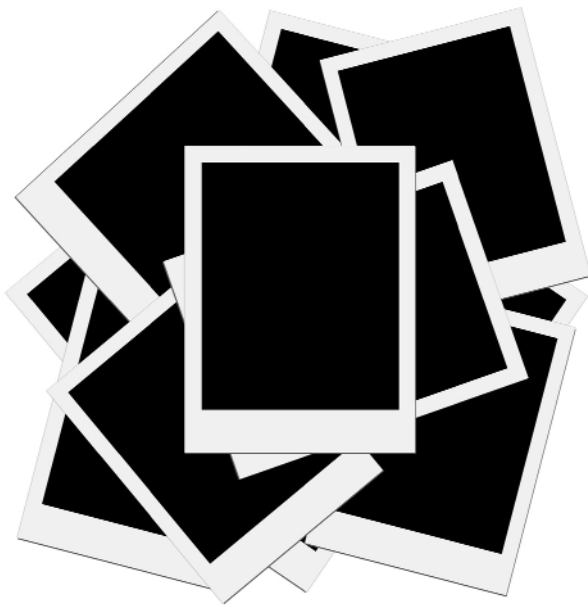


Lawyer

THE STATE BAR OF MONTANA

Attorneys and crime scenes



A Montana defense lawyer charged with holding 'evidence' is exonerated by Supreme Court in less-than-obvious ruling

[Read the opinion & dissent](#)

For people, not money

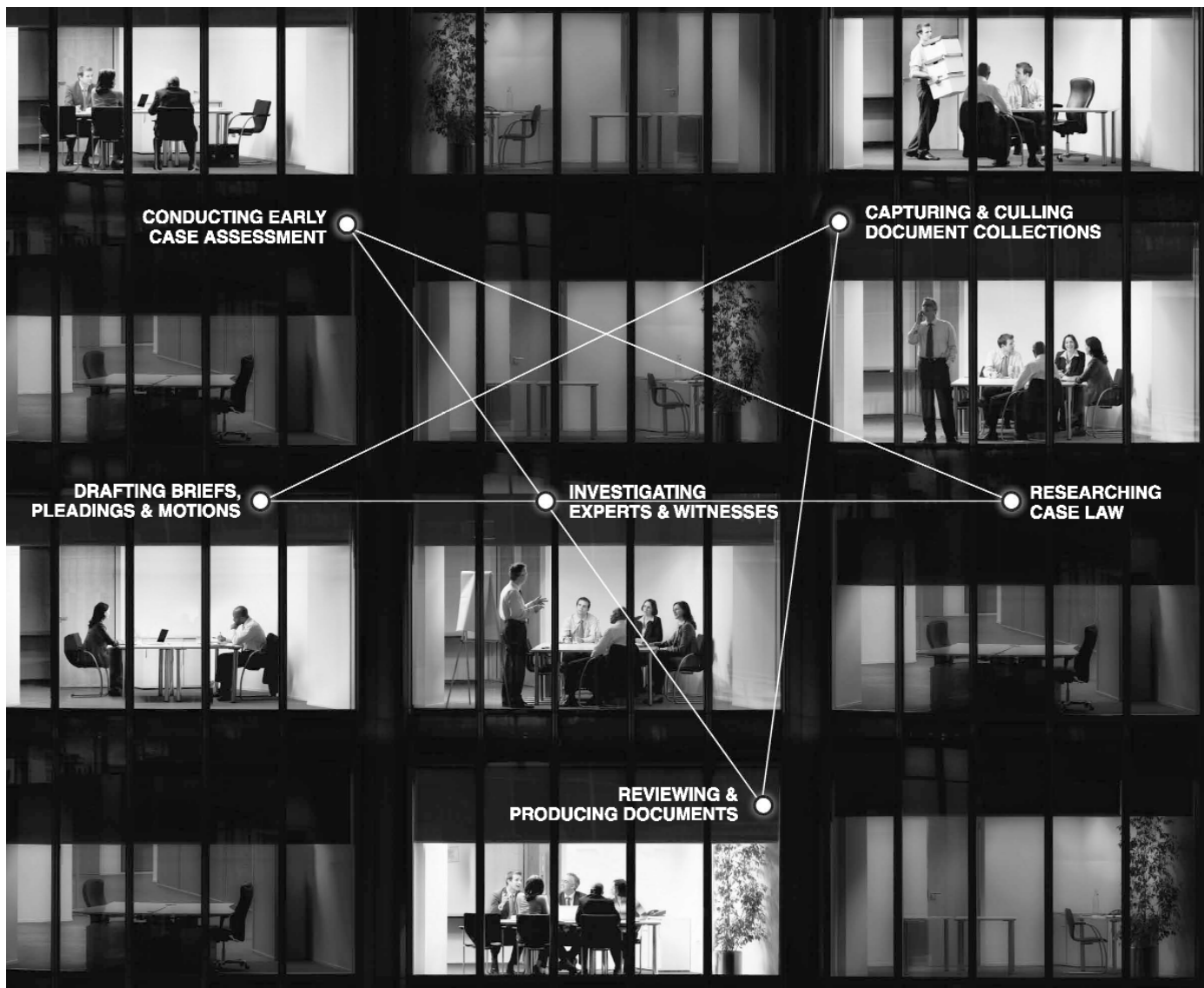
Judge Jameson's granddaughter gets rave reviews from clients other attorneys might not take



Another justice to bow out from the Montana Supreme Court



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PRESIDENT'S MESSAGE: CIVILITY PART II

Respect? Humanity? Glass ceilings?

What I heard at the Bench-Bar Conference

Cynthia Smith

Last month, my President's Message discussed the interconnectedness between civility and humanity. This past month I had the pleasure of attending the State Bar's annual Bench-Bar Conference, where the main focus of the conference was on civility. Several judges from federal, state, and city courts made up a panel on how civility is viewed from the bench. The comments and advice from the judges who spoke warrant a second column on civility.

As I listened to the panelists, I realized that judges don't generally see the kinds of incivility that aggravates the members of the bar. With the exception of a few anecdotes from the judicial panelists about rude or misbehaving attorneys appearing before them, it was clear that, for the most part, attorneys are on their best behavior when they are in court.

That is as it should be. We all owe respect and deference to the judiciary. The respect that we accord the bench in front of jurors and spectators enhances the credibility of our legal system and fosters the administration of justice.

ONE OF THE JUDICIAL PANELISTS gave an example of the lack of decorum he commonly sees in court. He said that attorneys have fallen away from the practice of stating their names and their clients' names when first addressing the court. He sees the formal introduction at the beginning of a proceeding as a demonstration of respect for the court.

One judge on the panel commented that incivility happens when lawyers allow things to get personal. That comment rang true with me. I know that I have to rein myself in harder when I feel personally attacked by opposing counsel. Too often, I also take it personally when opposing counsel attacks my client, especially when I believe passionately in my client's cause. It's a

serious mistake when I take things personally. It doesn't help my clients.

As one commentator correctly pointed out, attorneys should act as buffers for their clients – stepping aside from the clients' hostility to try to resolve their problems in an uncharged atmosphere. The commentator also said that when an attorney is uncivil, she misses a golden opportunity to be persuasive.

One judge said that attorneys have fallen away from the respectful practice of stating their names and their clients' names when first addressing the court.

A MEMBER OF THE audience asked about incivility based on gender. I was surprised to learn there is now a great disparity among the bench and bar about whether gender bias still exists in Montana. Some panelists and members of the audience stated they believe the glass ceilings have been shattered and that gender bias is a thing of the past. I heard this both from a young

female lawyer and male judge who has been on the bench for many years.

Others, however, believe that gender bias is alive and well, regularly rearing its ugly head in boardrooms and depositions.

I am very interested in hearing from other members of the bench and bar about whether gender bias still exists and the ways in which it does, especially if that bias impacts access to justice. I would appreciate hearing from any members of the bench or bar who believe that it continues to exist. Those comments may be fodder for a separate President's Message.

OVERALL, IT WAS AN excellent conference. The lawyers in the audience and the judicial panelists were unanimously interested in improving civility in our legal system. The panelists acknowledged that they were probably preaching to the choir. It's an important discussion, though, one that I hope will continue. ○

A different lesson from a crime scene

In a Dec. 31 order, the Montana Supreme Court dismissed an ethics complaint against Montana attorney Eric Olson in a case involving crime scene materials.

