rather than being subject to strikes and lockouts, which harm the public at least as much as they do the parties.

Interest arbitration and the varying role of the arbitrator

The central determinant of the effectiveness of any system providing the right to interest arbitration as a substitute or quid pro quo for the right to strike or lockout is the system's ability to produce voluntary contract agreement by the parties themselves, despite the existence of the right to interest arbitration. In attempting to direct the parties' attention toward voluntary contract agreement where interest arbitration exists in the absence of such agreement, states and local jurisdictions enacting interest arbitration laws or ordinances have utilized numerous approaches to the design of such systems.

Generally, interest arbitration systems can be categorized into three areas:

- **Conventional arbitration**, where the arbitrator has free rein to determine an award of any level or amount in the areas in dispute between the parties.
- **Final offer, issue-by-issue arbitration**, where the arbitrator's jurisdiction is limited to an award of the "final offer" of one or the other of the parties on each "issue" placed before him.
- **Final offer, package arbitration**, where the arbitrator is constrained to award the entirety of the final offer of one party or the other on all areas in dispute between the parties.

Each of these systems contains clear and differentiating impacts upon the authority of the arbitrator in fashioning the arbitration award, since each involves differing levels of constraints upon the ultimate award made by the arbitrator.

There are likewise differences among interest arbitration systems in the areas of both the timing of final offers and of the role of the arbitrator in assisting the parties in reaching a voluntary contract agreement. In that latter area, some interest arbitration systems, including the system in effect for organized employees of the City and County of San Francisco, specifically provide that the interest arbitrator is also to serve in the function of the mediator. Under such "med-arb" systems, the power of the med-arbitrator in the mediation context is greatly strengthened, in that suggestions made by the med-arbitrator while functioning as the mediator could well become elements of the arbitration award itself, if those mediator suggestions are rejected by the parties during mediation.

In addition, many interest arbitration systems provide for the arbitration to be conducted by a tri-partite panel of arbitrators, with one partisan "arbitrator" representing each of the parties on that panel. Such systems are intended either to increase the possibility of a voluntary agreement among all members of the panel (and thus the parties themselves), or at minimum to encourage a unanimous panel award more politically palatable to the parties' constituent groups. Other arbitration systems, such as that in effect in the Iowa public sector, clearly separate the mediation impasse step from the arbitration step, and specifically prohibit mediation by the arbitrator.

Similarly, arbitration systems vary in the timing and function of final offers made to the arbitrator or arbitration panel. Some systems such as that in Iowa, as well as for police officers in Montana, require written final offers sent to the arbitrator and the other party early in the arbitration step, and no change to such final offers thereafter. Other systems both allow multiple final offers and/or final offers to be submitted subsequent to the arbitration hearing itself.

These variations in interest arbitration systems can therefore best be visualized on a continuum addressing virtually all of these differing systems, such as that set forth below:

More Formal	**Less Formal**
Judicial (no arbitrator, mediation)	Mediatory (med-arb)
One final offer, no changes	Multiple final offers, final offers after close of hearing Final offer package Final offer, issue-by-issue
Conventional arbitration	Limited Arbitrator: Final offer, issue-by-issue Final offer, package
Conventional "med arb" authority	Extended arbitrator authority
Single arbitrator	Neutral & 2 partisan arbitrators

Each of these interest arbitration systems offers certain advantages and contains certain drawbacks – many of which will be discussed in this article. These differences highlight, however, that despite the relatively low instances of new interest arbitration laws passed since 1990, both the parties and state and local legislative bodies continue to tinker with interest arbitration systems, seeking the right combination of formality/informality and arbitrator authority to best promote the goal of voluntary contract agreement by the parties themselves.

Interest arbitration: pros and cons

The pros and cons of interest arbitration have been debated across state legislatures and by labor relations commentators

ever since the first interest arbitration law became effective in Wisconsin in 1970. Generally, the arguments in favor of interest arbitration are:

1. It provides an alternative for resolving impasses when strikes are prohibited, for the state must provide a substitute.
2. It substitutes judicial procedures for jungle warfare, because it is a civilized method of dispute resolution.
3. It protects the paramount needs of the public, for it is essential that there are no work stoppages in the protective services, endangering the health and safety of the public.

The arguments against statutory interest arbitration are:

1. It is an unconstitutional delegation of legislative power.
2. It has a "chilling effect" on collective bargaining because the parties fail to bargain.
3. It results in some parties repeatedly engaging in arbitration in order to get "a little bit more" than they can in negotiations – the "narcotic effect."
4. It may result in an administrative award of high wages, and a municipal employer may not have the ability to pay for the award.
5. It works to the advantage of weak unions.
6. Outside third parties who are unfamiliar with the practicalities of the enterprise write the contract.
7. It does not encourage cooperation, which is the essential aspect of ongoing employment relations; rather, it pushes the parties further apart.[4]

Since the main topic of this article is the impact of interest arbitration upon collective bargaining, focus will be placed upon the claimed negatives of interest arbitration and its claimed deleterious effect upon bargaining and voluntary contract resolution. However, it is the central theme of this article that the relative advantages of interest arbitration still greatly outweigh the disadvantages; that a brief history of interest arbitration in the protective services shows that many of the contra arguments lack substantial support; and that many of the opposing arguments can be answered and resolved by utilizing the different types of interest arbitration described earlier.

The constitutional argument

Some argue that interest arbitration is an unconstitutional delegation of legislative authority, because it improperly removes from the governing body the determination of employee wages and working conditions, and provides that authority to a third party not responsive to the public.

Although a complete discussion of the constitutionality of interest arbitration is beyond the scope of this article, state supreme courts in the vast majority of interest arbitration jurisdictions, with limited exceptions, have universally upheld the constitutionality of interest arbitration statutes. Among the approximately 40 states that enacted some form of interest arbitration for at least some of their public employees, only in Utah, South Dakota, Colorado and California (for general law cities only) has interest arbitration been found unconstitutional. Twenty-six "charter" cities and counties in California have passed, by referendum, interest-arbitration ordinances that have withstood constitutional muster. Therefore, the weight of authority is that statutes mandating interest arbitration are constitutional, especially where standards are provided to guide the arbitrator's decision making, and the arbitrator is chosen from those approved for interest arbitration by the pertinent neutral labor relations agency.

The claimed 'narcotic effect'

This criticism holds that parties will repeatedly engage in interest arbitration rather than serious bargaining and voluntary settlement, in an effort to get "a little bit" more from the arbitrator than can be attained in bargaining itself.

The empirical evidence in this area shows instead that while interest arbitration procedures are more often invoked during the years immediately following approval of such systems by state legislators or the voters, voluntary settlement rates tend to increase over time as the parties gain experience under such systems.[6] One study found that over time, interest arbitration evolves into less of a judicial procedure and more of a search by the parties and the arbitrator for mutual accommodation, particularly in the tripartite arbitration systems described earlier.[7] There is thus a clear indication that both parties in interest arbitration are getting the message that the arbitrator's decision may not be as good a deal for both of them as a bilaterally negotiated, voluntary agreement. The evidence supporting such a claimed "narcotic effect" is, therefore, little more than minimal and largely nonexistent as parties mature in their bargaining relationship under interest arbitration statutes.

The claimed 'chilling effect'

Another major criticism of interest arbitration is that it "chills" collective bargaining by directing the parties' attention toward the interest arbitration procedures rather than toward voluntary settlement, and that interest arbitration has strayed from its expected role of serving as a device for resolving those few remaining issues that the parties themselves could not resolve despite good-faith bargaining, and has instead become, in effect, a full-blown substitute for bargaining.

If this view is correct, it should be evidenced in two ways. First, there should be widespread use of interest arbitration in lieu of negotiated settlements. Second, those arbitrated impasses should each involve a substantial number of issues resolved by the interest arbitrator instead of by the parties.

Studies of these elements in numerous jurisdictions generally refute both of these claimed "chilling effects," and find such an effect only to a minimal degree at best. On the first of those claims, among the approximately 35 states with interest arbitration statutes, the most comprehensive data has shown that fewer than 10 percent of all disputes subject to interest arbitration are actually taken to arbitration, and that a high percentage of those cases proceeding to arbitration are settled

More *INTEREST ARBITRATION*, **Page 39**

Retiring from law, he turns to Lincoln

Missoula lawyer also teaches 8th grade, high school and college

By **Rob Chaney**
of the Missoulian

As we start the steep slide into the 2008 presidential election campaign, the Feb. 19 observance of Presidents' Day might be a good time to consider how Abraham Lincoln came to office.

"Lincoln didn't campaign," said Larry Mansch, a Missoula lawyer and educator who recently published "Abraham Lincoln, President-Elect."

"His managers considered him a country backwoodsman who looked funny. So they had other people campaign for him and let his speeches do the talking."

Due to the different inauguration date at the time, Lincoln had four months between his election and his first day as the nation's 16th president. He spent much of that time on a railroad tour of the country. Mansch said Lincoln essentially campaigned in reverse, reaching out to the people who had already voted for him.

"He was trying to drum up support for the war he knew was coming," Mansch said. "He was recruiting on that train trip, appealing to people's patriotism and their sense of right and wrong."

Before Lincoln took office, seven Southern states seceded from the Union, all but guaranteeing the Civil War. That conflict eventually consumed almost all of his attention.

"He was concerned with ending that war," Mansch said. "We have none of his thoughts on unemployment or health care or foreign relations. He spent his time building consensus to get hundreds of thousands of young men to go fight. I think our presidents today, when they're at their best, are able to reach out and build that consensus. When they go it alone, that's when they run into trouble. Lincoln kept his mind on the ultimate issue of preserving the Union. That's why I admire him so much."

Missoulian Photo

Larry Mansch with a bust of Abraham Lincoln.

MANSCH DATES HIS own fascination with Lincoln to his own birthday, Feb. 12, which happens to be Lincoln's as well. His classroom at St. Joseph Elementary School has a life-sized cutout of Lincoln in one corner, and photos of the president's birthplace and his presidential library on the walls. It's a fascination his students have learned to appreciate – and use.

"If we're about to have a test or something, we know we can get him off track by asking a Lincoln question," said eighth-grade math student Paul Heffernan. "Somebody will say, 'Was Robert E. Lee a traitor?' and he's off."

MANSCH RETIRED after 20 years of practicing law in Missoula. Today, in addition to eighth-grade math, he teaches the history of law at Loyola Sacred Heart High School and a law class at the University of Montana School of Law. And he is a lieutenant colonel in the National Guard's Judge Advocate General service.

After publishing his book on Lincoln's pre-inauguration period in 2005, Mansch earned a fellowship from the Lincoln Presidential Library to research another book, this time looking at the man's early law career. He hopes that legal research will reveal how the country lawyer reached the national

What do you do in your spare time?

When not practicing law, many Montana attorneys practice fascinating hobbies, have scholarly interests or participate in sports. We know one lawyer who writes music and plays it on his mandolin, others who write books, paint, carve or sculpt works of art, and one judge who climbs mountains.

The Montana Lawyer would like to hear about State Bar members with interesting hobbies and interests, both to present in the magazine and to display the members' works at the Bar's Annual Meeting in Missoula in September.

If you or any judge, lawyer, or legal assistant that you know has a pasttime that we should display, please contact Montana Lawyer Editor Charles Wood at (406) 447-2200 or *cwood@montanabar.org.*

scene.

We do know the self-taught Illinois attorney handled everything, including four murders in one year and seven trips to the U.S. Supreme Court. Mansch found it somewhat ironic that Lincoln's political advisers didn't want him on the national campaign, considering much of his political fame came from his public debates with senatorial challenger Stephen Douglas.

"Those things would draw 20,000 or 30,000 people," Mansch said. "It was literally like the Super Bowl of the day. They'd give 90-minute speeches and then turn around and make 30-minute rebuttals. That's a long time to talk."

And then there was Lincoln's understanding of what he didn't know. "We expect our presidents today to be experts on everything," Mansch said. "When Lincoln was asked about some economic plank, his response was: 'I'm going to look into it.' "

As it happened, Lincoln had little time to look into those other things. Just five days after the end of the Civil War and a month after his inauguration for a second term, Lincoln was shot and killed by John Wilkes Booth on April 14, 1865.

"He would have been judged on everything else he did in his presidency if he hadn't been assassinated," Mansch said. "He left lots of railroad questions behind, and lots of Native American questions. Reconstruction would have been a lot different if he had lived, and I think we would not have sunk so far and so quickly as we did. Intellectually, he was just a giant. He could see things and reason through things that other people couldn't. If he'd lived, I don't know if he would have made Mount Rushmore, but he'd have been in our Top 10." ❍

Courts

Court issues major rule changes on civil procedure and court records

The Montana Supreme Court in February issued three orders that affect attorneys and the practice of law in state courts. Those orders:

■ Adopted rules for privacy and public access to court records

The Supreme Court ordered that new rules on privacy and public access to court record become effective on Dec. 31, 2007. The Court said it issued the order "recognizing that certain rules or parts thereof may become applicable only when the technology contemplated by the rule or part thereof becomes available to the courts."

In November 2005, the Court's Commission on Technology (COT) established a task force to develop and recommend to the Montana Supreme Court comprehensive policy and rules to govern electronic access to Montana's Court records. The Task Force was instructed to develop its recommendations within the context of two fundamental rights guaranteed under Montana's Constitution: the Public's Right to Know, Article II, Section 9, and the Right of Individual Privacy, Article II, Section 10.

The COT also directed that the Task Force be interdisciplinary and represent those institutions and persons with the greatest stake in the policy and rules developed. The Task Force met seven times between December 2005 and March 2006 in duly noticed public meetings. In one or more of those meetings, representatives of the courts, court administration, the media, and the Freedom of Information Hotline were also present. In this series of meetings, the Task Force drafted policy and rules based on guidelines published by the National Center for State Courts and the State Justice Institute. The policy and rules were modified in some instances to accommodate Montana's Constitution and its statutory and jurisprudential law.

On May 15, 2006, the Task Force's recommendations were presented to the COT , which unanimously approved the policy and rules. The Court ordered a three-month comment period.

The court order and the new rules, in both Word and .pdf formats, can be found at the Montana courts' web site at *http://www.montana-courts.org/newrules.asp.* People unable to access these documents electronically may request a paper copy through the State Law Library, PO Box 203004, Helena MT, 59620-3004 (406-444-1977) upon advance payment of photocopying and postage charges.

■ Revised Montana Rules of Civil Procedure with respect to discovery of electronic information

In a Feb. 28 order, the Supreme Court adopted a proposal to amend Rule 26 of the Montana Rules of Civil Procedure, and other related rules, to facilitate the discovery of electronic information.

The Court said the revisions help Montana "conform more closely with recent amendments to the Federal Rules of Civil Procedure on this same issue."

The Advisory Commission on Rules of Civil and Appellate Procedure appointed a subcommittee to study whether the Supreme Court should amend the Montana rules with respect to the discovery of electronic information. The subcommittee reported back with a "Majority Proposal" and a "Minority Proposal." The Commission unanimously supported amending Rule 26, and had both the Majority Proposal and the Minority Proposal published in the August 2006 edition of *The Montana Lawyer* and followed by a public-comment period. The Commission also invited members of the bar and the public to

Dissent on malpractice opinion clarifies when a person becomes a client, *today*

By **Betsy Brandborg**
legal counsel
State Bar of Montana

The Montana Supreme Court issued a significant opinion on attorney malpractice on Jan. 17 – *Redies v. ALPS* 05-438, 2007 MT 9. It's a long opinion, with a concurrence by Justice Rice and dissents by Justices Cotter and Nelson. The critical point is captured in the final paragraph in Justice Nelson's dissent:

> It should be clear, henceforth, that the "privity of contract" defense will no longer provide an insurer with a reasonable basis in law for denying or contesting a third-party legal malpractice claim, and that the determinative question in such cases is whether the attorney placed himself or herself in such a relation toward the third party that the law will impose upon him or her a duty, sounding in tort, to act in such a way that the third party will not be injured.

In short, Montana attorneys may owe duties to non-client beneficiaries of their legal services.

The Facts:

Hurt in a bicycling accident in May 1995, Redies was comatose for two weeks and suffered a brain injury. A certified public accountant was appointed conservator, and the CPA in turn hired an attorney for legal advice concerning the management and administration of Redies' estate. Redies owned significant assets and she did not have any health insurance. Because of these assets, Redies was denied Medicaid. The CPA, attorney and others chose to deplete Redies' estate so she could qualify for Medicaid, supervised care and social security.