The Office of Disciplinary Counsel had filed a formal complaint charging that Mr. Olson, a public defender, concealed "evidence" from prosecutors in a child-pornography case. In a ruling by Justice Patricia Cotter – and concurred to by Justices Bill Leaphart, John Warner, Brian Morris, and Chief Justice Mike McGrath – Chief Justice McGrath had a criticism of the ruling, and Justice Jim Nelson wrote a lengthy and scathing dissent. Perspectives of whether crime-scene material is obviously evidence, and a lawyer's responsibility when he finds it, clash in this decision, as presented in the Court order:

On Feb. 15, 2007, the Office of Disciplinary Counsel (ODC) filed a formal complaint against Eric Olson alleging violations of Rule 3.4 and Rules 8.4(b)-(d) of the Montana Rules of Professional Conduct (MRPC). These rules read in relevant part as follows:

Rule 3.4 – Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act . . .

Rule 8.4 – Misconduct

It is professional misconduct for a lawyer to . . .

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice . . .

Olson contested the charges. On Jan. 17-18, 2008, the Commission on Practice held a hearing on ODC's complaint. Testimony and documentary evidence was presented at the

Attorney walks away with material from client's home and did not turn it over to prosecutors. How his handling of it, and the question of what is 'evidence,' got his ethics charges dismissed.

hearing. On July 28, 2009, the Commission issued its conclusion that ODC had failed to prove by clear and convincing evidence that Olson had violated Rules 3.4 and 8.4(b)-(d) of the MRPC. The Commission recommended that ODC's

complaint be dismissed with prejudice.

The ODC objected to the Commission's findings and recommendation of the Commission, but the Supreme Court denied ODC's objections and adopted the Commission's recommendation to dismiss the complaint with prejudice.

OLSON WAS THE CHIEF public defender in Cascade County until Feb. 28, 2006 [he now works out of Missoula]. On or about Dec. 25, 2005, police in Great Falls searched the apartment of Shaun and Kelly Mortenson, seizing various items of evidence related to child pornography. The Mortensons were charged with 38 counts of sexual abuse of children.

Olson undertook the representation of Kelly Mortenson. Neither Olson nor anyone else in his office had ever represented a client in a child pornography case. Olson met Mortenson for 2 to 3 hours after her arrest and began to form a compulsion defense to the charges against her. Olson also retained the services of Dan Kohm, a retired detective from the Cascade County Sheriff's Office and an experienced investigator.

On or about Jan. 9, 2006, Kohm and Olson were contacted by Mortenson's mother regarding items left in the Mortensons' apartment that the defense should look at. Olson and Kohm confirmed that an eviction notice had been issued, and were further aware that the apartment had been searched and released by the Great Falls Police Department.

Olson and Kohm went to the Mortensons' apartment. While there, they collected items they believed would be potentially helpful in formulating a defense. Among the items taken were 13 photographs which had been apparently downloaded from the Internet. All the removed items were bagged, tagged, sealed as evidence, inventoried, and stored under lock and key in Kohm's office. The 13 photographs were introduced by ODC at the hearing in this matter and have been included in the record on appeal. They depict young girls in various erotic

poses. In many of these pictures, the genital areas of the girls are exposed.

At the Commission on Practice ethics hearing, Olson and Kohm testified that they did not believe any of the photographs were child pornography. Olson further testified that he did not believe any of the items were contraband. However, Olson did harbor concerns that someone else might think so in light of the language in §§ 45-620(1)(f) and -625, MCA (2005). These statutes read in pertinent part as follows:

45-5-620. Definitions. As used in 45-5-625, the following definitions apply:

(1) "Sexual conduct" means actual or simulated . . .

(f) lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person . . .

45-5-625. Sexual abuse of children. (1) A person commits the offense of sexual abuse of children if the person . . .

(d) knowingly processes, develops, prints, publishes, transports, distributes, sells, exhibits, or advertises any visual or print medium, including a medium by use of electronic communication, as defined in 45-8-213, in which a child is engaged in sexual conduct, actual or simulated;

(e) knowingly possesses any visual or print medium, including a medium by use of electronic communication, as defined in 45-8-213, in which a child is engaged in sexual conduct, actual or simulated . . .

Kohm also expressed concerns to Olson about whether they could be subject to criminal culpability for possessing the photographs. Accordingly, Olson sought the advice and counsel of Tony Gallagher, the chief federal defender in the District of Montana, who had extensive experience in handling child pornography cases. Gallagher advised Olson to seek a protective order in the event someone might consider the items child pornography. At the hearing, Gallagher testified that such orders are commonplace in these matters and are obtained ex parte from the court. Gallagher also testified that Olson did not believe he was in possession of contraband or child pornography. Gallagher further testified that Olson had an obligation to gather items in preparation of a defense, and did not have a duty to turn over the information at that point in time.

BASED ON GALLAGHER'S advice, Olson sought and received a protective order from Cascade County District Court Judge Thomas M. McKittrick authorizing him and Kohm to retain possession of the seized items. Judge McKittrick testified at the hearing that he believed Olson was an aggressive defense attorney and needed to investigate the case adequately. Judge McKittrick also stated that the criminal statutes noted above could expose criminal defense lawyers to criminal liability when investigating charges against their clients. Judge McKittrick expressed the view that these statutes could potentially have a chilling effect on the conduct of criminal defense attorneys.

In early 2006, Olson retained forensic psychologist Dr. Michael J. Scolatti to evaluate his client, review the evidence,

and advise him on the compulsion theory of his defense. Dr. Scolatti reviewed the photographs, gave his opinion that none of the photographs were child pornography, and agreed with Olson's compulsion theory of defense.

On January 17, 2006, Cascade County Attorney Brant Light informed Olson via e-mail that the Mortensons' case would likely "go federal" and that the state charges would probably be dismissed. That same month, Olson was hired as the state training coordinator for the Office of the State Public Defender. By reason of the e-mail and Olson's new job, he did not go forward with his defense of Kelly Mortenson. Olson started his new job on March 1, 2006, and left the Cascade County Public Defender's Office.

OLSON DID NOT TURN OVER any of the seized evidence to law enforcement officials, or advise them of the existence of this evidence prior to leaving the public defender's office.

After Olson left, Kelly Mortenson's case was assigned to attorney Carl Jensen. Olson attempted to talk to Jensen about the matter, but Jensen did not have time to discuss it and simply asked for a memo. Olson prepared an e-mail memo on the case. Sometime after reading the e-mail, Jensen learned of the existence of the seized evidence. Jensen contacted investigator Kohm and ordered him to take the items out of the tagged and secured envelopes and turn them over to Cascade County Attorney Brant Light. Jensen did not review any of the evidence, which included some of Kelly Mortenson's private writings, along with the photographs. Kohm objected to Jensen's request but did carry it out.

When County Attorney Light received the material, he turned it over to the Great Falls Police Department. At the ethics hearing, Light testified that he never had any thought of prosecuting Olson for possessing the material.

MARCIA HURD IS THE assistant U.S. attorney who prosecuted Kelly Mortenson in federal court. Hurd testified at the ethics hearing that most of the photographs had already been found elsewhere by the police in their search of the apartment. Because the items had been removed from the tagged and sealed envelopes at Jensen's request, Hurd was unable to use any of the recovered items in the federal case. However, she testified that she had sufficient evidence to prosecute and convict. Furthermore, Brian Norcross represented Kelly Mortenson in the federal trial, and independently developed the same compulsion defense formulated by Olson in response to the state charges.

ODC's complaint alleged that Mr. Olson violated MRPC 3.4 when he "unlawfully obstructed another party's access to evidence and/or concealed documents or other materials having potential evidentiary value." The complaint alleged Olson violated MRPC 8.4(b), referencing the criminal offense of "tampering with or fabricating physical evidence" in § 45-7-207, MCA. This statute reads in pertinent part as follows:

45-7-207. Tampering with or fabricating physical evidence. (1) A person commits the offense of tampering with or fabricating physical evidence if, believing that an

official proceeding or investigation is pending or about to be instituted, the person:

(a) alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or availability in such proceeding or investigation . . .

Based on ODC's references to this statute in conjunction with the purported MRPC 8.4 violation, the Commission inferred that ODC was alleging that Olson violated § 45-7-207, MCA. The complaint also alleged Olson violated MRPC 8.4(c) by virtue of his "dishonest and deceitful" conduct. The

At issue is whether the material held by attorney Olson was child pornography, and whether he held it in 'good faith.'

violation of MRPC 8.4(d) allegedly occurred because Olson's conduct in this matter was "prejudicial to the administration of justice."

AT THE HEARING, the Commission on Practice received testimony from Professor Norm Lefstein, former dean of the Indiana University School of Law, and an expert on professional responsibility and defense representation in criminal cases. Lefstein was familiar with the Montana criminal statutes, the Model Penal Code upon which Montana's criminal statutes are based, the MRPC, and the American Bar Association's Criminal Justice Standards. Lefstein felt that the drafters of the Model Penal Code never considered the impact that a tampering-with-evidence offense could have on criminal defense attorneys, or the possibility this offense could be used against a criminal defense attorney.

Lefstein also reviewed portions of the ABA's Criminal Justice Standards pertaining to the possession of items of physical evidence in connection with an ongoing criminal matter. Under ABA Defense Function Standards 4-4.6(a) and 4-4.6(c), Lefstein said, Olson was not required by law or the court to turn the physical items over to law enforcement or the prosecution during the time he worked on this case. These Criminal Justice Standards provide as follows:

Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement only: (1) if required by law or court order, or (2) provided in [4-4.6(d)].

Defense Function Standard 4-4.6(a), Physical Evidence.

Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test,

examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source.

Defense Function Standard 4-4.6(c), Physical Evidence.

IN ITS FINDINGS, the Commission on Practice specifically found that "the fact that Olson obtained a court protective order to retain the items is totally inconsistent with the intent required under the tampering with physical evidence statute." While the Commission noted there was no "bright line" rule in the MRPC or model rules directly bearing on this case, it found the testimony of Lefstein and consideration of the ABA Criminal Justice Standards helpful. The Commission noted that the duty to investigate criminal cases is a "very broad responsibility and the failure to perform said duty would be a serious failure upon the part of defense counsel."

Further, the Commission noted the ABA's recognition of diligent investigation, and the importance of a defense lawyer taking possession of material produced by his client in order to make a judgment about its possible utility in defending his client. In comparing Olson's conduct to the ABA Criminal Justice Standards noted above, the Commission concluded that his conduct was a "textbook example" of the type of functioning expected of defense counsel.

Additionally, the Commission noted that the case before it involved a complicated area in which the lawyer's judgment must be given some leeway and understanding. The Commission also noted testimony to the effect that there was "bad blood" between Jensen and Olson prior to Jensen's handing of the materials over to County Attorney Light.

IN ITS CONCLUSIONS of law, the Commission found that Olson had a "good faith belief" that the items taken from the Mortenson apartment were possibly supportive of the defense, needed for examination and evaluation, contained privileged attorney-client information, and were not child pornography or contraband. The Commission noted that Olson had an obligation to provide competent representation to his client, and did so in trying to establish a compulsion defense. The Commission also concluded Olson had a good faith belief that he could not reveal the information in this case, except as required by a discovery statute or court order. In this case, no such statute or order applied.

With regard to the allegations under MRPC 3.4, the Commission concluded that Olson did everything to comply with this rule as he preserved the evidence in a manner that was safe, and sought a protective order for its possession.

Under MRPC 8.4(b) and (c), the Commission found no misconduct by Olson. The Commission found no unlawful obstruction of a party's access to evidence, and no evidence of Olson's intent to commit the offense of tampering with evidence. In order to establish a violation MRPC 8.4(d), the Commission, citing *People v. Jaramillo*, 35 P.3d 723 (Colo. OPDJ 2001), concluded that ODC must prove some nexus between the conduct charged and an adverse effect upon the administration of justice. The Commission determined that Olson's conduct had no adverse effect on the administration

of justice, and did not affect the federal case against the Mortensons.

....

ODC’S CHALLENGE to the Commission’s recommendation and findings boiled down to two main points, the Court order continued. First, ODC claimed that the Commission erred when it failed to determine whether or not the 13 photographs were child pornography. Instead, the Commission merely determined that Olson had a good-faith belief that these items were not child pornography or contraband. ODC included the photographs in the record on appeal and asked the Montana Supreme Court to review them and make a determination as to whether they are actually contraband. ODC claims this is an important issue which was not determined in this case.

Second, ODC contended that because these items were child pornography, they were either the fruits or instrumentalities of a crime, and that Olson was required to turn them over to the authorities under the MRPC. In this connection, ODC asserted that a violation of Rule 3.4(a) does not require a violation of a criminal statute. With regard to MRPC 8.4, ODC generally contended that Olson had an ethical obligation to turn the contraband over to the authorities, and that his “good faith belief” that the items were not in fact contraband cannot defeat this obligation, the Court ruling said.

ODC argued that the evidence in this case demonstrated that Olson knew he had child pornography because he obtained an ex parte order for its possession. ODC contended that the fact the apartment had been searched and released by the police does not defeat Olson’s duty under the MRPC.

ODC also disputed the correctness of the Commission’s conclusion that Olson believed in good faith that he did not need to turn these items over in the absence of a court order or applicable discovery statute. Again, ODC argued that a criminal statute or court order would not obviate Olson’s ethical duties in this case.

Finally, ODC disputed the contention that Olson’s conduct in this case was a “textbook example” of what the ABA Criminal Justice Standards require. ODC contended that there is nothing in these standards which permitted Olson to illegally possess the contraband. Further, ODC disputed the tenability of the claim that Olson had to retain the evidence in order to inspect it. ODC argued that it was apparent that the evidence in this case was child pornography, and that Olson could have still used this material even if it was in possession of the police.

“*IN JACOBELLIS V. STATE OF OHIO*, 378 U.S. 184, 84 S. Ct. 1676 (1964), Justice Potter Stewart famously said of illegal pornography that ‘I know it when I see it . . .’” *Jacobellis*, 378 U.S. at 197, 84 S. Ct. at 1683 (Stewart, J., concurring). ODC has included the disputed photographs on file, and it is difficult for the Court to comprehend how anyone would not ‘know’ that these are examples of child pornography,” the Court opinion continued.

Justice Cotter’s opinion then neared its conclusion:

“However, the dispositive question in this case is not whether the seized items in this case are child pornography. Rather, it is whether ODC has demonstrated, by clear and convincing evidence, that Olson violated MRPC 3.4(a) and 8.4(b)-(d), as alleged in ODC’s complaint. In its complaint, ODC charged that Olson violated MRPC 3.4 by unlawfully obstructing another party’s access to evidence and/or concealing documents or other materials having potential evidentiary value. The Commission correctly determined that Olson did not engage in such conduct. The items were stored, bagged, and tagged, and kept under lock and key in Kohm’s office. Olson was not, at that point in the proceedings, obligated to turn the items over to the police or prosecutor by virtue of a statute or court order. Moreover, Olson had a duty to conduct an investigation on behalf of his client and prepare a defense. While we have not yet formally adopted the ABA’s Criminal Justice Standards in Montana, the Commission properly relied on them for guidance in analyzing this matter. ODC has simply failed to demonstrate by clear and convincing evidence that this conduct amounted to unlawfully obstructing or concealing evidence.

“The violation of MRPC 8.4(b) was premised on allegations that Olson committed the criminal act of tampering with or fabricating physical evidence. There is no evidence in this record of Olson’s intent to tamper with or fabricate physical evidence.

“The violation of MRPC 8.4(c) was premised on Olson’s dishonest and deceitful conduct. While ODC disputes whether Olson could have had a good faith belief that the photographs were not contraband, it has failed to demonstrate that Olson’s conduct in this case was dishonest or deceitful. And although we do review the Commission’s findings and recommendations de novo, the fact remains that the Commission is still in the best position to assess and observe the demeanor of the witnesses in this case. *See Matter of Matt*, 252 Mont. 345, 354, 829 P.2d 625, 630 (1992).

“The MRPC 8.4(d) violation requires conduct on Olson’s part which is ‘prejudicial to the administration of justice.’ In order to establish a violation of this rule, the Commission concluded that ODC must demonstrate some nexus between Olson’s conduct and an adverse effect upon the administration of justice. *See Jaramillo*, 35 P.3d at 731. We agree with the Commission that ODC has failed to prove by clear and convincing evidence that Olson’s conduct met this standard.