Redies got better, and began questioning in 1998 the disposition of her assets as she was subsisting on SSI payments.

Lawsuits resulted, two of which I'll summarize here.

The Litigation:

The attorney was sued. At issue was whether the attorney should have established a self-sufficiency trust that would have qualified Redies for Medicaid while preserving her assets. ALPS was the attorney's malpractice insurer.

The litigation was settled after District Court Judge Baugh in November 2002 granted Redies' motion for a pretrial ruling that the attorney owed Redies a duty of care when he rendered legal advice to the CPA concerning the management of her estate.

Then Redies sued ALPS for unfair trade practices and bad faith, among other things. ALPS's defense was that it had a reasonable basis in law for contesting Redies' claim—that the attorney for the conservator did not owe a professional duty of care to Redies. In an order District Court Judge Todd agreed, explaining that "not until 2004, when the Montana Supreme Court issued its opinion in a case of first impression, [in *Watkins Trust v. Lacosta*, 2004 MT 144, 321 Mont. 432, 92 P.3d 620] were Montana attorneys held to owe duties to non-client beneficiaries."

The Appeal to the Montana Supreme Court:

Judge Todd's order granting summary judgment was reviewed de novo by the Montana Supreme Court. The issue at the heart of the Court's discussion was whether ALPS had a reasonable basis in law for contesting Redies' claim. And, the Court ruled, reasonableness was a question of law for the Court to determine, rather than a fact question for a jury.

Whether ALPS was reasonable, in turn, depended on interpreting relevant legal precedent at the time ALPS proffered the defense in 2001 and 2002. So the issue was: Did the legal landscape of 2001 and 2002 reasonably permit ALPS's argument that an attorney retained by a conservator did not

attend a meeting coinciding with the State Bar Annual Meeting in Bozeman, to provide comments on the proposal.

The Commission voted 6-1 in favor of adopting the Majority Proposal, which the Supreme Court then adoped.

The Court order and the new rules can be found at *http://www.montanacourts.org/newrules.asp.*

■ Extended comment period on proposed new Rules of Appellate Procedure

On Jan.10, 2007, the Montana Supreme Court ordered a public-comment period on proposed revisions to the Montana Rules of Appellate Procedure, until March 30. But in order to give the proposed rules more exposure, the Court has decided to extend the public comment period to end at 5 p.m. on April 16. The Court wants each person submitting comments to file an original and seven copies with the clerk of the Supreme Court.

The proposed revisions to the Montana Rules of Appellate Procedure can be found at *http://www.montanacourts.org/supreme/proprules.asp.* ❍

owe a duty to the protected person?

After considerable analysis, the Court ruled that yes, ALPS' defense in 2001 and 2002 was reasonable because the question was unresolved until 2004, when the Court decided *Watkins Trust*. In *Watkins Trust*, the Court held "as a matter of first impression in Montana" that a drafting attorney owes a duty to non-client beneficiaries named in the drafted instrument. Accordingly, the Court affirmed the District Court's conclusion that ALPS was entitled to judgment as a matter of law.

The Dissents:

Justice Cotter dissented from the premise underlying the majority's opinion that Redies was a non-client or third party beneficiary of the attorney's and all the conclusions in the majority opinion that flowed from that premise. She pointed to the record demonstrating that the attorney had in fact signed documents as "Attorney for Ms. Redies."

"It mystifies me" Justice Cotter wrote "that we could conclude that Redies was at best a third-party beneficiary to whom [the attorney] did not owe a duty of professional care."

Justice Nelson also dissented. He agreed with Cotter that Redies was the attorney's client and that ALPS should be bound by the attorney's admissions. He also agreed with the majority that the decision depended on the legal landscape as it existed during the negotiations that took place in 2001 and 2002. Where he parted ways with the Court

More *DISSENT CLARIFIES*, **Page 27**

Oral arguments

April 2007:

■ **Cause DA 06-0256** – REBEKAH KLEIN, Plaintiff and Appellant, v. THE STATE OF MONTANA DEPARTMENT OF CORRECTIONS, Defendant and Respondent.

Oral argument is set for 9:30 a.m. Wednesday, April 4, in the Montana Supreme Court courtroom in Helena.

■ **Cause OP 06-0232** – LORI OBERSON, Legal Guardian for BRIAN MUSSELMAN, et al., Plaintiffs, Respondents and Cross-Appellants, v. UNITED STATES OF AMERICA, et al., Defendant, Appellants and Cross-Respondents.

Oral argument is set for 10 a.m. Friday, April 20, in the University Theater at the University of Montana in Missoula. An introduction to the oral argument will begin at 9:30 a.m.

Attention Lawyers!

Law Day is rapidly approaching and volunteers are still needed

Plans are under way to make this year's Law Day a tremendous success. Because of the theme, "Ensuring democracy, empowering youth," a large effort is being made to guarantee that Montana students are given an opportunity to interact with informed and captivating members of the legal community.

To accommodate the schedules of schools and guest speakers, this year's activities will take place throughout the entire week of May 1st.

There are several ways for you to be involved in this year's activities – as a guest speaker or as a project planner. First, contact your local bar and see what activities are being planned in your area. If you live in one of Montana's major urban centers, see if there is a Law Day coordinator that can help you with placement. Or just initiate things on your own. Check with your local schools and see if they'd be interested in having you as a speaker.

The Law Related Education Center is always more than happy to provide lesson plans, lecture materials, or advice on project ideas. For assistance or just to check in on some of the statewide activities, contact:

Andrew Fox
406/442-7600 x 1205
afox@mtlsa.org
LRECenter web site at *www.montanabar.org/groups/lrecenter/index.html*

Free, new magazine for Bar members

The Complete Lawyer is an excellent professional resource for attorneys

The State Bar of Montana has introduce a new e-zine (a magazine found only on the web) for its members. *The Complete Lawer* is a resource (bookmark it on your computer!) to help guide attorneys in their careers, businesses, and personal lives, tackling important topics facing lawyers. The magazine can be found at *http://montana.thecompletelawyer.com.* The theme of the current magazine is "Focus on Selling" (marketing your law practice), including the articles:

- "Selling:" The Most Misunderstood Word In Marketing
- A Successful Attorney = A Powerful Brand
- Winning Strategies of the Best Women Rainmakers
- A Non-Traditional Approach To Marketing, by Montana attorney Antoinette Tease, of Billings.

In the magazine's other departments, you will find such articles as:

COACHING & MENTORING – Breaking Free of the Rat Race

MANAGING YOUR PRACTICE – Goal Setting for 2007

NAVIGATING YOUR CAREER – How Core Values & Family of Origin Impact Your Career

PERSONAL DEVELOPMENT– Is There a Place for Emotion in the Law?

HEALTH – We are Making Terrible Choices about Our Health

SURVEYS & RESEARCH – Stress Kills: What are the Early Warning Signs?

WOMEN IN THE LAW – Are Your Own Gender Biases Holding You Back?

FINANCIAL MATTERS – Make an Extra $15,000 a Year With 5 Quick Financial Planning Strategies

Other departments include book reviews, letters, humor and trend watch.

http//:montana.thecompletelawyer.com

Our growing list of membership benefits

State Bar Group Health Plans – life and AD&D coverage, long-term care, disability.

Work-Life Balance Employee-Assistance Program

ALPS Malpractice Insurance

LexisNexis Legal Research – State Bar members are eligible for exclusive, discounted benefits.

Technology Links & Advice – from our Technology Section.

Bar Bookstore – Montana legal manuals and CLE tapes.

Premiere Global Conference Calling – competitive rates for members on conference calling and web services.

VisionNet Videoconferencing – connects people across Montana and the world for depositions, interviews and meetings.

***The Montana Lawyer* magazine** – delivered free to members.

***The Complete Lawyer* magazine** – New! See article at left.

Bank of America Credit Cards – State Bar Mastercard or Amex card at special low-interest introductory rates.

The Career Center – Tools and services to bring legal professionals and employers together nationwide.

ABA Career Resource Center

Hertz Car Rental – offers members special year-round discounts.

Go Next Travel – uniquely designed travel programs for Bar members, their families and friends.

Find links to all these benefits at
http://www.montanabar.org/membership/index.html

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 MANUALS

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

Civil Jury Instructions
(MPI – MT Pattern Instructions)
1999 w/2003 Update, 400 pages
Book $150 / CD $150 / Both $200

Criminal Jury Instructions
1999 w/2003 Update, 400 pages
Book $180 / CD $80 / Both $105

Handbook for Guardians & Conservators
2005, 60 pages incl. 5 forms
Book $120 / CD $100 / Both $150

2007 Lawyers' Deskbook & Directory
400 pages
Book and mid-year update CD $15

MT Family Law Form Book
2005, 93 pages incl. 26 forms
Book $95 / CD $95 / Both $150

MT Freedom of Information Guide
2003, 138 pages
Book $25

Public Discipline Under Montana Rules of Professional Conduct
2005, 104 pages annotated
Book $35

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

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

Step-Parent Adoption Forms
2003, 5 forms
Book $20

U.S. & Montana Constitutions
2006, pocket-sized booklet
$4 each

MONTANA VIDEO / CD SEMINARS

For rentals, send 2 checks – one for $50 rental fee, one for $25 security deposit

2005 State Bar Annual Meeting
w/Tom Brokaw speech, Jameson Award Presentation & "On the Air" with Bar members
CD, free, please return

2005 Chapter 13 Bankruptcy CLE
5.0 CLE credits
Set of 4 CDs, rental
Set of 4 VHS tapes, rental
Printed accompanying CLE materials available, see "CLE Materials" list on next page

2004 Equal Justice Conference
5.0 CLE credits, including 2.0 Ethics credits
Set of 4 CDs, rental

2004 Family Law CLE
5.0 CLE credits, including 1.0 Ethics credit
Set of 4 VHS tapes, rental
DVD, rental

Please send the item(s) circled above in Book ___ CD ___ Both Book & CD ___
Videotape___ DVD ___ format to:

Name _____ Mailing Address _____
Street Address _____City, State, Zip_____
Amount Enclosed $_____(Payment must accompany all orders)
Credit Card: Visa ___ Mastercard ___ Account No: _____
Exp. Date _____ 3-digit PIN on the back of your card _____
Mail order & payment to: **State Bar of Montana, PO Box 577, Helena MT 59624**

State & Federal Court Decisions Affecting Criminal Law (3/14/06)
2.0 CLE credits
DVD Rental

Guardian Ad Litem's Role in Abuse & Neglect Proceedings
2.50 CLE credits
VHS tape, free, please return

2005 Information Technology CLE
1.50 CLE credits
DVD, rental

2004 Law & Psychology CLE
5.0 CLE credits, including 3.5 Ethics
VHS tape, rental
DVD, rental

2005 Legislative Update CLE
5.0 CLE credits
VHS tape, rental

2005 MT Constitution & School Funding
5.0 CLE credits
Set of 3 VHS tapes, rental

2004 Montana Ethics CLE, Butte
5.0 CLE credits, including 5.0 Ethics credits
VHS tape, rental
CD, rental
Printed accompanying CLE materials available, see "CLE Materials" list below

Steven Keeva, 2004 UM Blakenbaker Lecture on Professional Responsibility
CD, free, please return

CLE MATERIALS

CLE outlines for all January through June 2006 CLEs
CD only, $35

2004 Montana Ethics CLE
300 pages, $35

2005 Chapter 13 Bankruptcy CLE
150 pages, $35

Road Show itinerary being changed

The annual State Bar Road Show, in which State Bar officers and staff meet and hold a CLE with local attorneys in various parts of the state each spring, is undergoing some major changes.

Each year, a past Road Show has traveled to one specific area of the state – Western Montana, North Central Montana, Eastern Montana, etc. – where four of the Road Show seminars were held in four of that area's cities. Past Road Shows were a continuous event – for the presenters – over three or four days. Last year, the three-hour Road Show events were from May 22-24 in Glasgow, Sidney, Miles City and Billings.

Under a new, pilot plan, the Road Show will still serve four cities, but each will be in a different area of the state and presentations will occur in different months. A Road Show may be held in Kalispell in April, Miles City in May, Havre in June and Bozeman in July.

The new plan responds to a request from Bar members who wanted more Road Show opportunities in their areas of the state than just once every four or five years. It also allows State Bar Trustees to attend their area's meeting for one day without having to attend a long multi-day stretch of Road Show in a distant area.

Two legal 'stars' at Annual Meeting

The State Bar's 2007 Annual Meeting in Missoula is beginning to take shape. It will have a different look this year and will feature two national legal "stars."

The Annual Meeting Committee has planned the date of the two-day meeting to coincide with the University of Montana Tamm-Jones lecture by U.S. Supreme Court Chief Justice John Roberts, which State Bar members are encouraged to attend.

The Roberts lecture will be at noon on Thursday, Sept. 13, on the University campus. Later that day, former ABA President Mike Greco will address the State Bar Annual Meeting Banquet. The rest of Sept. 13 will be the classes of Rookie Camp for new attorneys. A Rookie Camp II, for attorneys with more experience is also in the planning stage and may be scheduled for Sept. 13.

Friday, Sept. 14, will feature a full day of CLEs, with the preliminary theme of "The Legal Profession in Transition."

Small-firm, solo-practice members sought

The State Bar of Montana CLE Institute recently sponsored a seminar in Missoula on Small Firm/Solo Practice Tips. Speakers covered topics such as Achieving Success, Lawyer Mobility, Hiring and Firing Associates and other Staff, Ethical Obligations, and a View from the Bench.

Several registrants indicated an interest in forming a Small-Firm/Solo-Practice section or committee of the State Bar in an effort to share ideas and information.

Approximately 60 percent of attorneys in Montana are in a solo/small-firm practice, according to the latest Bar survey.

If you would be interested in forming and participating in such a section or committe, please send your contact information to the State Bar at PO Box 577, Helena, MT 59624; or e-mail: jdiveley@montanabar.org; or fax: (406) 442-7763.

STATE BAR CALENDAR

March 21-24
Western States Bar Conference, Hawaii

March 23
Best of State CLE, Great Northern Hotel, Helena

March 23
Certified Legal Assistant exam, State Bar offices, Helena

March 26
Annual Meeting Committee conference call, 4 p.m.

March 30
Oil & Gas CLE, Billings Hotel & Convention Center, Billings

April 1
Completed dues statements and CLE affidavits due back at State Bar office

April 12
State Bar Executive Committee dinner meeting, Missoula

April 13
State Bar Board of Trustees meeting, UM School of Law, Missoula

April 16
Board of Bar Examiners meeting, 10 a.m., State Bar offices, Helena

April 23
State Bar Law Day Forum, featuring Chief Justice Karla Gray, Carroll College

April 25
Deadline for advertising and content for the May edition of *The Montana Lawyer* magazine

May 1
Law Day. See www.montanabar.org/groups/lrecenter/index.html for information.