“Finally, the Dissent opines that there is evidence in the record that Olson misled the District Court into believing he had obtained the photographs from the County Attorney’s files, and that such conduct implicates MRPC 8.4(c) and (d). *See Dissent*, ¶ 44-45. If the record before us supported a finding that such conduct occurred, we would not hesitate to find a rule violation. However, because there is not clear and convincing evidence in the record that Olson in fact made such misrepresentations to the court,

Supreme Court roster keeps on rotating

- *Justice Leaphart to retire Dec. 31*
- *Justice Wheat files for re-election*
- *Judge, attorney file for new opening*

Montana Supreme Court Justice William Leaphart announced on Feb. 3 that he is retiring at the end of this year after serving two eight-year terms on the Court. By Feb. 22, Helena attorney Elizabeth S. Baker and Livingston District Judge Nels Swandal filed for election to Justice Leaphart's seat.

Meanwhile, newly sworn-in Justice Mike Wheat formally filed to finish out the term he began a month ago when he was appointed to replace Justice John Warner, who retired last Dec. 31. Wheat will run for election in November for the chance to fill out the remainder of Justice Warner's term, which ends on Dec. 31, 2014.

A SUPREME COURT justice since 1995, Leaphart said he felt it was time for a change. "If I was fortunate enough to get elected for another eight-year term, I would be 72 and still reading briefs," he said in a Feb. 3 interview with the Lee Newspapers State Bureau.

After leaving the Supreme Court, Justice Leaphart said, he might work in mediation or work for nonprofit or public interest groups, instead of retiring from work altogether.

Born in Butte and raised in Helena, where he practiced law, Justice Leaphart, 63, said his last day will be Dec. 31.

BETH BAKER, 48, made her announcement on Feb. 5 before a small crowd of supporters at the Montana Capitol, the Lee Newspapers Bureau said.

According to her Internet profile, Ms. Baker received her law degree with high honors from the University of Montana School of Law in 1985. She then clerked for District Court Judge Charles Lovell in Helena into 1989. She became an assistant attorney general for Montana. During more than 11 years at the Attorney General's Office, she represented the state in a wide variety of civil and criminal cases, involving issues ranging from evidence and criminal procedure to civil rights and election law. She also represented the Montana Department of Justice before the Legislature during five regular and several special legislative sessions. She was assistant

chief deputy attorney general from 1993-1996 and chief deputy attorney general from 1997-2000.

Ms. Baker joined the Helena law firm of Hughes, Keller, Sullivan & Alke in November 2000, and is now a partner. Her practice areas include administrative law and civil litigation, with an emphasis on governmental liability in tort and civil rights cases. Her appellate practice has entailed many appearances before the Montana Supreme Court and the 9th Circuit Court of Appeals.

Ms. Baker has served on the board of the Montana Justice Foundation and on the State Bar's Access to Justice Committee; the 1st Judicial District Bar Association Pro Bono Committee; and the U.S. District Court Local Rules Committee for Montana. A State Bar Professionalism Award winner in 2006, she is a long-time volunteer for Montana Legal Services Association, handling pro bono cases.

Ms. Baker has never run for public office.



Justice Leaphart



Beth Baker



Judge Swandal

DISTRICT JUDGE NELS SWANDAL

announced on Feb. 22 that he is running for Justice Leaphart's seat, the Associated Press reported.

Judge Swandal, 56, has been the district judge for 15 years in the 6th Judicial District, comprising Park and Sweet Grass counties. He previously was Park County attorney from 1983-1994. Before that, Judge Swandal worked with his mother at the law firm of Swandal, Douglass & Swandal and was the Park County public defender.

According to the Associated Press, Judge Swandal retired from the U.S. Army in 2008 after 30 years of service. He was on active duty from 1978-81, followed by the U.S. Army Reserves until 1988 when he became a member of the Montana Army National Guard. He retired as a colonel and as Montana's staff judge advocate, the AP said.

The judge is a 1978 graduate of the University of Montana School of Law. He is president of the Montana Judges Association and is former president of the Montana County Attorneys' Association. He also was chairman of the Southwest Montana Chemical Dependency Center and Youth Dynamics. He also has chaired the Gateway Hospice Advisory Board and served on the board of trustees for Livingston Memorial Hospital.

In 2009, Judge Swandal was honored as judge of the year by the Court Appointed Special Advocates.

○

This article was written in the aftermath of a Jan. 18 suicide of a partner of a Galveston, Texas, law firm. The intellectual property litigator, who had also been a partner at a major Houston law firm, died of a single gunshot wound to the head after witnesses saw him sitting alone on a Galveston beach. "We just didn't see it coming," said one of his colleagues.

By **Ann D. Foster**, director
State Bar of Texas
Lawyer Assistance Program

I get a particular type of call too often. Over time, I've learned how to recognize a certain tension, a hesitation in the voices. I know a lawyer has died by suicide. Recently, I got a call about a lawyer in Houston.

According to a 2009 National Institute of Mental Health fact sheet, death by suicide is reported at the approximate rate of 11 deaths per 100,000 people per year in the United States. With about 85,000 members of the State Bar of Texas, if the statistics hold true, about nine lawyers die by suicide in Texas in any given year.

Other studies discussed in "Preventing Suicide: A Challenge to the Legal Profession" in the October/November 2008 issue of the American Bar Association's *GPSolo* magazine suggest that the number of lawyers who die by suicide each year may actually be six times greater than the national average.

No matter the number, when I hear about a lawyer's death by suicide, I think about the individual, what kind of mental state he or she was in, and what kind of misery could have prompted such a desperate action. I think about the consequences to family, friends, colleagues and clients. It's a heart-breaking event for all concerned. In the aftermath, many will question whether they could have done something to help. So what is a lawyer to do?

■ **Pay attention to suicide warning signs.** While some deaths occur without warning, most suicidal people provide a number of clues as to what they are thinking. Studies show that most people communicate their intentions to someone they know some time during the week preceding their attempt. These may be direct verbal clues, such as "I'm going to kill myself"; indirect verbal clues, such as "I don't think it's worth going on anymore"; and lots of clues in between, including nonverbal clues.

Listen for expressions of anxiety, feeling trapped, purposelessness, hopelessness and anger. Other warning signs may include increased isolation, recklessness, exhausted appearance, deteriorating hygiene, missing work and decreased productivity at work. If a lawyer is not sure whether what a colleague is expressing constitutes suicidal ideation, he or she should err on the side of caution.

How to help colleagues in crisis

■ Consider risk factors for suicide.

According to the American Foundation for Suicide Prevention's website, of the people who die by suicide, 90 percent are depressed, have substance abuse issues or another mental-health disorder; 25 percent to 50 percent have previously attempted suicide; many have a family history of mental disorder or substance abuse; and many have a family history of suicide or exposure to others' suicidal

behavior.

Men are four times more likely to complete suicide than women. Adult males older than 65 are at particular risk. Statistics from the National Institute of Mental Health indicate that 56 percent of men and 31 percent of females who die by suicide use a firearm.

Termination from employment, economic hardship, separation or divorce, and real or perceived public embarrassment or humiliation also may be factors.

■ **Be prepared to ask questions and to listen.** If a colleague or friend is exhibiting subtle or not-so-subtle warning signs or clues about suicide, familiarize yourself with what to say and how to say it.

A direct approach is best: In an empathetic, nonjudgmental way, ask, "Are you thinking about hurting yourself?" It's a myth that talking about suicide will encourage it. In fact, talking through these feelings and thoughts may help reduce the anxiety and stress your friend feels and help generate other options. Willingness to listen encourages a friend to talk. That's a solid indication that he or she still has the will to live.

Lawyers know how to ask artful questions, listen carefully and suggest solutions. We are perfectly capable of having these kinds of conversations.

■ **Get help and advice.** If, despite your best efforts, you remain concerned about someone, don't be sworn to secrecy, and don't take on the challenge alone. Get your friend to a mental health professional or call one yourself, call 911, call the National Suicide Prevention Lifeline at (800) 273-8255 or call the State Bar of Texas Lawyers' Assistance Program at (800) 343-8527. Your job is to get your friend the professional help he or she needs.

For more about what to say and how to respond, take a suicide prevention course such as QPR (question, persuade, and refer), available online at www.qprinstitute.com or contact a QPR-certified trainer who can make a live QPR presentation to a group.

These are complex and sensitive issues certainly deserving of more space and time than what is available here. No one

More COLLEAGUES IN CRISIS, Page 26

Billings lawyer has a penchant for unpopular cases

By **Ed Kemmick**
of the Billings Gazette

As the granddaughter of a federal judge, Liz Honaker spent a lot of time in the courtroom as a young girl.

It became a tradition for Judge William Jameson to take Honaker and her four siblings to the federal courthouse after church on Sundays.

"We'd play in the courtroom while he wrote decisions," she said. "We just kind of grew up like that."

That helps explain why, many years later, as a single mother with two young boys, she decided to go back to school and earn a law degree.

IT WAS HER mother's example that helped determine what kind of law she would eventually practice. Honaker's father, Walker, a physician, died in 1965 when Liz was 12. Her mother, Mary Lucille, had been a nurse who practiced with her husband, and, after he died, she went back to school so she could become a public health nurse.

She worked for School District 2 [in Billings] for many years, setting up clinics in low-income schools and coordinating the collection of clothes for needy students. She and her five children spent many days cleaning and painting the homes of her clients, and she sometimes invited underprivileged children to join family excursions.

Honaker's mother later earned a master's degree and went to work as a counselor at the Mental Health Center, where she helped start outreach programs for low-income people and also helped open a neighborhood community center.

"That's how we grew up – trying to help our mother help these people," Liz Honaker said. "She stood up for people.



Billings Gazette photo

Liz Honaker, granddaughter of Judge William Jameson.

She was a big influence on my life."

That attitude is reflected in some of the cases Honaker has taken on in recent years – cases that put her, a woman described by one colleague as "a shy introvert" – in the middle of front-page stories again and again.

HER MOST NOTORIOUS client was Linda Kapsa, the Ballantine woman who was sentenced last year after pleading no contest to a charge of aggravated animal cruelty. County officials found two dozen dead dogs on Kapsa's property and seized 200 other dogs, many of them injured and malnourished.

Honaker filed a lawsuit on behalf of two women who volunteered to care for Kapsa's dogs while they were in Yellowstone County's custody. The women, Penny Ronning and Kelly Dennehy, were suing the county and the group National English Shepherd Rescue, alleging breach of Kapsa's plea agreement for not giving the volunteers preference in the adoption of four of the dogs.

HONAKER ALSO represented Bill Milligan, the owner of the Good Stuff secondhand store on Broadwater

Avenue, who has been fighting with Billings code enforcement officials for years.

ANOTHER CLIENT in the news last summer was Charles Albert, whose ramshackle house burned to the ground in August, the day he was supposed to appear in Municipal Court to update the judge on his progress on a court-ordered cleanup of his South Side property.

Honaker said she has represented at least half a dozen similar clients whose disputes with city and county code enforcement authorities were settled out of court. She has been concentrating on cases that involve fundamental issues of constitution-

al and civil rights since opening her own law practice in 1999.

"I think I was interested in that since I was a kid," she said. "I was always interested in justice and seeing people get a fair shake."

It took her a while, though, to be in a position to do that.

LIKE HER MOTHER, Liz Honaker worked at the Mental Health Center, where she was a social worker for two years, and then for 12 years she ran her own toy shop, Wee Whimseys, on Grand Avenue. In 1991, newly divorced and with 2- and 6-year-old sons to take care of, she enrolled in law school at the University of Montana in Missoula, living with the boys in family housing.

"It was hard at times," she said. "I had to wait until they went to bed before I could study."

She earned a law degree in 1994, moved back to Billings and spent a year clerking for District Court Judge Robert Holmstrom. Before starting her own practice 10 years ago, she put in four years working at two other law firms.

The last person she worked for was Randy Nelson, who hired her as an asso-

ciate in his independent law firm. Nelson had clerked for Holmstrom before Honaker, and it was Holmstrom's high praise of Honaker's intellect – and the fact that she had graduated first in her law class – that persuaded Nelson to hire her as an associate.

“She has extraordinary credentials,” Nelson said. “The intellectual ability she has – if you asked her to write a paper on recombinant DNA, she'd probably do it better than anyone.” Nelson said his practice is fast-paced and high-stress, dealing mostly with what he called institutional civil defense involving insurance companies. “We're not exactly the bleeding-heart, lost-cause type of law firm,” he said, and, though Honaker did her work well, her heart clearly wasn't in it. Nelson said she was drawn more toward people “who never in a million years could afford to pay for her services.”

Nelson, who called Honaker “a shy introvert,” said he has been amused but not surprised to read about the cases in which she's been involved lately. “I kind of smile and think she's definitely in the niche for which she was destined,” he said.

Honaker feels that way, too. “I really want government to be accountable, and I really think they have to be if they want the people to be accountable,” she said. “It's not like the most lucrative type of law,” she added. “And it sometimes makes enemies of people you don't want to be enemies.”

THE NEED FOR government accountability is what drew her to the Kapsa case, Honaker said. She objected to the way county officials conducted an involuntary cleanup of Kapsa's property in 2003, and she filed Kapsa's suit against the county in 2004. It was the county's failure to obtain a warrant that led to an out-of-court settlement, which included a \$45,000 payment to Kapsa. Another county case against Kapsa, in the early 1990s, was dismissed.

Honaker said the raid in 2008, which resulted in the animal cruelty charge against Kapsa, was unnecessary and vindictive. She said Kapsa was working with her daughter, a veterinarian, to do something about her dogs, but the county swept in before she had a chance to deal with the problems.

At Kapsa's sentencing on the criminal charge, Honaker, her civil attorney, was the only person to testify on Kapsa's behalf. Some people found that odd, not to say troubling, given the condition of Kapsa's animals and the fact that Honaker was also president of the Yellowstone Valley Animal Shelter. Honaker doesn't see any conflict.

“I never defended the condition of the animals,” Honaker

said. “I was just offended by the way the county went in there. They brutalized the animals. They could have gone about this in a much different way.”

Honaker said she is a “great animal lover” who was asked to join the animal shelter board by former Billings City Councilwoman Joy Stevens, who was then board president. When Stevens resigned from the council and moved to Wyoming, Honaker took over as board president.

HONAKER SAID THE CASE of Charles Albert was similar to Kapsa's. She said she understood the city's desire to have Albert clean up his very messy property, but “I think they could have been more diplomatic about it.”

Albert suffers from schizophrenia and was basically a junk collector for most of his life. What the city didn't seem to understand, Honaker said, is that “the stuff he collected was precious to him. And he was living on his own without needing help from other people.”

Honaker did have kind words for City Administrator Tina Volek, who she said has gone out of her way since the fire to offer help in resettling Albert in a new house or apartment.

IN THE CASE OF Milligan, who recently had Municipal Court convictions for code violations overturned by a District Court judge, Honaker said the problem was that code enforcers ignored the nonconforming-use clause in city code, which should have prevented the city from trying to make Milligan's decades-old business conform to rules created years after he started the business.

“Bill and Cindy Milligan have been tortured for a decade,” she said.

Milligan, understandably, is a fan of Honaker's. “She kept the big, bad wolf from blowing over the straw house of this little piggy,” he said.

But, beyond helping him win his case, Milligan said, Honaker always appeared personally interested in his plight, not in the money she might make off it or the time she'd have to put in on it. “She's a different type of lawyer,” he said. “I don't think money is the concern at all.”

HONAKER SAID THE THING that ties most of her cases together is that the people she represents are more than clients to her. “I also see them as people,” she said. “I think we all need to be gentler with other people. It's a pretty mean-spirited world.” ○

Doherty named advisor for Interior

By the **Great Falls Tribune**

Secretary of the Interior Ken Salazar has appointed Missoula attorney Steve Doherty – a former Democratic state senator and recent state parks and wildlife commission chair — as senior adviser to the secretary for the Northwest.

“Steve's more than 20 years of experience in tribal and natural resource law, his familiarity with Northwest and Native American issues and his knowledge of state politics will enable him to provide outstanding advice to me in this position,” Salazar said. Doherty will serve as the secretary's “eyes and ears” in this important region, a news release

said.

Doherty, a former Great Falls lawyer, currently is a partner at Smith & Doherty in Missoula. He has more than two decades of experience in civil litigation as well as litigation pertaining to tribal entities and governments in tribal, federal, and state courts.