May 1
State Bar Law Day Forum on environmental issues, Montana College of Technology, Butte

May 4
CLE Institute spring meeting, location to be announced

May 4
State Bar Executive Committee meeting, 10 a.m., State Bar offices, Helena

May 8
Swearing-in ceremony for new Montana lawyers, 10 a.m. , Montana Supreme Court chambers, Helena

May 8
Swearing-in ceremony for new federal-court lawyers, 1:30 p.m., Max Baucus Federal Building, Helena

Coming March 30

Oil & Gas Update CLE

By the CLE Institute of the State Bar of Montana

at the Billings Hotel & Convention Center
Billings

7.0 CLE credits

Register for $165; discounts for attorneys practicing for fewer than five years and for law clerks; free for full-time judges

The program & registration brochure has been mailed to State Bar members, or check CLE:Upcoming CLEs at www.montanabar.org, or call (406) 447-2206

Topics include:

- Horizontal Bakken Development in Richland County
- New Rules for Deducation of Expenses from Royalty Payments
- Title Problems
- Understanding Lease Forms
- Leasing from a Company Perspective
- Right to Access; Surface Damages

Upcoming CLE seminars for Montana lawyers

March 23 Helena – Great Northern Hotel
Best of State CLE 6.0 CLE credits, including 1.0 Ethics credit. Presented by the CLE Institute of the State Bar of Montana (406) 227-2206. See details of program, speakers and registration at CLE/Upcoming CLEs at *www.montanabar.org*

March 23 Missoula – Holiday Inn Parkside
Examining & Resolving Title Issues 6.0 CLE credits, including 1.0 Ethics credit. Presented by National Business Institute, (800) 930-6182

March 27 Miles City – Holiday Inn Express
Privacy & the Right to Know 6.50 CLE credits. Presented by the state Personnel Division, (406) 444-3985

March 30 Billings – Billings Hotel & Convention Center
Oil & Gas 7.0 CLE credits. Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. See details at CLE/Upcoming CLES at *www.montanabar.org*

March 30 Billings – Crowne Plaza Hotel
The Art of Settlement 6.0 CLE credits, including 1.0 Ethics credit. Presented by National Business Institute, (800) 930-6182

Other web & phone CLEs for Montana credit are:

■ MTLA's SeminarWeb Live! Seminars at *www.seminarweblive.com/mt/index.cfm?showfullpage=1&event=show AppPage&pg=semwebCatalog&panel=browseLive*

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

April 18-19 – Fairmont Hot Springs
Family Mediation CLE credits pending. Presented by the Montana Mediation Association. Sign up on the Association's web site in conjunction with the spring conference April 20-21

May 9-12 – Bozeman
Mediation 4-Day Fundamentals CLE credits pending. Presented by the Center for Collaborative Solutions, (406) 587-2356, mewolfe@imt.net

June 15 - Bozeman
5th Day Mediation CLE credits pending. Presented by Center for Collaborative Solutions, *mewolfe@imt.net* or (406)587-2356

LEGISLATURE, **from Page 5**

admission to the State Bar if the person had graduated from any law school, whether or not the school is ABA accredited. It missed the transmittal deadline after it was tabled in the Senate Judiciary Committee.

OTHER BILLS on the State Bar's Bill Watch List (see *www.montanabar.org*), but on which the Bar's Executive Commitee has not taken a stand are:

■ **HB 251,** authorizing a city or town to establish a city court of record, was passed by the House and was scheduled for a hearing in the Senate Judiciary Committee on March 8.

■ **HB 402,** revising fees collected by the Supreme Court, was also set for a hearing in the Senate Judiciary Committee after it was passed by the House on Feb. 12. The bill would require cross-appellants to pay a filing fee, adding other fees and increasing certain current fees.

■ **HB 722,** by attorney-Rep. Joey Jayne, D-Arlee, requiring justice courts to be courts of record, died after it was tabled in the House Judiciary Committee.

■ **HB 804,** containing the budget for Montana's Judicial Branch – $33.6 million for the 2008-2009 biennium – received its first hearing in the House Appropriations Committee on March 7. Appropriations bills were not required to meet the Feb. 27 deadline for transmittal to the opposite legislative chamber.

■ **HJ 43,** a resolution calling for the study of major aspects of the Judicial Branch, was passed by the House on March 7. Among other things, the study would determine if there is adequate legislative oversight of the Judicial Branch; identify any public concerns with the Judicial Branch that need to be addressed through legislation; determine if the Montana Canons of Judicial Ethics, Judicial Standards Commission and employee Code of Conduct are approporiate; assess whether the current processes for judicial recusal, disqualification, or impeachment are correctly written and functioning as they should; and examine the appropriateness of judicial opinions. Joint Senate-House Resolutions are not bound by the Feb. 27 bill-transmittal deadline.

■ **SJ14,** which called for an interim study on the requirement of candidates for the Montana Supreme Court to be a graduate of a law school accredited by the ABA, died after it was tabled in the Senate Judiciary Committee. This was another bill by Sen. Jerry O'Neil.

KEEP WATCHING the State Bar's Bill Watch List at *www.montanabar.org* to see whether these and other bills are introduced and become law. We'll have an update in the April *Montana Lawyer*.

Meanwhile, the complete text of the bills can be found at the Legislature's web site at *http:leg.mt.gov*. ❍

From the **Washington Post**

Open call from the Patent Office – agency web site will solicit advice

The government is about to start opening up the process of reviewing patents to the modern font of wisdom: the Internet.

The Patent and Trademark Office is starting a pilot project that will not only post patent applications on the Web and invite comments but also use a community rating system designed to push the most respected comments to the top of the file, for serious consideration by the agency's examiners. A first for the federal government, the system resembles the one used by Wikipedia, the popular user-created online encyclopedia.

"For the first time in history, it allows the patent-office examiners to open up their cubicles and get access to a whole world of technical experts," said David J. Kappos, vice president and assistant general counsel at IBM.

It's quite a switch. For generations, the agency responsible for awarding patents, one of the cornerstones of innovation, has kept its distance from the very technological advances it has made possible. The project, scheduled to begin in the spring, evolved out of a meeting between IBM, the top recipient of U.S. patents for 14 years in a row, and New York Law School Professor Beth Noveck. Noveck said the initiative will bring about "the first major change to our patent examination system since the 19th Century."

Most federal agencies invite interested parties to weigh in on proceedings, and even the patent office allows some public comment, but never to the degree now suggested.

Until now, patent examiners rarely sought outside opinions, instead relying on scientific writings and archived records of previous patents. For security reasons – in particular, out of concern that examiners could inadvertently reveal proprietary information if their online searches were tracked – patent officials have at times even been barred from using the Internet for research.

But their mission has grown increasingly unwieldy. Last year, the agency's 4,000 examiners, headquartered in Alexandria, Va., completed a record 332,000 applications. The tremendous workload has often left examiners with little time to conduct thorough reviews, according to sympathetic critics.

Under the pilot project, some companies submitting patent applications will agree to have them reviewed via the Internet. The list of volunteers already contains some of the most prominent names in computing, including Microsoft, Intel, Hewlett-Packard and Oracle, as well as IBM, though other applicants are welcome.

The patent office said the program will begin with about 250 applications from the realm of software design, where it is especially difficult for examiners to find related documentation. Unlike specialists in many other fields, software designers often forgo publishing their innovations in technical journals and elsewhere.

Anyone who believes he knows of information relating to these proposed patents will be able to post this online and solicit comments from others. But this will suddenly make available reams of information, which could be from suspect sources, and so the program includes a "reputation system" for ranking the material and evaluating the expertise of those submitting it.

With so much money riding on patent decisions – for instance, a federal jury ordered Microsoft last month to pay $1.52 billion for infringing two digital-music patents – the program's designers acknowledge that the incentive to manipulate the system is immense. "I'm sure there will be a degree of gaming. There always is," IBM's Kappos said.

New royalties 'disaster' for music streaming

Internet radio companies are revving up for a fight with the Copyright Royalty Board that could lead to the halls of Congress and – some fear – the end of streaming music stations in the U.S., *Wired* magazine reported.

In a March 2 bombshell, the Board released new royalty rates representing a potential tenfold increase webcasters – that serve more than 50 million listeners – would have to pay out.

In the old system, webcasters paid the Recording Industry Association of America – which pushed the Board to adopt the new rates – a percentage fee based on audience reach. The new system charges all webcasters a flat fee per song per listener. In 2007, streaming companies would owe $0.0011 per song per listener (rates change each year).

That amount may not sound like much, but it adds up quickly. AOL Music, with its average of 210,694 listeners for November 2006, retroactively owes about $1.65 million in sound-recording royalties for that month alone (and that doesn't include songwriting royalties). By the end of this year, the company could owe roughly $20 million – unless the rates are overturned by Congress.

Services that offer thousands of channels, such as the free Pandora, could "disappear," one analyst said. Overseas competitors which are removed from the Board's restrictions, could easily claim Pandora's market share. If Pandora has to pay the annual $500 minimum for each channel, its sound-recording royalty bill for 2006 alone would be capped at about $2 billion (based on the service's 300 million registered users, each of whom gets to create up to 100 unique channels).

Citizens seek to learn more about courts

Informal group forms in Montana county to pay visits on judges

By **Linda Halstead-Acharya**
of the Billings Gazette

New faces have been showing up for court in Stillwater County (in Columbus, Mont.), not because they've been summoned but because they want to learn more about local government in action.

Darlene Wills of Absarokee is one of them. She breathed a sigh of relief earlier this week when she learned the man charged with breaking into her garage and stealing her car was still being held at the Yellowstone County jail.

Such information would seem easily accessible, but that's not always the case for someone unfamiliar with the legal system.

Finding that information, however, just got easier for Wills, thanks to a newly formed citizens forum in Stillwater County.

"Oh, they've been a big source of support," said Wills, who credits the group with helping her get the wheels of justice moving on her case.

The fledgling organization, known as the Citizens for Effective Government, formed late last fall as a spin-off from

More *CITIZENS SEEK*, Page 29

Montana Justice Foundation Issues Call for 2007 Grant Proposals

The Montana Justice Foundation, a statewide funder of access to justice programs with a mission of making justice accessible to all Montanans, announces its 2007 call for grant proposals. The Montana Justice Foundation makes grants to non-profit organizations qualified to carry out the following charitable objectives of the Foundation:

(a) supporting and encouraging the availability of legal services, including services to vulnerable and underserved populations;

(b) increasing public understanding of the law and the legal system through education;

(c) promoting the effective administration of justice; and

(d) increasing public understanding of and access to alternative dispute resolution.

The deadline for submission of grant proposals is Friday, March 30, 2007 (no exceptions). Funding decisions will be made in May.

To receive an MJF grant application or for further information on the MJF grant application process, please visit the Montana Justice Foundation website at:

www.mtjusticefoundation.org

For additional information, please contact MJF coordinator Chris Newbold at (406) 523-3920 or cnewbold@alpsnet.com.

2007 Lawyers' Deskbook & Directory

Errata Sheet

Please make the following corrections: 2/12/07

Page 8

U.S. District Court (Montana)
Hon. Carolyn S. Ostby, Replaces Hon. Richard W. Anderson (retired)

Hon. Keith Strong, Replaces Hon. Carolyn S. Ostby
P.O. Box 2386 727-0028
Great Falls, MT 59403 454-7838 *fax*

Page 11

Montana Supreme Court
Seth Palmer, Replaces Graden Hahn
(Justice Cotter's Legal Research Assistant)

Page 31

Commission on Courts of Limited Jurisdiction
Barb Pepos, Term Expires 1/1/09

Page 32

Criminal Jury Instructions Commission
Jim Wheelis, Replaces William F. Hooks
Term Expires 12/31/10
P.O. Box 200145 841-2001
Helena, MT 59620 841-2003 *fax*
JimWheelis@mt.gov

Page 37

Judicial Nomination Commission
Shirley Ball, Replaces Jack Galt
Term Expires 1/1/11
So. Route Box 206
Nashua, MT 59248

Page 44

Commission on Practice
Ward E. "Mick" Taleff, Replaces Mike Lamb
Term Expires 6/30/10
P.O. Box 609 761-9400
Great Falls, MT 59403 761-9405 *fax*
mail@taleffiaw.com

Page 50

Commission on Unauthorized Practice
Lee Berger, Term Expires 12/31/09

Page 57

3rd Judicial District
Hon. Ray Dayton, Replaces Ted Mizner
800 S. Main 563-4044
Deer Lodge, MT 59722 563-4077 *fax*

Page 58

9th Judicial District
Hon. Laurie McKinnon, Replaces Marc Buyske

Page 168

County Officials – Gallatin County
Both JP listings for Judge Seiffert should be under Carbon County (page 167)

Page 171

County Officials – Missoula County
Municipal Judge Marie Andersen (not Anderson)
Phone: 552-6178; Fax: 552-6178

Page 173

County Officials – Ravalli County
JP/City Judge listings for Ryegate and Lavina City should be listed under Golden Valley County (page 169)

Page 174

County Officials – Toole County
Sheriff Donna Matoon
Address: P.O. Box 550, Shelby, MT 59474

Page 210

Annual Meeting Committee
Add: Katie DeSoto 523-2500
P.O. Box 7909 523-2595 *fax*
Missoula, MT 59807 *kldesoto@garlington.com*

Page 223

Lawyers' Fund for Client Protection Board
John Kauffman, Email: *jkauffman@kkmlaw.net*

Page 230

Lawyers Helping Lawyers Network

Add: Skye E. Lazaro 207-4095
504 El Capitan Loop
Stevensville, MT 59870 *skye.lazaro@umontana.edu*

Page 231

Lawyers Helping Lawyers Network, *continued*

Mike Larson, Phone: (406) 683-6525
Email: *lawyerhelper@bmt.net*

Page 234

Resolutions Committee

Add: Keith A. Maristuen 265-6706
P.O. Box 7152 265-7578 *fax*
Havre, MT 59501 *kmaristuen@bkdlaw.org*

Page 288

Local Bar Presidents

Eric Hummel, Replaces Dan Wilson
P.O. Box 1678 257-6001
Kalispell, MT 59903-1675 257-6082 *fax*
Eric@scottkalviglaw.com

Page 308 **Inadvertently omitted:**

Brubaker, Jessica M. Deering (406) 442-8560
33 S. Last Chance Gulch (406) 442-8783 *fax*
P.O. Box 1715 Active – 10/2006
Helena, MT 59624
jmb@gsjw.com

Page 364 **Wrong address printed:**

Ragar, Chris J (406) 585-8891
2050 W. Dickerson, Suite B (406) 585-2420 *fax*
Bozeman, MT 59718 Active – 7/1986

Page 478 **Inadvertently omitted:**

Firm Directory

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Phone: (406) 829-3305 Fax: (406) 829-3303

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Washington, DC 20003
Phone: (202) 546-9575 Fax: (202) 546-0135
www.militarydefense.com

Affiliated Attorneys:
Debra Thatcher Gilcrest (Missoula office)
David P. Sheldon (Washington, DC office)

MAGAZINE CORRECTIONS

- The February edition of *The Montana Lawyer* identified Sen. Jesse Laslovich, a new Anaconda attorney who chairs the Senate Judiciary Committee, as a Republican. He is a Democrat.

- The February M*ontana Lawyer* article misrepresented an aspect about the recent Senate testimony against the death penalty by attorney Ed Sheehy Jr., and with his representation of David Dawson, who was executed. “While the article clearly represented what I said, it was incorrect as to my occupation at the time of the Senate hearing or when I represented David Dawson,” Mr. Sheehy wrote. “The article began with my being a ‘Helena public defender.” This is not true. At both times, I was and am the regional deputy public defender of Region 2 of the Montana Office of Public Defender. However, in appearing before the Senate, I was not appearing for OPD but on behalf of myself as a death-enalty qualified lawyer.”

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The Legal Writer

Judge Mark Painter

Truth is always stranger

In the allegedly rarefied – but actually rather stagnant – air of the appellate court, sometimes the day is unexpectedly enlivened. It was a few weeks ago by, of all things, a motion to strike a brief. Sitting there in a pile of other putatively dull motions, it didn't cry out for immediate attention, even though our "motions meeting" was the next day.

But I dutifully tackled it. This is the upshot – the real decision with the names changed for obvious reasons:

PAINTER, J.

Not wishing to let stand a brief they consider too long, counsel for appellant Smithco, Inc., have moved this court to strike appellees' (a group of insurance companies) joint brief. Smithco advances two arguments, contending the brief (1) put the citations in footnotes (where they belong!); and (2) uses footnotes to "get around" the page limit. And counsel even goes so far as to *redraft* their opponent's brief, inserting the jumble of letters and numbers into the paragraphs – even the references to the record. Thus bollixed up and unreadable, the brief comes out to 38.5 pages, instead of the regulation 35. Egad. And Smithco makes some other objections to the form of the insurers' brief, which we deem even more piddling.

Our dreary day has been enlivened by the thought that lawyers care about one another's prose so much as to redraft it. And that this dispute is so close that it may turn on a few extra pages of a lawyer's argument. We can't wait to read the final version – or maybe we should wait for the movie.

As to citations, they *belong* in footnotes. Putting goofy letters and numbers in the middle of paragraphs destroys readability. We had to do that with typewriters, just as we had to use underlining because typewriters did not have italics. No more.

But Smithco's counsel makes one proper point: the insurers' brief uses talking footnotes interspersed with citation footnotes. Using talking footnotes detracts from the gain in readability achieved by taking the citations out of the text – if footnotes are not for citations only, then the brief declines into law-reviewesque unreadability.