From 2005 to 2009, he chaired the Montana Fish, Wildlife & Parks Commission, which oversees the regula-

tion and management of lands in the state valued by hunters, anglers, outdoor enthusiasts, and other recreationists from Montana and throughout the United States.

He previously served 12 years in the Montana State Senate, including two terms as Senate minority leader. Doherty also is the national founding co-chair of the Progressive States Network, an organization he helped create to steer progressive public policy proposals to state Legislatures nationwide.

Doherty has a law degree from Lewis & Clark Law School and experience as a legal intern for three years on the Columbia River Intertribal Fish Commission in Oregon. He also worked as a community organizer for the Northern Plains Resource Council in Montana for five years.

In his new job, Doherty will ensure that the views of the secretary are considered and implemented in all appropriate venues, and that the secretary has adequate, timely information about proj-

ect developments, opinions and concerns from elected officials; upcoming deadlines; legal issues; potential media attention and imminent controversies in any area of the Department of the Interior's jurisdiction.

"My senior adviser for the Northwest is a champion for public lands, lakes, streams, and rivers," Salazar said. "He understands the balance required to manage these resources as critical wildlife habitats and recreation opportunities for the public."

STATE BAR NEWS

State Bar publishes its new court guide for Montanans

The State Bar in February published "The Montana Citizen's Guide to the Courts," a free full-color, 20-page booklet designed to help Montanans navigate their way through local, state, and federal courts.

The booklet also provides a research tool for students. It will be distributed to self-help law centers, public libraries, schools, and law firms that request them. It also will be placed on the State Bar home page for online downloading.

The Guide was produced by a partnership of the State Bar and the Montana Supreme Court's Commission on Self-Represented Litigants, with the aid of a \$3,000 grant from Humanities Montana. Two Americorps/VISTA workers – Abigail Houle from the State Bar, and Kendra Nickel from the court commission – led the production of the Guide, with input from lawyers, judges, and law professors from around the state.

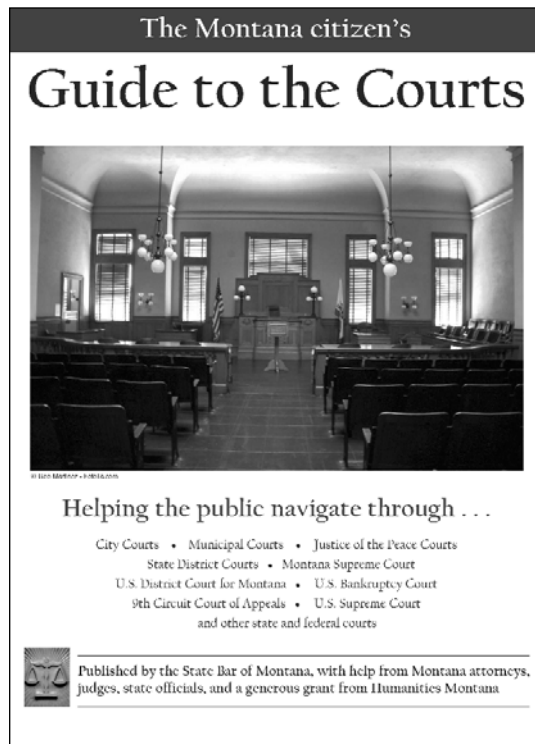
The Guide discusses differences between civil and criminal law; how local, state, federal, and Indian reservation courts operate; the rights and responsibilities of lawyers and judges; and how to settle differences out of court, with mediation and arbitration. Also provided are phone numbers, web addresses and physical locations of courts, state agencies, and legal aid groups.

The initial printing of 2,000 copies is being distributed by the Bar's new VISTA, Brendan Kelley, at bkelley@montanabar.org. The full-color version is available for free download in PDF format at www.montanabar.org.

Bar financial information available

An auditing firm's report of the financial condition of the State Bar of Montana through March 31, 2009, is available for viewing by any Bar member.

To receive a copy, call (406) 442-7660.



In other publishing news...

■ **The 2010 Lawyers' Deskbook & Directory** was mailed, beginning the last week of February, to those who pre-ordered. You can still order the deskbook for \$40 with the form on Page 18, at the Bar Bookstore online at www.montanabar.org or by calling (406) 442-7660.

■ **Verdict forms** have been added to the new 2010 Montana Criminal Jury Instructions. Those who pre-ordered instructions without the verdict forms can download the forms for free at www.montanabar.org under "Front Burner." The verdict forms are included in all new orders.

STATE BAR CALENDAR

March 9

Access to Justice Committee meeting, 10 a.m., Bozeman, location to be announced.

March 10

Commission on Self-Represented Litigants meeting, 1 p.m., State Law Library, Helena

Content and advertising deadline for April issue of *The Montana Lawyer* magazine

March 12

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

March 19

Family & Elder Law Update CLE, Colonial Hotel, Helena

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

March 26

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

April 1

Bar dues payment deadline

April 10

News and advertising content deadline for May issue of *The Montana Lawyer* magazine

April 12

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

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

April 15

State Bar Executive Committee meeting, 5 p.m., Missoula

CLE affidavits sent to attorneys by State Bar

April 16

State Bar Board of Trustees meeting, Room 203, UM School of Law, Missoula

May 7

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

May 15

CLE affidavits due back at State Bar

May 21

State Bar Executive Committee meeting, 8 a.m., Gallatin Gateway Inn

May 21-22

State Bar Board of Trustees strategic planning meeting, Gallatin Gateway Inn

Coming March 26

All in a Day's Work (Paralegal/Attorney Topics)

By the CLE Institute of the State Bar of Montana
and the Bar's Paralegal Section

at the Holiday Inn Grand Montana Hotel
in Billings, Montana

**6.50 CLE credits, including 2.0 Ethics credits
(1.0 of which meets the SAMI requirement)**

Register for \$200; 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
register online at Upcoming CLEs at www.montanabar.org, or call (406) 447-2206

Topics include:

- Malpractice & the impaired lawyer
- Business advantages of going paperless
- Ethics & social networking
- Real estate planning
- Federal rules change
- Employment ADA
- Providing access to justice for the aged

Member dues are due April 1

Statements for the annual dues, assessments, and license tax for State Bar of Montana members were mailed to members on Feb. 26, said Jill Diveley, Bar membership coordinator.

The dues and license tax are for the 2010-2011 Bar fiscal year.

Members must have their payments in

to the State Bar office by April 1. Failure to postmark by April 1 will result in a \$25 penalty.

Dues and fees for active members are shown in the sample dues statement below. Of the \$385 required from active members, \$200 are Bar dues, \$25 is the state license tax on attorneys, \$20 goes

into the Lawyers' Fund for Client Protection, \$125 is for the Disciplinary Counsel assessment levied by the Montana Supreme Court, and \$15 is the CLE filing fee.

Statements also are sent to inactive members, members serving in the active military, and senior members.

The statements contain instructions on returning the fees by mail with a check, or going online to pay by credit card.

Fee listings from a 2010-2011 dues statement

PLEASE NOTE: Dues are not deductible as charitable contributions for federal income tax purposes; however, such dues may be deductible as a business expense.

Membership Dues

♦ 305 Mont. 279, 53 P.3d 854 (2001)

If changing to Inactive or Senior status, please sign here. Only active members may practice law in Montana. TO CHANGE TO INACTIVE OR SENIOR STATUS:

Signature _____ Date _____

Returning to active status from inactive or senior status requires petitioning the Montana Supreme Court (Bylaws of the State Bar of Montana, Article I, Section 3(e).)

Current Membership Category:

Active Attorney Member

\$200.00*

Other Assessments

Status	State Bar Dues	State of Montana License Tax	Lawyers' Fund for Client Protection	Disciplinary Counsel Assessment	CLE Filing Fee
ACTIVE	\$200.00	\$25.00	\$20.00	\$125.00	\$15.00
INACTIVE	\$125.00	\$25.00	X	X	X
ACTIVE MIL	X	\$25.00	\$20.00	\$125.00	X
SENIOR	\$50.00	X	X	X	X

You must be 70 years of age or older to qualify for senior status. Senior is equivalent to inactive.

State of Montana License Tax

♦ § 37-61-211, MCA

Lawyers' Fund for Client Protection

♦ 165 Mont. 1, 530 P.2d 765 (1975)

Disciplinary Counsel Assessment

♦ MT Supreme Court Order November 8, 2006

CLE Filing Fee

♦ Affidavits will be sent under separate cover.

\$25.00*

\$20.00*

\$125.00*

\$15.00*

Voluntary Section Dues

Please indicate Section membership:

- | | |
|--|---|
| <input type="checkbox"/> Bankruptcy (\$20) | <input type="checkbox"/> Nat. Res. & Environmental (\$10) |
| <input type="checkbox"/> Business, Estates, Trusts, Tax & Real Property (\$20) | <input type="checkbox"/> New Lawyers' (\$10) |
| <input type="checkbox"/> Construction (\$20) | <input type="checkbox"/> Nonprofit (\$20) |
| <input type="checkbox"/> Criminal (\$15) | <input type="checkbox"/> Paralegal (\$60) |
| <input type="checkbox"/> Family (\$10) | <input type="checkbox"/> Public (free) |
| <input type="checkbox"/> Federal Practice (\$20) | <input type="checkbox"/> School (\$20) |
| <input type="checkbox"/> Health Care (\$20) | <input type="checkbox"/> Women's (\$20) |
| <input type="checkbox"/> Indian (\$20) | |

(A) Total:

*indicates mandatory fees

\$385.00*

(B) Section Dues:

\$

Total Due April 1, 2010:

Total lines (A) & (B)

\$

Failure to postmark by date above will result in \$25 late penalty.

FOR STATE BAR USE ONLY

Amount: _____ Date: _____

To pay by credit card, go to www.montanabar.org and click on "Login" at the top. (under your name click on the "renew" link). If paying online you do not need to return the original or a copy of this statement.

American Express, Discover, MasterCard and Visa accepted.

Upcoming CLE seminars for Montana lawyers

CLEs with Ethics & SAMI* credits

**Substance Abuse / Mental Impairment*

5.0 Ethics credits required every 3 years – 1.0 of them must be a SAMI credit

March 5 Great Falls – Holiday Inn

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

March 10 Billings – Wingate Hotel

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

March 12 Butte – War Bonnet Hotel

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

March 12 Helena – Metcalf Building, Capitol Complex

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

March 17 Helena – Colonial Hotel

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

March 19 Billings – Kelly Inn

State Ethics Law 3.0 CLE credits, including 3.0 Ethics credits. Presented by the state Personnel Division, (406) 444-3985

March 25 Helena – Carroll College Campus Center

State CLE Seminar 6.50 CLE credits, including 1.0 (no SAMI) Ethics credit. Presented by the state Personnel Division, (406) 444-3985

March 26 Great Falls – Hilton Garden Inn

Montana Trial Lawyers Spring Seminar 6.50 CLE credits, including 2.0 Ethics credits (which meet the 1.0 SAMI credit). Presented by the Montana Trial Lawyers Association, (406) 443-3124.

April 7-8 Butte - Location to be announced

Fair Housing Conference 13.0 CLE credits, including 1.0 Ethics (no SAMI) credit. Presented by Montana Fair Housing, (406) 782-2573

Other web & phone CLEs for Montana credit are:

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

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

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

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

All other CLEs

March 2 Chico Hot Springs

Montana Floodplain Legal Issues Workshop 9.50 CLE credits. Presented by the Association of Montana Floodplain Managers, (406) 444-6654.

March 4 Helena – Metcalf Building, Capitol Complex

Preventing Harassment 3.0 CLE credits. Presented by the state Personnel Division, (406) 444-3985

March 4 Missoula – Location to be announced

Employment Law Fundamentals 7.0 CLE credits. Presented by Sterling Education Services, (715) 855-0495

March 11 Webcast

New Tools for Legal Research 1.0 CLE credit. Presented by National Constitution Center Conferences, (800) 964-6033

March 11-12 Billings – Wingate Hotel

Montana Agriculture: Legal Issues 12.0 CLE credits. Presented by The Seminar Group, (206) 463-4400

March 12 Teleconference

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

March 16 Missoula, – Grant Creek Inn

Deeds, Descriptions & the Law 7.0 CLE credits. Presented by PESI, (715) 855-5292

March 18 Billings – Crowne Plaza Hotel

Deeds, Descriptions & the Law 7.0 CLE credits. Presented by PESI, (715) 855-5292

March 18 Missoula – Missoula Courthouse

The Law, The Guardian & Law Enforcement 1.0 CLE credit. Presented by the 4th Judicial District Court, (406) 258-3461

March 19 Helena

Family & Elder Law Update Presented by the CLE Institute of the State Bar of Montana. Details to be mailed to State Bar members and be presented at www.montanabar.org.

March 22 Billings – Crowne Plaza Hotel

Legal Reform Conference 7.50 CLE credits. Presented by the Montana Chamber of Commerce, (406) 442-2405

March 24 Helena – Metcalf Building, Capitol Complex

Privacy & the Right to Know 6.50 CLE credits. Presented by the state Personnel Division, (406) 444-3985

March 26 Billings

Attorney-Paralegal Tips 6.50 CLE credits, including 2.0 Ethics credits (which meet the SAMI requirement). Presented by the CLE Institute of the State Bar of Montana, (406) 447-2206. Details to be posted at www.montanabar.org

BAR-BENCH BRIEFS

Barristers' Ball set for March 13

The annual Barristers' Ball will be held Saturday, March 13, at the Hilton Garden Inn in Missoula.

The Ball, organized by University of Montana School of Law students, is open to all Montana attorneys and judges and their spouses.

The Ball begins at 8 p.m. and lasts through midnight. Music will be provided by the Mike Bader Blues Band. A contest called "Dancing with the Professors" will be held, judged by a UM Law professor and two Montana judges.

The ticket prices are \$35 for couples, \$20 for singles.

West's new MCA lacks 2009 statutes

The State Law Library is urging attorneys to use the 2009 Montana Codes Annotated instead of the new West's Montana Code Annotated that they may have purchased.

The West MCA only has the Code through the 2007 Legislative Session (see 1West's Montana Code Annotated, Preface, page III.) "Without the West pocket parts, you do not have any of the new statutes or amendments to existing statutes that were enacted in the 2009 Legislative session," Library officials said.

The Law Library recommends that attorneys rely on the MCA 2009, either in paper or electronic form for the current version of the Code. "If you have been relying solely on the West set, you may wish to review work that you have done which is based upon statute," Library officials said.

Booklet summarizes discharge cases

The Professional Development Center in Helena has published a new edition of "Wrongful and Unlawful Discharge: Montana Cases and Considerations." The publication is available in print and on CD-ROM from the State Human Resources Division, Department of Administration, (406) 444-3871.

Written by John Moore, the Center's director, the 212-page booklet summarizes 272 Montana Supreme Court decisions and 5 U.S. District Court opinions. Each summary gives the legal citation for the opinion. The cases are arranged in chronological order and flagged with relevant labels, such as

"just cause," "discrimination," and "court procedure."

The cases focus on all areas of discharge from employment. Since the passage of the Wrongful Discharge from Employment Act in 1987, many decisions have centered on that law. However, the summary includes cases dealing with other issues, such as human rights or collective bargaining.

The booklet costs \$32, either in print or on CD-ROM. The cost of both media together is \$46. Call (406) 444-3871 or e-mail pd01@mt.gov.

Law students' pro bono work to be honored

A ceremony to recognize pro bono work by students at the University of Montana School of Law will be held at 4:30 p.m. on Wednesday, April 7, at the Law School's Lower Commons.

The ceremony will help "cultivate the spirit of pro bono service, and encourage University of Montana School of Law graduates to seamlessly transition into pillars of pro bono service in Montana's legal community," said Beth Hayes, Equal Justice Works AmeriCorps Legal Fellow with Montana Legal Services Association.

Refreshments at the ceremony will be provided by the State Bar of Montana New Lawyers Section.

If you have any questions, contact Ms. Hayes at bhayes@mtlsa.org, or (406) 543-8343 ext. 202.

Justices to hear oral arguments at UM & MSU

The Montana Supreme Court will sit en banc at the University of Montana and Montana State University campuses on separate days to hear oral arguments.

On April 9, the Court will hear the case of *Matthew Summers and Heidi Ames v. Crestview Apartments, LH Residential LLC and Scott Hacker*, at 10 a.m. at the University Theater in Missoula.