The insurers respond to Smithco's motion by stating that, at least on most points, Smithco is nitpicking or flat-out mistaken. They even cite the first edition of this author's legal writing book (it is now in its third edition). And to clear up any possible problem, they have redrafted and resubmitted their brief – we now have *three* versions – shortening it somehow but not taking out the talking footnotes – having read only part of the cited treatise. We note, though, that the insurers still use 12-point type for the footnotes. We would approve 10-point, which would make their brief even shorter.

We venture a guess that this court's eventual opinion resolving this dispute will be fewer than 20 pages. To both sides we suggest that less is usually more.

And because three judges of the appellate court have nothing better to do than referee a dispute about brief formatting, we hold as follows:

(1) The insurers' redrafted brief (the one they redrafted, not the one Smithco redrafted for them) is substituted for their original one, not because we would have done so in any event, but because it is slightly easier to read, though we wish they had retired the talking footnotes;

(2) Were the reply brief not already filed, we would hold that counsel for Smithco, obviously having free time on their hands, should use some to whittle down their reply brief to 11 pages rather than 15, as they have wasted 4 pages on this motion. But the reply brief is 10 pages, so the penalty is perhaps self-imposed; and

(3) Now that the pleadings are complete, perhaps the case can be decided on its merits.

So ordered.

GORMAN AND SUNDERMANN, JJ., CONCUR.

MARK PAINTER *has served as a judge on the Ohio 1st District Court of Appeals for 12 years, after 13 years on the Hamilton County Municipal Court. He has taught as an adjunct professor at the University of Cincinnati College of Law since 1990. Judge Painter is the author of 340 nationally published decisions, 102 legal articles, and 5 books, including "The Legal Writer: 40 Rules for the Art of Legal Writing." It is available from http://books.lawyersweekly.com. Judge Painter has given dozens of seminars on legal writing. Contact him through his web site, www.judgepainter.org.*

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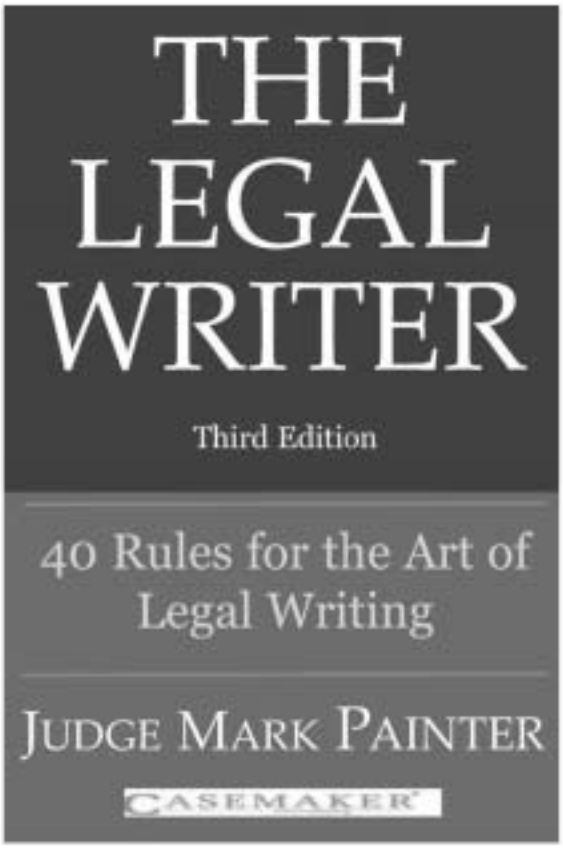

Judge Painter's book is a classic in its field.

Joseph P. Tomain
Dean Emeritus, University of Cincinnati College of Law

Every page of Judge Painter's book is dripping with insights about how to improve your legal writing. There should be a new malpractice claim for overlooking that advice.

Bryan A. Garner
Editor, *Black's Law Dictionary*
Author, *Garner's Modern American Usage*

When I was Cleveland Law Director, we gave Judge Painter's book to every lawyer in our office, and required our attorneys to follow Judge Painter's '40 Rules.' Our writing immediately became more effective and persuasive.

Subodh Chandra
Distinguished Practitioner in Residence and Adjunct Professor of Law,
Case Western Reserve University

How did lawyers become so incomprehensible? Less is more when it comes to effective legal writing. Judge Painter's book is a quick and easy must read for all lawyers, even the old dogs.

Laurie C. Barbe, Partner
Steptoe & Johnson PLLC

This concise guide has earned acclaim from legal-writing experts, law professors, and practitioners. It's an attractive primer that offers uniformly sound pointers for improving your legal writing.

Beverly Ray Burlingame, Partner
Thompson & Knight LLP
From review for *Scribes Journal*

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MLSA starts Child Custody Pro Bono Project

Montana Legal Services Association has developed CLE training packets for Montana attorneys who volunteer to represent children in parenting-plan actions.

The project was funded by the ABA Child Custody Pro Bono Project, and included collaboration with A.W.A.R.E. Inc., a Montana children's mental health provider. The focus of the training is to inform attorneys about children's unique needs during family transitions as well as provide basic information about Montana laws governing parenting-plan actions.

The self-study packet includes a 30-minute DVD narrated by Montana Supreme Court Justice Brian Morris and a notebook of written materials which are approved for 3.0 CLE credits, including 1.5 ethics credits. Funding for the project honors the memory of Ann Liechty, a child-law advocate who lived and worked in Billings.

Legal and mental health professionals across the state assisted in the development of the materials, which are available at no cost for attorneys who accept a Montana Legal Services Association client pro bono. Contact Dana Toole in the Helena MLSA office by calling (406) 442-9830 ext. 21, or e-mail *dtoole@mtlsa.org* to obtain the training materials.

State Bar seeks new trustee for Board

Robert Spoja, State Bar of Montana trustee for Area E resigned on March 1 from the Bar Board of Trustees after taking a job with the Yellowstone County Attorney's office, which is not in Area E.

The State Bar is searching for an attorney who resides in Area E (most of Eastern Montana) to replace him. Send a letter of interest to the State Bar, attn: Chris Manos at PO Box 577, Helena MT 59624. The application deadline is April 6.

The Board of Trustees would like to consider applications for the position and set up interviews during its April 13 meeting in Missoula. Refer to the State Bar By-Laws in the 2007 Deskbook for questions on the position (and for a map of Area E) or call State Bar Bar Executive Director Chris Manos at (406) 447-2203.

LRE Center working on three community forums

The State Bar of Montana's Law-Related Education Center is organizing and sponsored three community discussions about Montana legal issues in three Montana colleges in April and May.

The forums, open to students and the general public, will be focused around Law Day, which is May 1. They will be only part of the LRE Center's support for Law Day activities statewide, said Andy Fox, the Bar LRE Center coordinator.

The forums are scheduled for:

- **Carroll College in Helena on April 23.** Montana Supreme Court Chief Justice Karla Gray is scheduled to speak about the future of the Montana Constitution. Due to Carroll's exam schedule, this lecture will take place before the May 1 Law Day.
- **Montana Tech in Butte on May 1.** It will feature a panel discussion of environmental law in Montana and current issues in Butte. The panel will be made up of six attorneys and one moderator. Three lawyers will represent the industry and business perspective; three lawyers will represent public interest or regulatory organizations.
- **MSU Billings or Rocky Mountain College.** The date for this forum has not been set. It is meant to be a lecture that addresses financial issues that the young-adult population faces, perhaps dealing with identity theft, Mr. Fox said.

Local Bar meets to address latest suicide

Following the suicide of an attorney in February, the Cascade County Bar Association set up a special meeting on March 9 to help local attorneys address issues of stress.

"The tragic death of our friend Steve Hudspeth brings to the forefront our need to remember the practice of law is full of stresses and pressures we don't always deal with very well or appropriately," Cascade Bar President Mick Taleff wrote to local bar members. "In an effort to try to provide some ideas on prevention and help, I've arranged for Mike Larson, the director of the State Bar's Lawyers Helping Lawyers program, to come for a presentation and question-and-answer session on depression and chemical or substance-abuse related issues."

The Cascade Bar was working to obtain CLE credits for attendance at the meeting.

"This is only the most recent incidence of an event (suicide) which has happened far too frequently to our local bar," Mr. Taleff said.

Judge wins achievement award

The Bozeman chapter of Business & Professional Women on Feb. 28 named Gallatin County District Judge Holly Brown its Woman of Achievement for 2007.

"Through her position as District Court judge, (Brown) encourages other women to make positive decisions in their lives and to maintain the highest standards possible in their individual professions," according to BPW.

The award recognizes a woman who has promoted women's interests in areas such as business advancement, and through means such as public service and education.

Judge Brown is the first, and so far only, woman judge in the Gallatin County District Court. She was appointed to the bench in early 2004 by then-Gov. Judy Martz, following the death of Judge Mark Guenther, who died of cancer. She was then elected in 2004 and re-elected in 2006.

Students set up public-interest law web site

Students taking the UM School of Law course on Public Interest Lawyering have developed a web site that might be of interest to Montana Lawyers.

"They post to it daily as part of the course requirements," said Missoula attorney and professor Jim Taylor, who is teach-

ing the course.

One of the recent additions to the web site is a short video on how to find Montana Supreme Court opinions on the web, Mr. Taylor said.

The web site address is:
http://montanapublicinterestlaw.spaces.live.com

Conflict-resolution workshops set for Helena

Two Conflict Partnership Workshops will be presented in Helena by the Montana Consensus Counsel, each taught by Dr. Dudley Weeks, an international confict-resolution facilitator and teacher.

The first two-day workshop will be on March 29-30 at the MACo Building, 2715 Skyway Dr. in Helena. It is an introduction to Dr. Weeks's Conflict Partnership Process and qualifies the attendees for the second workshop.

The second five-day workshop is April 2-6 in Helena. Participants become certified as "Conflict Partnership catalyst facilitators."

The cost of the first workshop is $250; the second costs $1,200. See *http://mcc.mt.gov/Dr Weeksregister.asp.*

DISSENT CLARIFIES, **from Page 14**

was in its assessment of the legal landscape that existed in 2001 and 2002. He argued that the case law was more advanced in holding a professional liable to third parties than the majority recognized.

> "It was absurd to suggest that [the attorney] could hide behind the [CPA] under these circumstances. [The CPA] hired [the attorney] precisely because the CPA did not have the legal expertise to make certain administrative decisions concernine Redies' estate. [The attorney] could not be shielded from liability to Redies simply because it was [the CPA]—and not [the attorney]—who implemented [the attorney's] advice and recommendations."

Conclusion:

Sometimes the most powerful and most direct language about a majority opinion is found in the dissent.

The undercurrent in the majority opinion is that in *2007*, attorneys owe a duty to non-client third parties.

And if there's any doubt of that, read the final paragraph of Justice Nelson's dissent, where all doubt is snuffed out.

Negotiation Theory & Practice

Alain Burrese

Negotiating with the government

By **Alain Burrese**

I have had the opportunity to negotiate with a number of government agencies, and there is a difference between private industry and administrative agencies and how you should approach them.

Research into the "Attorney's Practice Guide To Negotiations, 2nd Edition" by Donner & Crowe also provides many general considerations when negotiating with the government. In this column, I will share a few thoughts and considerations to assist you in your next negotiation with a government agency.

Administrators often have an objective that is grounded in public policy rather than in furthering monetary or other less principled goals. While some may say this about every interaction or negotiation, it is especially true that the first step in any negotiation with an administrative agency is to establish a good working relationship. As long as the negotiator acknowledges that social welfare must play a role in the process, it is usually possible for private entities to negotiate with administrative bodies in a friendly, cordial manner, without turning to combative techniques.

WHEN LITIGATING AGAINST an administrative agency, it can often be difficult to craft a monetary settlement which will resolve the matter due to the political nature of many administrative agendas. These agendas often have more weight in the matter than mere monetary matters.

Additionally, private parties that have long-term stakes in the resolution of a particular case may have a stronger interest in precedent. That makes it all the more important that their attorneys focus their attack on those aspects of the case which are governed by some aspect of public policy.

Therefore, it can be very advantageous to bargain rather than litigate with administrators.

In a short summary of advantages of good-faith bargaining versus litigating with administrators, Peter H. Schuck, Yale Law School, is quoted in the "Attorney's Practice Guide To Negotiations, 2nd Edition." He includes such insights as unearthing solutions lying between those extreme positions that will be asserted by the parties in litigation; exposing the true intensity of the preferences rather than exaggerating them; and stimulating the flow of information between the parties rather than constricting interparty communication.

Mr. Schuck also acknowledges the advantage of a bargained solution. Since is essentially voluntary and emerges from a process that helps build consensus – it is likely to generate support from both parties for its implementation. Therefore, a cooperative philosophy, while limited in value in some contexts, is of particular importance in the context of administrative matters.

SOMETIMES IT CAN be easy to get caught up in the adversarial process and forget how important it is to strive for a friendly, productive relationship with an administrator or regulator. It is basic human nature to be more receptive and trusting to someone you know and remember. It might be a good idea to remember the old cliché, "You can catch more flies with honey than with vinegar" the next time you have to deal with a government agency. This saying suggests you can win people to your side more easily by gentle persuasion and flattery than by hostile confrontation, and it can be especially true when dealing with government agencies.

Usually, the first contact with the agency by an attorney is in the form of a letter stating that the attorney has been retained. The letter should be firm and professional, but should indicate a willingness to reach an amicable solution. Harsh or threatening initial contact may cause the agency to develop an overly defensive attitude that may hamper or frustrate future negotiations. Establishing a favorable first impression with the agency and its counsel can go a long way toward successful bargaining.

Establishing a relationship of mutual trust and respect between the parties creates a greater likelihood that a settlement will be reached. Additionally, any future relationship between the parties will be easier. To assist this process, we should demonstrate our commitment to cooperation from the outset. We must convince the agency, or its counsel, that not only are the agency's best interests being considered, but those of the public interest as well.

There are many ways of effectively appealing to the needs of the agency, but one of the most simple is to remember the Golden Rule and treat those you are dealing with the same way you want to be treated. Respect and consideration go a long way in all negotiations, but especially when dealing with government agents that may often be the recipients of hostile communications over policies they are required to enforce but did not enact. One then must remember to keep his commitment to cooperation throughout the entire negotiation process, even if it ends in litigation.

WHILE THIS ADVICE will help most negotiations settle, there are situations when your client's concerns may not be addressed and it will be necessary to consider filing suit. If you exhaust every other recourse and you have been unable to negotiate a satisfactory settlement or obtain a favorable decision from an administrator, a lawsuit may be appropriate. This may also aid your negotiations and is why you must keep your

commitment to cooperation even during litigation.

Filing suit can be useful to encourage administrators to rethink their positions and will also allow for the participation of counsel who may not otherwise be involved. If you have established a relationship of mutual trust, the lawsuit may be only a stepping stone toward settlement, rather than an ugly adversarial quagmire.

The bottom line is that attorneys must always keep their client's goals in mind and recognize that negotiations with the government are often different from those with private industry. Therefore, negotiation strategies and tactics must conform to the situation at hand.

ALAIN BURRESE *is a mediator and attorney with Bennett Law Office in Missoula. He conducts mediations and settlement conferences as well as speaking and training in negotiation and mediation. He can be contacted at (406) 543-5803 or at www.bennettlawofficepc.com.*

CITIZENS SEEK, from Page 21

a candidate forum.

"We asked the candidate a question about law enforcement and she started to explain things," said Donna Adams of Absarokee, one of the group's original members. "It came in response to some things that elected officials didn't seem to be dealing with. We wanted to learn what was going on and what you can and can't do."

Since then, the loosely knit group – so loose that some participants prefer not calling it a group at all, and its only "officer" is a moderator who changes from meeting to meeting – has spent hours observing court sessions and commissioner proceedings. The group's own meetings, every other Sunday, typically draw anywhere from 12 to 20 people who come from just about every corner of the county.

The group espouses no party affiliation, Adams said, and anyone, including elected officials, is welcome. Those who show up are drawn for different reasons. Some want to learn more about the workings of local government, others want to track their tax dollars and a few crime victims seek ways to grease the wheels of justice.

"It takes some courage on people's parts," Adams said, explaining that a few of the participants prefer to maintain their privacy. But others, like Stan Dietz of Columbus, are forthcoming about their involvement. He started attending meetings after reading about the group in the local paper.

"Speaking strictly as an individual, it is my goal to better understand the functions of our county agencies and how the tax dollars are being spent," he said. "It's also my personal belief that, from time to time, government needs to be reminded that they should always act in the best interests of the citizens whom they serve."

Dietz, a retiree, knows working families don't have the hours he has to sit in court. However, they can attend the Sunday afternoon meetings to learn from other members and featured speakers.

This past Sunday (Feb. 25), the group invited Justice of the Peace Marilyn Kober to explain the workings of justice court. She told the dozen in attendance that she was glad for the opportunity and "thrilled" to see them in the courtroom.

"I welcome being watched," she said. "Do not stop what you're doing. And don't think for a minute that it doesn't make a difference."

Stillwater County Commissioner Dennis Hoyem voiced similar support.

"It's kind of refreshing to see folks show interest," he said. "A lot of people have concerns and this gives us an opportunity to dispel unnecessary apprehension and clarify things."

Adams said it's been a two-way street, that the commissioners have been very receptive and have even asked the observers if they have any questions.

"At least you feel like you're doing something," Adams said. "It doesn't do any good to sit around and drink coffee and complain." ❍

News About Members

Missoula law firm Worden Thane announced that a number of firm attorneys have been selected to be listed in the 2007 edition of "The Best Lawyers in America." They are: **Jeremy G. Thane**, personal injury litigation; **Ronald A. Bender**, banking law, labor and employment law, product liability litigation and real estate law; **Martin S. King**, real estate law; **Patrick D. Dougherty**, real estate law; and **Peter S. Dayton**, real estate law.

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Suing your fellow attorneys can bring a new view of their vices

By **Meredith Hobbs**
Fulton County, Ga., Daily Report

When Frank J. Beltran started suing other lawyers in the early 1980s, some colleagues were aghast. He recalled a case in Valdosta, Ga., around that time where the defense lawyer leaned over in the middle of a deposition and whispered, "Frank, what's it like suing a lawyer?"

Times have changed, and the stigma of suing other lawyers has lessened, he said. Even so, he still gets a lot of referrals from lawyers in small Georgia towns who don't want anyone to know they're helping someone sue one of their own. In Atlanta, that isn't an issue, Beltran said: "Nobody cares here. It's too big for that."

But lawyers will testify against each other more readily than doctors, said Beltran, who handled some medical malpractice cases early in his career.

"Lawyers understand that it's just business," he said. "They can go to court against someone and then shake their hand. Doctors don't have that experience, and they're scared of the legal system."

Most legal malpractice suits settle, and generally, the former client who's suing just wants restitution, not punitive damages or pain and suffering compensation as in medical malpractice suits, Beltran said.

He gestured toward a notepad on the table and said that when he started handling legal malpractice cases, the only reference work on the topic was no thicker than the pad. Now the authoritative work, called simply "Legal Malpractice," runs to five volumes. It's co-edited by Jeffrey M. Smith of Greenberg Traurig, who referred Beltran his first legal malpractice case.

Beltran joined Alston Miller & Gaines, now Alston & Bird, in 1976 after receiving his law degree from Mercer University, but left after a couple of years because he wanted to do plaintiffs work. A Macon, Ga., lawyer whom he'd clerked for in law school started referring him lawyer discipline cases while he was still at the Alston firm, mostly for aspiring lawyers who needed to convince the State Bar of Georgia that the youthful indiscretions on their record were a thing of the past.

Beltran, 55, formed his own firm, Beltran & Associates — which now has three lawyers, including himself — in the early 1980s and, after his initial legal malpractice referral from Smith, gravitated toward the specialty, which remains a very niche practice. He represents both plaintiff-clients and defendant-lawyers in malpractice suits, with more plaintiff than defense work. Litigation accounts for about half his practice, and representing lawyers before the State Bar on discipline charges makes up another third. He also represents lawyers in fee disputes and serves as an expert witness in malpractice cases. Almost all of his cases are referrals from other lawyers.

Although the number of legal malpractice suits has increased in the quarter-century that he's been handling them, Beltran thinks that the notion of an impending legal malpractice crisis, akin to that in the medical profession, is a myth. Statistics from the American Bar Association back himup. A study of legal malpractice claims self-reported by insurers shows a decrease in the number of claims and only a slight increase in claim size from 1999 to 2003, the most recent time period available.

Taboo lessons

But in continuing legal education lectures, Beltran tells lawyers to expect three to five lawsuits and bar complaints in their careers. In the early 1980s, Beltran said, Smith told lawyers to expect only one or two lawsuits and bar complaints.

Beltran said the increase in suits is mainly because there are so many more lawyers practicing today. He thinks the increase also comes from better-educated clients, who are more likely to ask questions, and the weakening of the taboo against suing lawyers. But he added that one practice area is seeing a marked rise in the number of malpractice suits. "You know who's getting sued more? It's insurance defense lawyers when they blow a case," he said. "It's a numbers thing. Insurance companies in the past would write it off. Now they want to recoup it." He added that there is not the same loyalty between insurance companies and their outside counsel as in the past.

Simple things like missed deadlines are the most common causes of malpractice suits and bar complaints for lawyers, Beltran said. He estimated that in 95 percent of cases, personal stress, such as a divorce, addiction or depression, causes a lawyer to make mistakes. "Most of the time the lawyer is not a bad person – just careless," he said.

He gave a particularly messy example from his case files. A lawyer who was getting divorced had an affair with his secretary and took money out of his trust account to buy her gifts. But then he broke off the affair. She got upset and filed a bar complaint.

Beltran said he once represented a judge who had been drinking in the morning. A cop pulled the judge over, recognized him and let him go. But then the judge sped away too fast, and the cop arrested him.

When it comes to the Gwinnett County judge who was caught on camera by a TV reporter three years ago driving off drunk from a bar, Beltran said if he'd been the man's lawyer, "I'd try to get him help," adding that there is an entire chapter in Smith's legal malpractice primer on impaired lawyers. Beltran said he's had judges fire him when he's tried to get them counseling. They tell him, "I'm a judge; I know what I'm doing," or they say that the problem was a one-time incident.

"Many times I feel like I'm ministering to the client or the lawyer," said Beltran, who was the ninth child in a Catholic

family. (Two of his brothers became priests, and two of his sisters became nuns, although one later left her order to get married.) When asked if he is religious, Beltran replied, "I'm spiritual."

Frequently, lawyers make things worse for themselves by trying to cover up their mistakes. "It's like a wounded dog in the corner. They panic," he said.

Beltran said he'd made a lot of money over the years from cases where lawyers got caught altering or faking documents, for instance, creating letters long after the fact notifying clients of court dates, hearings and depositions to cover up a prior failure to notify them. A client's failure to appear in court could trigger a default judgment.

He said he has caught lawyers faking documents when they used their firm's current letterhead instead of letterhead corresponding with the document's date – or the name of a secretary who was not with the firm at the time. Others have forged filing date stamps on documents that, when Beltran checked at the courthouse, had never been filed.

In every case where he's defending a lawyer, Beltran said, he thinks, "There but for the grace of God go I." He too could transpose a date for a filing deadline or court appearance, he said. "That's why I have insurance."

No state except Oregon requires lawyers to carry malpractice insurance, but Beltran said lawyers should "absolutely" have it. He and the other members of the State Bar's malpractice committee are trying to get the bar to require lawyers to at least alert clients if they carry less than $100,000 in malpractice coverage. "We're trying to do it in steps," he said.

Some practitioners oppose insurance requirements because they think the expense would be prohibitive for lawyers practicing solo or in small shops. Beltran disagrees. He said that for his firm, which has two experienced lawyers and one brand-new one, he pays less than $5,000 a year for $2 million in coverage.

Has Beltran ever turned down a client? "Yes," he said. "If they're not honest, if I don't like them, or if they think they know more than I do."

The conflicts question

Suits by clients charging their lawyers with conflicts of interest have increased somewhat as firms and their clients grow larger and larger, but Beltran adheres to the notion that a firm cannot serve two masters. "The best advice is not to touch it. But lawyers are afraid they're going to lose business."

Just last month in Fulton County Superior Court, McKesson Corp. won an injunction against its law firm, Duane Morris, for representing plaintiffs against a McKesson subsidiary in Atlanta when the firm was already representing other McKesson subsidiaries in an unrelated Pennsylvania matter.

Beltran advises lawyers to avoid suing clients to recover fees, since this can often trigger a malpractice countersuit. He recalled one case where he represented a woman who sued her lawyer for failing to tell her about a $250,000 settlement offer in a case that he subsequently lost. She discovered the omission after he sued her for expenses. He refused to turn over the case file, so she got it from opposing counsel – and discovered the settlement offer, which her lawyer had turned down, hoping for a bigger win in court.

"The thing he did that was wrong was not telling her about the settlement offer. The thing he did that was stupid was suing her for expenses," Beltran said.

In another case, a lawyer agreed to witness a will for a friend – after the friend had died – as a favor for the widow. She then refused to pay his fee. He sued her for it, and she filed a bar complaint exposing him for improperly witnessing the will.

The ugliest suits are those where lawyers sue lawyers, which can happen when lawyers dissolve a partnership. "When lawyers split up it's worse than a marriage," Beltran said, observing that some get vindictive as "ego and testosterone" kick in. And fee disputes all too frequently can turn into lawsuits, Beltran said. For example, two lawyers work on a case and agree to split the fee equally. The case settles, and their fee is $1 million. But Lawyer A gets greedy and wants more than half. Lawyer B protests and litigation ensues.

Don't they sign a fee agreement when they decide to work together?

"They're supposed to," Beltran said. "But it's like the shoemaker's children. A lot of lawyers don't have written fee agreements with other lawyers [including, he said, some big-name lawyers whom he declined to name]. They also don't have wills.

"Lawyers have a tendency to be ostriches. ... They're always hoping things will go the way they should go. In the real world, it's not that way," he said. ❍

LETTERS

Reader pleased with securities-law primer

I thought the "Securities law and raising capital in Montana" article in the February 2007 issue of *The Montana Lawyer* was excellent. Karen Powell did an excellent job of demystifying securities regulation in Montana, and provided practical advice to practitioners for helping their clients raise capital.

Please pass along my enthusiastic praise to Ms. Powell for a great article. I know the year is still early, but if I had a vote, I would be voting to name Ms. Powell's article for the Haswell Award [for best article appearing in *The Montana Lawyer* in the past year]. If you need a specific nomination, I would be glad to make one.

– Shane A. Vannatta, attorney
Worden Thane law firm
Missoula

Some questions about the purge of U.S. attorneys

By **Josh Marshall**
Talking Points Memo.com

So there you have it: the White House's side of the canned U.S. attorney story provided by the [Washington] *Post*'s John Solomon.

It turns out the whole thing is just one of those unfortunate misunderstandings the Bush White House now and again finds itself in. The ouster of the U.S. attorneys had nothing to do with political payback or stymieing investigations. It's just that the White House wanted to get rid of a hand full of U.S. attorneys who weren't doing a good enough job enforcing administration policy on immigration, guns and other issues.

As Solomon puts it, "Privately, White House officials acknowledged that the administration mishandled the firings by not explaining more clearly to lawmakers that a large group was being terminated at once – which is unusual – and that the reason was the policy performance review."

Now, there's a certain inattention in the piece to the growing body of evidence which casts doubt on the new administration story. But when a White House tries to get out ahead of a story like this it's key to note the admissions of salient facts that come along with the larger bamboozlement.

The key point is that the White House signed off on the firings, as did Attorney General Gonzales and his deputy Paul McNulty.

Now, let's join Mr. Solomon recounting what 'officials' told him ...

> Officials portrayed the firings as part of a routine process, saying the White House did not play any role in identifying which U.S. attorneys should be removed or encourage the dismissals. The administration previously said that the White House counsel recommended a GOP replacement for one U.S. attorney, in Arkansas, but did not say that the White House approved the seven other firings.

And again ...

> The seven prosecutors were first identified by the Justice Department's senior leadership shortly before the November elections, officials said. The final decision was supported by Attorney General Alberto R. Gonzales and his deputy, Paul J. McNulty, and cleared with the White House counsel's office, including deputy counsel William Kelly, they said.

There's a lot of signing off ons, supportings and clearings and such. But it is a little tough to get a handle on just whose idea this was and who actually came up with the list, isn't it?

Another interesting point.

Sen. [Pete, R-New Mexico] Domenici's spokesman tells the *Post* that, yes, the senator "raised concerns" with the Justice Department about [New Mexico U.S. Attorney David] Iglesias. But not about his alleged unwillingness to buckle to Domenici's pressure to indict a Democrat before the election. Not at all. Domenici's beef was immigration.

"We had very legitimate concerns expressed to us by hundreds of New Mexicans – in the media, in the legal communities and just regular citizens – about the resources that were available to the U.S. attorney," Domenici's chief of staff told the *Post*.

So Domenici's office is willing to say that it "raised concerns" with DOJ, which I take to mean pressed for his ouster or disciplining. But the senator himself still refuses to answer the pretty straightforward question: did he call Iglesias to discuss the corruption investigation into a New Mexico Democrat which his office then had under way.

Let's remember what Domenici is alleged to have done.

Yesterday, McClatchy Newpapers' Marisa Taylor spoke to "two people familiar with the contacts" between Iglesias and [Sen. Heather, R-New Mexico] Wilson and Domenici.

> The two people with knowledge of the incident said Domenici and Wilson intervened in mid-October, when Wilson was in a competitive re-election campaign that she won by 875 votes out of nearly 211,000 cast.
>
> David Iglesias, who stepped down as U.S. attorney in New Mexico on Wednesday [Feb. 28], told McClatchy Newspapers that he believed the Bush administration fired him Dec. 7 because he resisted the pressure to rush an indictment.
>
> According to the two individuals, Domenici and Wilson called to press Iglesias for details of the case.
>
> Wilson was curt after Iglesias was "non-responsive" to her questions about whether an indictment would be unsealed, said the two individuals, who asked not to be identified because they feared possible political repercussions. Rumors had spread throughout the New Mexico legal community that an indictment of at least one Democrat was sealed.
>
> Domenici, who wasn't up for re-election, called about a week and a half later and was more persistent than Wilson, the people said. When Iglesias said an indictment wouldn't be handed down until at least December, the line went dead.

Call me overly suspicious. But it seems to me that any reporter really interested in getting to the bottom of this story needs to get a straight answer from Domenici about whether this alleged call took place in any degree as described above.

If it didn't, then Domenici's being slandered. If it did, then Domenici's claim that his only beef with Iglesias was over

immigration prosecutions just isn't credible.

Let's find the answer to that question.

And while we're at it, I'll be curious to find the answers to these questions.

If this whole business was about U.S. attorneys not implementing White House policy on immigration and firearms enforcement, why all the secrecy about it?

The White House didn't let members of Congress know what they were doing when they did it. When called on it in an open hearing recently, Deputy AG Paul McNulty said the U.S. attorneys were fired for performance issues. When called on the apparent falsity of those claims, it became a matter of policy disagreements. Again, if the U.S. attorneys were canned for not following administration policy, why was this fact withheld even from the fired U.S. attorneys themselves? Remember, when called on Dec. 7 and informed that they must resign, apparently none was given any explanation for their ousters.

Here's the funny thing. Of all the reasons an administration might have to fire serving U.S. attorneys, a willful refusal to follow the administration's law enforcement policies would seem to be a pretty good one. Given the fact that so many of the fired prosecutors were also in the midst of major public corruption investigations, you'd think they'd be more forthcoming with this exculpating explanation. Even more so when you consider that one of the fired U.S. attorneys was the target of two sitting members of Congress trying to pressure him to subvert justice to alter the outcome of a 2006 House race.

Lots of potential for misunderstanding. And yet the White House has been so resistant to revealing this exculpating explanation until now. Their own worst enemies, I guess.

And one other thing. What the White House folks told Solomon was that the list was drawn up at the Department of Justice. White House signed off on it. But they weren't involved.

But how does that square with what Dan Eggen (who has a co-byline on the Solomon piece) came up with back on Feb. 4.

> There is also evidence that broader political forces are at work. One administration official, who spoke on the condition of anonymity in discussing personnel issues, said the spate of firings was the result of "pressure from people who make personnel decisions outside of Justice who wanted to make some things happen in these places."

So who are these folks "who make personnel decisions outside of Justice who wanted to make some things happen in these places"?

Anybody have an answer?

UPDATE: Senator Pete V. Domenici, Republican of New Mexico, said on March 4 that he had urged the Justice Department to dismiss the state's top federal prosecutor, David Iglesias, the *New York Times* reported. In addition, Mr. Domenici said in the statement that last year he called Mr. Iglesias to ask about the status of the federal inquiry into the accusations of kickbacks in a New Mexico courthouse construction project in which a former Democratic state official was said to be involved. Mr. Domenici apologized in the statement and said he regretted making the call, but added that he had not urged any course of action in any investigation.

2nd Update: Rep. Heather A. Wilson (R-NM) acknowledged on March 5 that she contacted prosecutor Iglesias to complain about the pace of his public corruption investigations, the *New York Times* reported. Rep. Wilson specifically asked Iglesias about sealed indictments, which of course he could not discuss.

3rd Update: John McKay, the former U.S. attorney from the Western District of Washington, testified before the Senate Judiciary Committee on March 6 that Rep. Doc Hastings' (R-Wash.) chief of staff called him and pressured him to investigate Democrats involved in the closely-contested Washington (state) governor's race. Also on March 6, former U.S. attorney David Iglesias testified that Rep. Wilson and Sen. Domenici called to pressure him to issue indictments against Democrats in New Mexico. Sen. Domenici called him at home (which was unprecedented) and specifically asked if any indictments would be issued before November, then hung up on him when Igleasias told him no. Domenici placed his call four to six weeks before Iglesias was fired.

Senate bill offers solution to the talent drain in the criminal justice system

By **Karen J. Mathis**, president
American Bar Association

A bill introduced by Sen. Richard Durbin (D-IL) provides a winning solution for all of us concerned that low wages paid to prosecutors and public defenders, along with the high cost of law school, are undermining confidence in the effectiveness of our criminal justice system.

As introduced, the John R. Justice Prosecutors and Defenders Incentive Act of 2007, brings bipartisan support to a solution for the problem faced by jurisdictions across the country: that of attracting and retaining qualified lawyers for public service careers.

Named for the late John Reid Justice, former South Carolina Supreme Court Justice and former president of the National District Attorneys Association, the bill establishes a program of student loan repayment assistance for law school graduates who agree to remain employed for at least three years as state or local criminal prosecutors or as state, local or federal public defenders. Eligible lawyers would receive student loan debt repayments of up to $10,000 a year with an option to renew for a second three-year commitment.

Communities are the first to suffer when qualified law

More *TALENT DRAIN*, **Page 44**

Confused About CLE Compliance?

Answers to Some Frequently Asked Questions

How do I get credit for CLE courses attended out-of-state?

The Montana CLE Commission will honor CLE approval given by other states, so applications and course materials are no longer required for out-of-state programs. You can pre-report any seminars you attend by sending your attendance certificates to the Bar. Your record will be credited accordingly.

If your attendance information was received by February 1st, the course(s) should appear, pre-printed, on your affidavit. If your attendance information was not pre-reported to the Bar, you can claim those credits by simply listing the course information on your affidavit and attaching the attendance certificate(s) or other documentation that shows the designation of CLE credits.

Once you've received your affidavit on March 1st, please DO NOT send attendance certificates or applications for accreditation to the State Bar except as attachments to your CLE affidavit.

What about in-state seminars?

For most law-related programs that take place in Montana, the sponsor has already obtained approval. A list of approved courses that were held in Montana can be found on the State Bar website www.montanabar.org. *Please note that no out-of-state courses appear on this list.*

Applications for approval of programs for 2006-07 should have been sent to the Bar by February 1st to allow time for processing before the end of the reporting year. **After you receive your affidavit on March 1st please submit applications for credit as attachments to your affidavit.**

Do I have to get Ethics credits every year ?

No. Active members must obtain at least 5 ethics credits every 3 years. The Bar will keep a running tally of your ethics credits as they are reported each year. Ethics credits may be earned either by attending live seminars or by self-study methods such as audio/video tape or online programs.

How do I know when the 3-year period ends?

You will find this information near the top of your CLE affidavit. For the majority of attorneys, the current 3-year ethics reporting period ends on March 31, 2007. For newer attorneys the ethics reporting period depends on your date of admission to the Bar. Please check your affidavit to verify when ethics credits are due.

Why don't all the courses I've attended appear on my affidavit?

The CLE Commission credits each attorney's record if an attendance list is provided by the program's sponsor, or, if the attorney pre-reports by sending the attendance certificate(s) to the State Bar. Attendance information received after the first week in February cannot be recorded in time to appear on the affidavits. You must write it in.

What if the information on my affidavit is incorrect?

It is each attorney's responsibility to verify all information on his or her affidavit. If you attended only a portion of a seminar, please write in the number of hours you were actually in attendance. If a program you attended is not pre-printed on your affidavit, you must write it in.

Should I attach my attendance certificates to my affidavit?

Not for in-state programs. However, if you attended an **out-of-state** program that does not appear on your affidavit, it is helpful to the Bar staff to attach the attendance certificate or other documentation CLE accreditation. Attendance certificates provide useful information, but are *not* mandatory because CLE is compliance is reported on an honor system in Montana.

Should I send my CLE affidavit to the Bar if I don't have all my credits?

No. The State Bar will not accept an affidavit that does not meet the requirement of 15 credits per year, including carry-over.

What about the April 1st deadline?

There is a 30-day grace period for filing CLE affidavits. You may obtain and report CLE credits until April 30th without penalty. A $50.00 fee will be assessed on all affidavits postmarked after April 30th. Attorneys will have until June 15th to earn and report CLE credits and pay the $50.00 late fee.

What happens if I don't have all the credits I need?

Please note the important rule change that took effect last year: Attorneys who have not complied with CLE requirements by June 15th will be immediately transferred to inactive status and will not be allowed to practice law. The names of these attorneys will be furnished to all Montana District Courts, the Montana Supreme Court, Federal District Court of the District of Montana, and the Ninth Circuit Court of Appeals. To be readmitted to active status, these attorneys will be required to petition the Montana Supreme Court with documentation of CLE compliance and pay a fee of $200.00 .

Are new admitees required to complete CLE activities?

New admittees are exempt from the CLE requirement for the remainder of the *reporting year* in which they are admitted to the Bar. Attorneys who were sworn in after April 1, 2006, do not report CLE for the 2006-07 year. If a new attorney attends CLE programs during this time, the credits are claimed when the attorney first reports CLE at the end of the *following* reporting year (March 31, 2008.)

Montana should raise homestead exemption

By **Frederick P. Corbit**

For more than a century, Montana homeowners have been protected by the "homestead" statute that exempts a limited amount of home equity from execution by judgment creditors.[1] The homestead exemption was created to protect families from losing their homes in hard times,[2] but even though the homestead has increased from $2,500 in 1895 to $100,000 today, in relative terms it has shrunk over the years. As a result, there are several reasons why the Montana Legislature should raise the homestead exemption. Moreover, there are few adverse consequences if it does.

For many decades, the $2,500 homestead exemption was more than enough to cover all the value of an average Montana home. In 1940, the median value of Montana homes was only $1,626.[3] In the last three decades the Legislature has raised the homestead on several occasions; however, in recent years the increases have not kept pace with inflation.[4] The homestead was raised to $100,000 in 2001, but by 2003 the median value of Montana homes was $113,089.[5] Consequently, if the constitutionally required "liberal homestead exemption" is going to cover the full value of an average Montana home it has to be raised again.

While the homestead exemption is necessary to achieve the classic goal of protecting the family home, it also encourages prudent long- term investments. It provides individuals with the incentive to build equity in their homes because they know that the equity will be safe in the event they incur unforeseen financial problems that generate large unsecured debts. Furthermore, since building equity in a home is a form of savings, Montana residents should be encouraged to do so because they are no longer saving like they did in the past.

Back in the 1950s, the generation of Americans who survived the Great Depression and World War II saved roughly 8 percent of their income, but now savings have plummeted to just 1.3 percent.[6] Accordingly, government policies are needed to promote savings so that households have more economic security,[7] and increasing the homestead exemption is one way the Montana Legislature can encourage Montana residents to save.

MANY MONTANA RESIDENTS are in a precarious situation when it comes to being able to afford a home. The median income for Montana residents ranks 46th among the 50 states, but the median Montana house price ranks 30th.[8] One way to help bridge the gap is to give residents of Montana more value for their house-buying dollars, and raising the homestead exemption does that to some extent.

For example, assume that there are two completely fungible homes, with identical sales prices, but house "A" comes with an insurance policy that protects $100,000 dollars of equity from unsecured creditors' claims and house "B" comes with similar insurance providing $125,000 of protection. Under this hypothetical, a buyer gets more for his or her money when buying house "B". As a result, the Montana Legislature can help Montana homebuyers get more for their already stretched dollars by raising the homestead.

The downside of providing such exemptions is that they shield homeowner's equity from the legitimate claims of creditors. For that reason, if creditors' rights are further limited by increasing the exemption, there is a concern that credit will no longer be as accessible. However, increasing the homestead exemption does not adversely effect all types of credit.

SINCE HOME LOANS ARE normally secured, their performance levels are relatively unaffected by exemption levels. In fact, higher homestead exemptions can actually encourage mortgage lending.[9] This is the case because higher exemptions reduce the incidence of execution sales, and with fewer execution sales more homeowners stay in their homes and continue to make mortgage payments.

On the other hand, it is true that increased exemptions could make it more difficult for consumers to obtain unsecured credit.[10] (To the extent there are additional limits on the assets available to satisfy the judgments obtained by unsecured lenders against defaulting borrowers, the less desirable it becomes for unsecured lenders to do business in Montana.) But how much more difficult would it be to obtain unsecured credit in Montana if the homestead exemption amount was increased, and is tightening the availability of unsecured credit

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necessarily a bad thing?

The answer to the first part of this compound question can be found in Florida, Iowa, Kansas, South Dakota and Texas. Prior to the recent amendments to the Bankruptcy Code, each of these states had an unlimited homestead exemption, but their residents were bombarded with credit card applications just like the residents of Montana.[11] Hence, a higher homestead exemption will not dry up the pool of unsecured credit.

The answer to the second part of the question is "No". The plethora of easy-to-obtain credit cards is not good for our economy. Credit card debt has almost tripled since 1989 and is up 31 percent in the past five years.[12] Also, large unsecured debts to credit card companies frequently end up eating into home equity because of the tendency of many home owners to take out a second mortgage to obtain a debt consolidation loan once their unsecured debt load becomes overwhelming.[13]

THE UNLIMITED HOMESTEAD exemptions provided by some states were criticized as a result of unscrupulous individuals, like some of the former executives of Enron, who were able to use recently acquired homestead exemptions to keep millions of dollars of equity in luxurious homes away from the claims of the creditors that they defrauded.[14] As a result, Congress amended the Bankruptcy Code in 2005 to provide limits on exemptions, including a limit on a state homestead to the extent the homestead is in excess of $125,000 and was acquired within 1,215 days of the filing of a bankruptcy petition.[15] Therefore, the Bankruptcy Code minimizes the risk of unscrupulous debtors acquiring a large state homestead, on the eve of bankruptcy, in order to frustrate the claims of their creditors.

Raising the homestead would not adversely limit credit available for Montana residents or be inconsistent with the policies behind the new bankruptcy laws. Accordingly, to provide homeowners with protections relatively similar to what was available in previous decades, to encourage savings, and to make Montana homes a better value, the Montana Legislature should increase the homestead exemption to at least $125,000 and possibly up to $150,000.[16]

FRED CORBIT *is a shareholder, and a member of the real estate and finance practice group, in the Seattle office of Heller Ehrman LLP. He represents clients in connection with matters pending in the majority of the Western states.*

NOTES

1. The Montana Legislature first enacted a homestead law in 1895 to satisfy the constitutional mandate that the state "enact liberal homestead and exemptions laws." See, Civ. Code 1895, Secs. 1670-1703; Article XIX, Sec. 4, of the Montana Constitution of 1889; and Article XIII, Sec. 5, of the Montana Constitution as ratified in 1972. The current Montana homestead laws are codified at MCA 70-32 et. seq.

2. The homestead law has as it purpose "…the maintenance and protection of the family." *See, Wall v. Duggan*, 76 Mont. 239, 245 P. 953, 955 (1926).

3. *See*, U.S. Census Bureau date, accessed, on Nov. 10, 2006, at: *http://www.census.gov/hhes/www/housing/census/historic/values.html.*

4. For example, the homestead was raised from $20,000 to $40,000 in 1981, to $60,000 in 1997, and to $100,000 in 2001.

5. Supra at Note 3.

6. *See*, Robert Tanner, "America in the Red," published in the *Seattle Times* on Aug. 28, 2005.

7. *See*, "The Plastic Safety Net: The Reality Behind Debt in America," published by The Center for Responsible Lending and accessed, on Nov. 10, 2006, at *http://www.demos.org/pub654.cfm*.

8. *See*, NexTag Report, accessed, on Nov.10, 2006, at *http://www.nextag.com/home-mortgage/0/Montana-Has-Large-Disparity-between-Home-Prices-and-Income.html.*

9. Souphala Chomsisengphet & Ronel Elul, "Bankruptcy Exemptions, Credit History, and the Mortgage Market," Working Papers 04-14, Federal Reserve Bank of Philadelphia. Souphala Chomsisengphet is with the Office of the Comptroller of the Currency in Washington D.C. Ronel Elul is with the Federal Reserve Bank of Philadelphia.

10. Reint Gropp, John Karl Scholz, and Michelle.J. White, "Personal Bankruptcy and Credit Supply and Demand," *Quarterly Journal of Economics* 112(1), 217-251 (February 1997).

11. A sampling of 20 recent consumer bankruptcy filings by Montana residents shows that unsecured credit is easy to come by in Montana. The debtors in 15 of the 20 bankruptcy cases had credit card debts. On average, each of the debtors with credit card debt had five out-of-state credit cards with a total balance on those cards of $24,442. *See*, Case numbers 06-60402-RBK through 06-60421-RBK in the United States Bankruptcy Court for the District of Montana.

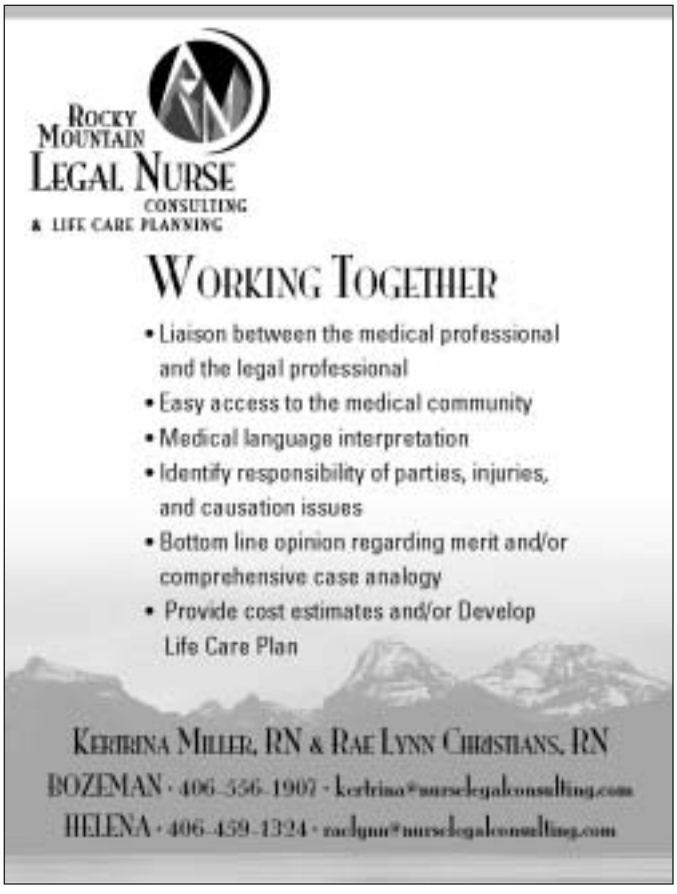
12. See, Note 9, supra; and Mark Trahant, "We Can't Borrow and Spend Forever," published in the *Seattle Post-Intelligencer* on Oct. 16, 2005.

13. Id.

14. *See*, Ryan P. Rivera, "State Homestead Exemptions and Their Effect on Federal Bankruptcy Laws," 39 *Real Property, Probate and Trust Journal*, 71 (Spring 2004).

15. *See*, 11 U.S.C. § 522 as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Also, the $125,000 limit does not apply if the residence is the principal residence of a family farmer. 11 U.S.C. § 522(p)(2)(A).

16. Homeowners that file for bankruptcy, more than 1215 days after acquiring their home, could enjoy the full amount of a $150,000 Montana homestead exemption, and other Montana homeowners could benefit from up to $125,000 of a $150,000 homestead exemption.



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without the need for a written binding award.[8] Some jurisdictions, including in Iowa during the nearly 11 years I served as a mediator and that as PERB's director of Mediation Services (and where interest arbitration is the final impasse step for all categories of non-federal public employees), reported voluntary settlement rates as high as 97 percent of the approximately 650 contracts per year eligible for interest arbitration, and no lower than a 94 percent settlement rate in any year.[9] In New York, the percentage of police and fire disputes resolved using interest arbitration remained constant at about 3.5 percent over a 12-year period from 1983 to 1994.[10] In a study of eight Midwestern and Eastern states with interest arbitration covering the period 1980 to 1983, resort to interest arbitration increased little despite the existence of an economic recession during those years.[11] In fact, a number of commentators believe that studies such as these show that the larger the degree of uncertainty that exists as to the results of interest arbitration, the greater the incentive of the parties to bargain and to voluntarily resolve their contract disputes.[12]

In addition, consistent with the findings of studies concerning the claimed "narcotic effect," resorting to interest arbitration tends to decrease over time as parties gain experience under such systems. Studies show that over time, the number of issues placed before the interest arbitrator also decreases, indicating at least a general showing that in the vast majority of cases, the parties are truly at impasse over issues placed before the arbitrator.[13]

To the degree that any real "chilling effect" may exist, it is notable that the type of interest arbitration criticized for having such an effect is conventional arbitration – a type of interest arbitration now out of favor and repeatedly replaced in law by various types of final-offer arbitration. While some level of such an effect has been found for conventional arbitration, little or no chilling effect has been found in final offer arbitration, particularly in the variety of such arbitration that utilizes final-offer, package arbitration.[14]

Therefore, little support exists in the data for anything other than a very minor "chilling effect" of interest arbitration upon the bargaining process and voluntary settlement, particularly where the "final offer" variety of interest arbitration is utilized.

Awards of higher-than-appropriate wages

The criticism that a higher-than-appropriate wage level is awarded under interest arbitration statutes is similarly not supported by the evidence. Rather, comparisons of arbitration awards with negotiated settlements instead demonstrate the effectiveness of the process.

The relation between interest arbitration and wage levels, while positive, is also small, and even nonexistent in some studies.

The New York PERB's annual report on the first 15 years of experience under its interest arbitration statute showed that for both police and firefighters, negotiated wage increases averaged about .1 percent higher than arbitrated wage increases.[15] Other studies comparing wage levels of police and firefighters in neighboring states – one with an interest arbitration law and the other without – show that wage levels over periods of time as long as six years remain roughly the same whether or not impasses are subject to arbitration.[16]

Where studies have shown somewhat high wage levels achieved through arbitration, they have based that determination upon a finding that a union makes a rational choice to go to arbitration when it feels it has a provable inequity on which to base its case.[17] Still other studies of wages for public safety employees covered by interest arbitration laws show that of the many independent variables tested, the only statistically significant predictors of public safety wages were private sector wages and median family incomes in the same communities.[18] This result is what one would expect under "free collective bargaining," and does not suggest that the availability of arbitration tends to skew resultant wage rates in any significant way.

If it is true that the use of interest arbitration does not significantly affect resultant wage levels, the question then arises as to why the parties bother with it. Several possibilities suggest themselves, although these areas have not been fully researched. One is that resort to interest arbitration is essentially a political rather than an economic decision. These political factors may be particularly influential in the case of the largest cities in interest arbitration jurisdictions, which have a tendency, if arbitration is available, to use it in nearly every round of negotiations.

A California study in this area found no empirical evidence that public safety employees covered by interest arbitration statutes have gained on their California counterparts who do not have interest arbitration. Its author contends instead that the benefits of interest arbitration lie elsewhere – in its "stabilizing influences, in provision of opportunities to be innovative, to correct inequities, and to eliminate paternalism and other government abuses."[19]

Another possibility is that interest arbitration is used primarily by parties in two situations. The first is where the wage level is already relatively high and management is attempting to restrain further upward movement, and the second where the wage level is relatively low and the union is attempting to catch up. Assuming rational arbitration awards, it is reasonable to believe that the employer would be more likely to win in the first case and the union in the second. It is certainly true that wage dispersion has decreased in states where arbitration is available.[20] In short, some unions may be winning in interest arbitration and some may not. But aggregate statewide data would show no overall payoff from the resort to interest arbitration.

The claim of an advantage to weak unions

The argument that interest arbitration works to the advantage of weak unions can be countered by the fact that, especially in final-offer jurisdictions, the parties' bargaining power becomes more balanced, because even the "stronger" union will be forced to make more reasonable offers so that the arbitrator is more likely to chose its position. Although it is reasonable to believe that some unions may hope to gain more from arbitration than from negotiations, the fact that public safety employees subject to arbitration statutes have not used the strike weapon suggests that whether a union is 'strong' or

'weak' is a minimal factor, if a factor at all, in the use of the statutory arbitration process.[21]

The claim of contracts written by outside parties

The proposition that outside entities unfamiliar with the practicalities of the enterprise write the contracts also seems to contradict the realities of the situation.

The arbitrator can be analogized to a judge. Just as a judge hears evidence and argument, an arbitrator or arbitration panel is educated by counsel and therefore need not be unfamiliar with the practicalities of the unit of government (and union) involved.

The claim of failure to encourage cooperation

Despite the fears to the contrary, cooperation is encouraged under mandatory arbitration, especially under final-offer arbitration. This is so because either party, if it fails to negotiate or takes extreme positions, risks losing. Parties' awareness of this risk dampens the desire toward extremism in most cases.

A few words about 'final offer' arbitration

"Final offer" arbitration has been offered as a counter to any "chilling effect" on the bargaining process. Under final-offer, as opposed to conventional arbitration, arbitral discretion is highly limited, and virtually entirely limited under the "final offer-package" alternative. The theory in this area holds that, as the arbitrator must select one or the other final offer, the parties are induced to develop more reasonable positions in the hope of winning the award. Thus, bargaining in good fath is encouraged, and because the parties have been forced to cooperate, they are likely to create their own settlement.

In terms of the final offers, it has been argued that the final-offer-package interest-arbitration procedure is superior to the final offer issue-by-issue procedure as a means of forcing a settlement. There have been two noticeable effects of entire package selection decisions. First, such a system forces the parties to be reasonable with each proposal on each issue, or risk losing before the arbitrator. Second, entire-package selection prevents arbitrators from imposing their version of desirable compromises upon the parties in multi-issue disputes, a freedom they would appear to have to at least some degree under issue-by-issue selection arbitration.

Another argument in favor of final-offer-package systems is that they place maximum pressure on the parties to resolve their disputes prior to the arbitration process. Also, it has been noted that there is a reduction in the number of issues submitted to arbitration. Under such a system, the parties are less likely to insert bogus issues into the final-offer package, as they do not want to jeopardize their total-package offer. Many critics, however, believe that an issue-by-issue, last-final-offer system is preferable because of the very real possibility that, under a final-offer-package scheme, an arbitrator may be faced with two unpalatable final offers.[22]

In summary in this area, it is my view that based upon the data, the relative advantages of interest arbitration greatly outweigh the disadvantages, and virtually all of the contrary arguments lack substantive support. In addition, even where some of the disadvantages have at best limited merit, most of those opposing arguments can be answered and resolved by utilizing some form of "final offer" arbitration, rather than "conventional arbitration."

Comments on the Montana statutes

This article has previously addressed the varying types of interest arbitration systems in existence in public-sector labor relations jurisdictions around the country, and has categorized them on a continuum from fully formal and "judicial" on one end of the continuum to fully flexible on the other end. To a large degree, where a particular system sits on that continuum depends upon two elements: 1) the "type" of interest arbitration involved (i.e., conventional, or final-offer issue-by-issue, final-offer package); and 2) the timing of the submission of any final offer or offers.

The two Montana statutes appear to place themselves largely at opposite ends of this conceptual continuum. While both address final-offer arbitration, the firefighter statute appears to envision the final-offer-package variety, and provides that each party is to submit a "final position on matters in dispute" to the arbitrator "at the conclusion of the hearings." However, since Section 39-34-103(2) MCA allows the arbitrator "to refer the issues back to the parties for further negotiations ... prior to making a determination on any issue," the statute allows further negotiations subsequent to the close of the hearing, and arguably a second set of final offers, in the event the parties resolve an impasse area during such an arbitral remand.

The firefighter statute also provides for factfinding prior to evocation of interest arbitration, but there is no indication in the statute concerning the role of the factfinder's recommendations, if any, on the any subsequent interest arbitration proceeding. It is therefore assumed that the parties will likely agree in most cases to skip the factfinding step if there is no contract agreement at mediation. To the extent that the factfinding step is utilized, it is hoped that the parties utilize the factfinder in a mediation capacity to, at minimum, narrow the issues that might subsequently proceed to interest arbitration.

It is also interesting to note that the factfinding provisions in the firefighter statute, in contrast to the interest arbitration provisions, do not set forth any criteria upon which the factfinder is to base his/her report and recommendations. Parenthetically, no criteria exist in the factfinding provisions of Montana law applicable to Montana education-sector employees and school districts. I was concerned about this omission in my Wolf Point Schools factfinding hearing and decision which was issued in early 2006. In my pre-hearing discussions with the parties, I suggested, and the parties ultimately agreed upon, criteria for my recommendations which were virtually identical to those contained in the firefighter interest arbitration statute, even though I was then unaware of the existence of that statute.

The new police interest arbitration statute varies from the firefighter statute in several ways. First, while the parties may use the factfinding-impasse step, it is not required. Second, when an impasse is declared after 15 days of mediation, both

parties are required to submit to the mediator their "final offers," including a cost summary of the offer. The mediator is then required to "make public" the final offers and cost summary "...addressing those issues on which the parties have failed to reach agreement." Since this language differs from the "last-best-offer package on all unresolved mandatory subjects" language contained in the police interest arbitration law, it appears that such mediation level "final offers" can include non-mandatory subjects of bargaining.

Third, there is a penalty in the police statute for a party's failure to participate in the arbitrator selection process – a provision which I have never seen before in examination of over 35 interest arbitration laws nationwide. Section 39-31-504(1)(b), MCA, provides that if only one party participates in the arbitrator selection process, "the board ... shall appoint the arbitrator from the names remaining on the list." It also provides that such a selection must be made by the parties within five days of receipt of the list, and that if they fail to do so in that time period, the Board has the authority to appoint the arbitrator. Both of these Board authorities, particularly given the short time frame involved, are unusual when compared to other states' interest arbitration statutes.

Fourth, in marked contrast to the firefighter statute, the police interest arbitration statute is more formal and judicial in nature, requiring final offers by package "within 14 days prior to the hearing," and providing that such final offers cannot be changed subsequent to that submission. This system is clearly significantly more on the "formal and judicial" side of the previously described continuum for interest arbitration statutes nationwide. It certainly suggests that the parties should be at an actual, legitimate impasse in their negotiations by the time such final offers are made, since they are bound by those final offers once submitted.

Fifth, again in marked contrast to the firefighter statute, the police statute requires that such a "final-offer package" be limited to "unresolved mandatory (bargaining) subjects." The firefighter statute in Section 39-34-103, MCA, in contrast, utilizes the phrase "final position on matters in dispute." It will be interesting to see whether the BPA and the courts equate these two varying phrases and limit final-offer submission in interest arbitration only to mandatory bargaining subjects, similar to such a limitation contained in virtually every other state interest arbitration statute.

Finally, although both statutes indicate that the arbitrator's award is final and binding, the police statute in contrast to the firefighter statute essentially makes the arbitrator's award a BPA "agency action" by providing that the BPA "shall issue an order containing the decision." That statute further provides that refusal to comply with the arbitration award is an unfair labor practice, and that this BPA order may be enforced in district court. Such enforcement and unfair labor practice provisions are not contained in this area in the firefighter statute.

The role of the BPA in making interest arbitration work

As previously indicated in this article, the central determinant of the effectiveness of the right to interest arbitration as a substitute for the right to strike or lockout is its ability to produce voluntary contract agreement by the parties themselves despite the existence of the right to interest arbitration.

The BPA, in unfair labor practice cases or declaratory ruling requests arising before it, can significantly impact this goal by focusing the attention of the parties upon potential voluntary settlement and away from the statutory interest arbitration provisions, particularly under the new police interest arbitration law. That statute already moves in that direction by requiring the exchange of final offers before the arbitration hearing, limiting final offers to mandatory bargaining subjects, and prohibiting multiple final offers. The Board could enhance the effectiveness of voluntary settlement procedures by clearly delineating what can and cannot be done for the purpose of enhancing one's position at arbitration by, among other things, strictly enforcing both the statutory timing and non-changeability of final offers, and by requiring that a party may not include in its final offer a proposal that has not previously been offered to the other party during the course of negotiations. The rationale for such a decision is straightforward: withholding movement during negotiations and mediation for the sole purpose of enhancing once's position at arbitration derogates the obligation to bargaining in good faith.[23]

In addition, consistent with the generally accepted principle in labor law that a party which insists to impasse upon inclusion in the contract of a non-mandatory subject of bargaining is guilty of an unfair labor practice, the BPA could focus the attention of the parties upon the ultimate voluntary settlement goal and away from the interest arbitration award by requiring that the firefighter statute "final positions on matters in dispute" final-offer language address only mandatory bargaining subjects. Such an action would serve to limit the potential areas in dispute in interest arbitration under that statute, and thereby reduce the scope of the bargaining disagreement in most cases.

These elements, when combined together, are included in what we did to enhance the bargaining process while I was with the Iowa PERB, and produce, in my judgment, a most salutary impact upon the bargaining process. Although the parties are free to continue bargaining during the arbitration proceeding, the arbitration itself in view of such elements, at least under the police statute, does not become an extension of the bargaining proces. The effect is to avoid the overuse of the arbitration provisions.

Equally important under both of these statutes is some clear decision from the BPA concerning what the contract length will be when the parties in their final offers differ as to that contract length. Speaking now as the interest arbitrator, it is essentially impossible for the neutral to make final offer awards where the contract duration element of those final offers is different. In Iowa, we resolved this problem by determining that where there was a difference in the parties' positions at arbitration concerning contract duration, the duration level would by default be one year. That decision was based at least in part on the fact that the Iowa Legislature made yearly appropriations to Iowa public-agency jurisdictions. It might make sense in Montana to make the default duration level two years, since the Legislature meets only biennually.

Finally, the Board should also develop, like we did in Iowa,

an expedited procedure for making determinations concerning what is a mandatory or permissive subject of bargaining allowed to be placed in the final offers, under at least the police statute. In Iowa, we developed an expedited declaratory ruling procedure where either party or the arbitrator could petition the Iowa PERB to make such a decision on an element of either of the parties' final offers on which a dispute existed on the final offers' mandatory/permissive nature, plus highly expedited hearings before the PERB Board itself (rather than a hearing officer) and similarly expedited PERB decisions in such cases. Of course, the parties would be well advised not to include permissive bargaining subjects in their final offers, particularly under the police statute, since they cannot revise their final offers once made, to take into account any "loss" that might occur by deletion from their final offers of a non-mandatory bargaining subject.

Conclusion

The recently enacted interest-arbitration law covering police officers and their municipal employers in Montana represents the latest attempt to provide a method of collective bargaining dispute resolution in the absence of the right to strike which re-equalizes the parties' bargaining power and results in an equitable balance of the interests of employees, public safety employers and the public itself. An examination of the research data on the subject of the impact of interest arbitration on the bargaining process shows that the numerous contrary arguments to the utility and effectiveness of interest arbitration, with minimal exception, either lack substantive support or can be resolved by utilizing the various types of final-offer interest arbitration, in focusing the attention of the parties toward the goal of voluntary contract agreement despite the availability of interest arbitration as the final impasse step.

Although the Montana police interest-arbitration law and the longer existing firefighter interest-arbitraton law take markedly different approaches to dispute settlement in those jurisdictions, both contain elements designated to encourage focus upon voluntary contract agreement and away from resolution via interest arbitration. In addition, the BPA via unfair labor practice or declaration ruling procedures, can take steps designed to further encourage focus upon voluntary agreement rather than the interest arbitration step.

Finally, it is the actions of the parties themselves which will ultimately determine the effectiveness of the protective service interest arbitration statutes in Montana. Mere "good faith" in dealing with the other party and the arbitrator may not be enough in interest disputes. Rather, such disputes require adherence to the duty of utmost good faith, in making interest arbitration and bargaining process function most effectively.

RONALD HOH *has served in dispute resolution capacities in the public and private sectors for more than 33 years. He has been a full-time labor and employment arbitrator, factfinder and mediator for nearly 20 years and has issued more than 1,400 decisions, including about 55 interest-arbitration decisions in seven states. Prior to that, he was the regional director for the California PERB Sacramento office for two and one-half years, and director of Mediation Services, mediator, arbitrator and administrative law judge for the Iowa PERB. He is a regular speaker at the annual Montana BPA conference, and has often served both as a factfinder and a grievance arbitrator in Montana cases. He has been a member of the National Academy of Arbitrators since 1992, and serves on numerous permanent arbitration panels in both Western and Midwestern states.*

NOTES

1. Hebden, "Public Sector Dispute Resolution," in Public Employment in a Time of Transition.
"Madison, WI: Industrial Relations Research Association." 1996. Pages 85-125; Tanimoto, "Guide to Statutory Provisions in Public Sector Collective Bargaining;" "Honolulu: Industrial Relations Center." University of Hawaii, 1981.
2. "Public Employee Bargaining." Chicago, IL: Commerce Clearing House, 1990: Pages 10401-31201.
3. The only exceptions to this general rule nationwide occur in Texas, which outlaws public employee collective bargaining for all employees except police and firefighters, who may use interest arbitration if both parties agree; in Wyoming, where only firefighters have collective bargaining (and interest arbitration) rights; and in California, where interest arbitration rights for employees in general law cities arise under the California Code of Civil Procedure, rather than the California Government Code Provisions establishing bargaining rights for public employees.
4. *See,* e.g., DiLauro, "Interest Arbitration: The Best Alternative in Resolving Public Sector Impasses," Employee Relations Law Journal, Volume 14, No. 4 (Spring, 1989).
5. The California Legislature's 2004 attempt to overcome the California Supreme Court's 2003 finding of unconstitutionality in the interest arbitration law for general law cities initially passed in 2000 has not yet been constitutionally tested, but is virtually never used due in part to fears concerning its constitutionality.
6. Davis and Schlichtmann: "Interest Arbitration: Legality, Reality & Value," California Public Employment Relations No. 121 (December 1986).
7. Rehmus, "Interest Arbitration," in Bonner, ed., Labor-Management Relations in the Public Sector – Redefining Collective Bargaining (Labor Relations Press, 1999).
8. Rehmus, supra, Note 6, at 220.
9. Hoh, "The Effectiveness of Mediation in Public Sector Arbitration Systems – The Iowa Experience," 39 Arbitration Journal No. 2 (June, 1984). Pages 30-40.
10. Hebden, supra, Note 1, at Page 110.
11. Doherty, "Trends in Strikes and Interest Arbitration in the Public Sector " 37 Labor Law Journal 474 (August, 1986).
12. Holett, "Interest Arbitration in the Public Sector" 60 Chicago– Kent Law Review 815 (1984).
13. Davis and Schlichtman, supra, Note 5; Rehmus, supra, Note 6.
14. Hebdon, supra, Note 1, at Page 110.
15. Newman, "Interest Arbitration: Impressions of a PERB Chairman," 37 *Arbitration Journal* 7 (December, 1982).
16. Rehmus, supra, Note 6, at 203.
17. Ibid.
18. Stern, Rehmus, Loewenberg, Kaspar and Dennis, Final Offer Arbitration (D.C. Heath Company, 1975).
19. "Open Forum: A 10 Year Review of Compulsory Arbitration in California," California Public Employment Relations No. 63 (December, 1984).
20. Di Lauro, supra, Note 4, at Page 554.
21. Howlett, "Interest Arbitration in the Public Sector" 60 Chicago-Kent Law Reveiw 815 (1984).
22. Di Lauro, supra, Note 4, at 558.
23. Loihl, "Final Offer Plus: Interest Arbitration in Iowa," in Dennis and Somers, eds., "Truth, Lie Detectors and Other Problems in Labor Arbitration," Proceedings of the 31st Meeting of the National Academy of Arbitrators (Bureau of National Affairs, 1979), Pages 317-41.

Alexander (Zander) Blewett III was awarded the Cascade County Bar Association's Edward C. Alexander Award for outstanding trial advocacy and professionalism. Mr. Blewett received the award at the annual meeting of the Cascade County Bar Association on Feb. 13. Mr. Blewett is the owner of the Great Falls law firm Hoyt & Blewett. As a trial lawyer, he handles civil litigation involving railroad crossing accidents, Federal Employer Liability Act cases and a wide variety of other cases including product liability, medical and legal negligence, insurance bad faith, automobile and aircraft accidents, government liability, fraud, workplace injuries, toxic tort and environmental cases, and other negligence cases. Mr. Blewett has been honored in the past by being selected as a fellow of the American College of Trial Lawyers; a fellow of the International Society of Barristers; a fellow of the International Academy of Trial Lawyers 1995 (Montana chair); and an advocate of the American Board of Trial Advocates. He was the Trial Lawyer of the Year 1993-1994, selected by the Montana Trial Lawyers Association, and he is the only Montana lawyer admitted to the Inner Circle of Advocates. He has been certified in Civil Trial Advocacy by the National Board of Trial Advocacy. Mr. Blewett has also been involved in many community service and volunteer organizations. He is currently president of the Great Falls Education Foundation and a member of the University of Montana Law School Development Committee. Mr. Blewett also provides wrestling scholarships for students in the high schools of North Central Montana and was the major contributor to the wrestling room for Great Falls High.

Former Montana prosecutor **John Huntley** has gone to work as an associate for his former immigration law school professor, Sarah Reinhardt. She has set up an office in Albuquerque, N.M., devoted exclusively to immigration and naturalization matters. Previously, Mr. Huntley was a county attorney in Fallon County, Mont., for more than five years. After leaving the County Attorney's Office, he went to New Mexico where he worked as a federally funded regional narcotics prosecutor for the five counties in the northeastern corner of New Mexico. After funding ended for this position, Mr. Huntley took a job with a local district attorney's office in the Albuquerque area. Initially, he was a felony prosecutor who handled serious felony matters such as homicide cases. Later, he was put in charge of all habeas corpus cases in three out of five of the counties in metropolitan Albuquerque, assigned conflict cases from various parts of New Mexico that concerned matters such as public corruption, and special projects. Before leaving his job with the DA's office, Mr. Huntley tried cases all over the state of New Mexico in about half of its judicial districts.

Glenn E. Tremper has formed The Law Office of Glenn E. Tremper in Great Falls. A 1987 graduate of the University of Montana School of Law, Mr. Tremper served as law clerk to Chief Judge James R. Browning of the U.S. Court of Appeals for the 9th Circuit before entering a litigation practice in San Francisco and later in Great Falls. Since 1993, he has been an attorney and shareholder at Church, Harris, Johnson & Williams. His practice, located at 104 4th Street North, Suite 301 in Great Falls, will continue to emphasize personal injury and business litigation, including insurance coverage and bad faith, breach of fiduciary duties and construction law. Lori J. Hester will join him as his paralegal. He may be contacted at PO Box 2263, Great Falls MT 59403; (406) 761-9400 or at *glenn@tremperlaw.com*.

Deaths

Michael Mulroney, Helena attorney

Michael J. Mulroney, 74, a Helena attorney, died at his home in Helena on Feb. 12.

Mr. Mulroney was born in Fort Dodge, Iowa. After graduating from high school, he enlisted in the Navy, and saw action in the Korean War. Upon his discharge he attended the University of Iowa Law School.

In 1962, Mr. Mulroney was admitted to the Montana Bar. Shortly after, he traveled to Washington, D.C., and began working with the Internal Revenue Service in the Corporate Reorganization Division. While in Washington, he married Ann Bonner and they had one daughter, Kathleen. He worked from 1968 to 1976 as assistant general counsel for the Wachovia Corporation.

Mr. Mulroney then moved his family back to Montana, where he became a partner in the law firm of Scribner, Huss & Mulroney. He later joined the Law Firm of Luxan & Murfitt and remained there until the time of his retirement.

After his retirement from the active practice of law, Mr. Mulroney was appointed by Gov. Judy Martz to serve on the State Tax Appeal Board. He thought it was ironic that he should be serving on the State Tax Appeal Board when his father, the Hon. John E. Mulroney, had been appointed by President Eisenhower to serve on the U.S. Tax Court.

In addition to the love of the law, Michael loved flying airplanes. He received the Wright Brothers Master Pilot award from the Federal Aviation Administration which is presented to pilots who exhibit viation expertise for at least 50 years. He restored a World War II airplane affectionately known as Mrs. Miniver, which he continued to own and fly until his death.

Steven Hudspeth, Great Falls attorney

Great Falls attorney Steven Mark Hudspeth, 46, died on Feb. 16 at his home.

Mr. Hudspeth was born in Iowa City, Iowa. He attended elementary school in Muscatine, Iowa, Missoula and St. Ignatius and graduated from Dawson County High School in Glendive. He then attended Dawson Community College and the

University of Montana, receiving his juris doctorate in 1986 from the University of Montana.

Mr. Hudspeth served as deputy county attorney and public defender, then opened his own legal practice in Great Falls. He proudly served on the Great Falls International Airport Board and Great Falls Development Authority.

Survivors include his wife, Brenda, and a son, Grant. The family suggests memorials to a college fund for Grant Hudspeth, c/o Great Falls Teachers Federal Credit Union, 1500 River Drive N., Great Falls MT 59401.

Other deaths

- **Mary Alice Mizner**, mother of recently retired Deer Lodge District Judge Ted L. Mizner, died on Feb. 23 in Deer Lodge.

TALENT DRAIN, **from Page 33**

school graduates turn to the higher starting salaries offered by private firms and away from public service salaries in the mid $40,000 range offered to new prosecutors and public defenders. Yet with an average loan debt of nearly $80,000 for graduates of private law schools and more than $50,000 for those who graduate from public law schools, these new lawyers often have no choice. In fact, two-thirds of law school students say that their education loans prohibit them from even considering public service positions.

When communities are unable to recruit or retain public service lawyers, justice suffers through lengthy delays, increasing the possibility that the innocent may be sent to jail, crimes may go unprosecuted and the guilty may go free.

While law enforcement rightly is – and should remain – a state and local concern, the federal government has a responsibility to make sure the criminal justice system in our country functions effectively.

The John R. Justice Prosecutors and Defenders Incentive Act of 2007 is a step toward ensuring that our country's criminal justice system has the talented, experienced lawyers it needs to function effectively. Without the ability to attract and retain talented people dedicated to carrying out our laws, we will not have true justice for ourselves or our fellow citizens. ❍

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ASSOCIATE: Sullivan Tabaracci & Rhoades PC seeks an associate attorney with at least 3 to 7 years experience to complement its growing transactional and litigation practice specializing in commercial, real estate and business law. Our 11-member firm enjoys over seven decades of combined experience, and provides associates with excellent opportunities to expand their legal practice. In our continuing effort to exceed our client's expectations, we hire only exceptional attorneys and staff. Situated in centrally-located Missoula, the firm's upscale office suite offers a spacious, technologically advanced and pleasant work environment. Successful applicants must be licensed to practice law in Montana and demonstrate an exceptional academic background as well as superior research, analytical, verbal and writing capabilities. All applications will be held in confidence. Please submit your cover letter and resume to: Sullivan, Tabaracci & Rhoades PC, Attn: Office Administrator, 1821 South Avenue West, Third Floor, Missoula MT 59801; *www.montanalawyer.com; info@montanalawyer.com*

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A Sampling of Articles and Topics for 2007

Intelligent Design Will Survive Kitzmiller v. Dover
by David K. DeWolf, John G. West, & Casey Luskin

Disaster in Dover: The Trials (and Tribulations) of Intelligent Design
by Peter Irons

A Compilation of Articles from the Fall 2006 "The Right to Privacy" Symposium, including *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right* by Vincent J. Samar

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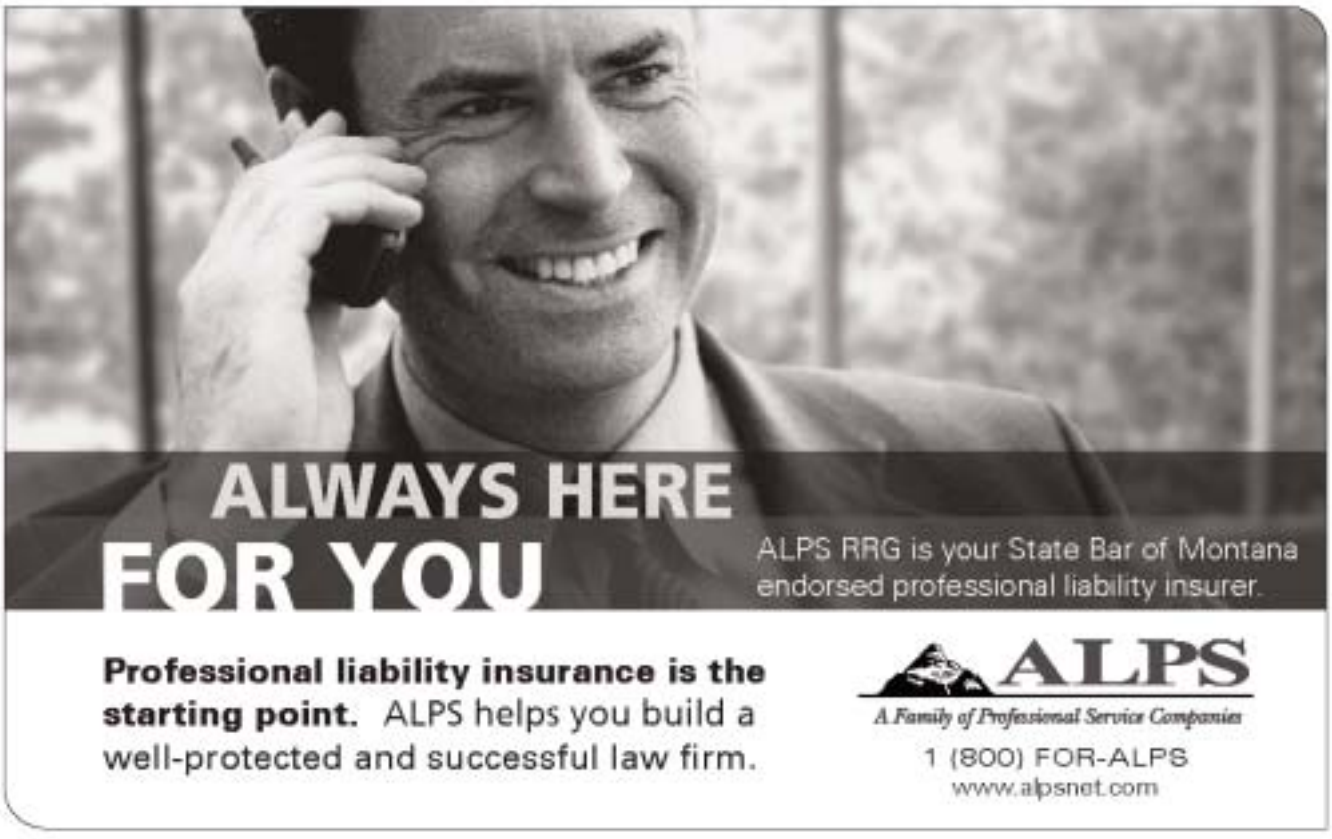

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