On May 3, at 10 a.m. at MSU's Strand Union Building in Bozeman, the Court will hear arguments *State of Montana v. Brian Hayden Allen* as to whether the Court's decision in *State v. Goetz* and *State v. Hamper* applies to warrantless electronic recording of telephone communications and whether the district court properly denied the appellant's motion to dismiss a juror.

State Bar of Montana Bookstore

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

LEGAL PUBLICATIONS

2008 Guide to Montana's Local and County Community Foundations

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Cascade Bar honors John Alexander

John D. Alexander was awarded the Cascade County Bar Association's Edward C. Alexander Award for outstanding trial advocacy and professionalism.

Mr. Alexander began his law career as a member of the Army JAG Corp which took him to Kentucky, Korea, and New York. Upon returning to Great Falls in 1975, Mr. Alexander joined the firm of Alexander, Hall, Keuning & Miller. In 1986, Mr. Alexander became a founding member of his present firm, Ugrin, Alexander, Zadick & Higgins. Mr. Alexander's trial experience has involved wrongful death and survival actions, auto accident cases, medical malpractice, and product liability cases.

Mr. Alexander has also served the legal community as an associate professor of business law, trustee for the State Bar, president of the Cascade County Bar Association, and as an attorney representative to the 9th Circuit. He has been honored with membership to the American Board of Trial Advocates and included in Best Lawyers in America and Mountain States Super Lawyers.

In addition to his legal activities, Mr. Alexander has been involved with youth sports, housing for the developmentally disabled, and Rotary Club.

State fails to shut down new O'Neil ad

A district court judge has denied a request by the State of Montana for a summary judgement to compel Kalispell area paralegal Jerry O'Neil to halt a new ad for his services.

The new telephone-book ad was published after the Montana Supreme court upheld an injunction prohibiting O'Neil from practicing law or advertising that he is capable of doing so. The new ad reads, "O'Neil Jerry, Independent Paralegal, Low Cost Divorce, Since 1984, Free Telephone Consultation, [phone number]."

Helena District Judge Jeffrey Sherlock ruled that the new ad is "very different from the advertisements he was enjoined from using." The new ad continues to appear under the Flathead's phone book category of "attorneys," to the State's chagrin. The new ad dropped the former ad's references to O'Neil services as non-attorney typing and mediation, licensed to practice law in the Blackfeet Tribal Court, guaranteed paperwork, membership in the State Bar's Child & Family Law Section, a charter member of the Montana Mediation

Association, and acceptance of credit-card payments.

Judge Sherlock said, "O'Neil's new advertisements present a new set of facts, and the issue as to whether there has been any violation of the MCPA presents a jury question." The state, he said, "has failed to present any affidavit, sworn testimony, or case law which would support its position that a violation of the MCPA has occurred."

Commission on Practice elections being held

Elections for appointees to the Montana Commission on Practice, the attorney-conduct watchdog of the Montana Supreme Court, will be held in March in two of the Commission's geographical areas.

The elections, to close on March 19, will be in Area A (Mineral, Missoula, Flathead, Lincoln, Lake, Sanders, and Ravalli counties), and Area E (Lewis & Clark, Broadwater, Park, Sweet Grass, and Gallatin counties).

Three nominees will be elected in each area, one of which will replace a Commission member in each area whose term has expired. Hamilton District Judge Jeffrey Langton will supervise the balloting, either by mail or e-mail, in Area A; Helena District Judge Dorothy McCarter will supervise the Area E vote.

The term of Area A Commissioner Tracy Axelberg, a Kalispell attorney, will expire on March 28. The four-year term of Helena attorney Gary Davis expires April 1, and Mr. Davis did not wish to be reappointed.

Lawyers, judges called 'dangerous drivers'

Lawyers and judges have been named The Most Dangerous Drivers by Profession by the insurance industry website *insurance.com*.

A recent study by *insurance.com* compared accident claims from members of different professions basing those claims as a percentage of insurance-purchase quotes.

The study said 44 percent of attorneys who received a car insurance comparison quote from *insurance.com* had previously made an accident claim. Financial professionals came in second as the top dangerous drivers.

"Professions that demand multi-tasking – being on the phone, moving fast on a tight schedule – are prone to more distractions and, from there, more accidents," said Sam Belden, vice president of *insurance.com*.

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Prosecutor argues for lower 'courts of record'

Transcripts for city and justice courts could reduce costs of appeals, he says

By John Grant Emeigh
Butte Montana Standard

A Montana prosecutor thinks cities in the Treasure State would save time and money by preventing new trials on appeals from misdemeanor convictions.

This could be done by requiring all city court and justice courts to be made "courts of record," meaning they would have to record all their proceedings.

Jeffrey Hays, prosecuting attorney for Darby and Stevensville, suggested this at the state Law & Justice Interim Committee in Helena in February.

Hays told the *Montana Standard* on Feb. 18 that mostly misdemeanor DUI offenders who get convicted in city or justice courts will automatically appeal to district court.

Because the lower courts are not "courts of record," there are no transcripts, so the defendant must have an all-new trial

in the higher court. "It's a way to manipulate the system," Hays said.

By granting an appeal, counties must fork out more money for jury and witness fees, and other costs. Hays estimated that each new trial costs about \$1,500.

Hays said that if the lower courts recorded proceedings, the higher court could simply review the lower court's transcripts.

Hays said the state Legislature would have to adopt a policy making all state courts a court of record.

[Butte-Silver Bow] County Attorney Eileen Joyce said Butte doesn't appear to have many appeals from its justice and city courts, which are not courts of record.

"It's hard to say if it's going to be cost-effective, but it is something worth looking into," she said.

[Butte District] Judge Brad Newman said this issue was first raised about a decade ago when he was a state representative. Newman said the proposal met most of its resistance from rural areas that preferred keeping their city and justice court "people's courts." Newman said some people wanted these courts to be less formal and not "infested with lawyers and lawyer judges." However, Newman said Butte District Court has had four appeals from the lower courts so far this year.

"Clearly, there's some expense involved (having a new trial)," Newman said.

Under the state law, it's up to the counties to decide if they want to make their justice courts a court of record. It would have to be approved by the council of commissioners. It would take an act from the state Legislature to give city courts that distinction.

Hays said he realizes that it may be difficult to get the state to change its policy. He acknowledges that people think the system works fine, even though he believes it is flawed.

"In the legal system, tradition is better than reason," he said.


Butte attorney placed on disability status

The Montana Supreme Court ordered Butte attorney Thomas J. Joyce to be transferred to disability/inactive status with the State Bar of Montana, effective March 31.

Mr. Joyce has asserted that he was unable to assist in his defense in relation to informal disciplinary proceedings pending against him, and requested that he be transferred to disability/inactive status.

The Court ordered that the informal disciplinary proceedings pending against him before the Commission on Practice are deferred indefinitely.

Mr. Joyce must notify all current clients, co-counsel and opposing counsel (or adverse parties), and courts in pending matters of his change to inactive status. He must also pay the costs of the disciplinary proceeding.



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Great Falls attorney to be admonished

The Montana Supreme court has ordered Great Falls attorney Fausto G. Turrin to be given a private admonition by the Court's Commission on Practice for failing to keep a client reasonably informed about a legal matter.

The Commission said Mr. Turrin also violated Rule 3.4, Montana Rules of Professional Conduct, by knowingly failing to appear in response to a district court order to show cause in relation to that matter.

Mr. Turrin neither filed an answer to the complaint nor appeared at the hearing held before an adjudicatory panel of the Commission in November.

The Commission noted, however, the absence of any suggestion Turrin failed to perform the duties for which he was hired by the client in question. The Commission also said that from the absence of evidence concerning the district judge's reaction to Turrin's failure to appear at the show-cause hearing it inferred that Turrin's absence was excused.

Finally, the Commission concluded it had not been proved that Mr. Turrin suffered from a physical or mental condition which impaired his ability to represent his client that would have required him to withdraw pursuant to Rule 1.16(a), MRPC.

ORAL ARGUMENTS

The following oral arguments will be heard by the Montana Supreme Court:

April

■ Case No. DA 09-0489 – MATTHEW SUMMERS and HEIDI AMES, Plaintiffs and Appellants, v. CRESTVIEW APARTMENTS, LH RESIDENTIAL, LLC, and SCOTT HACKER, Defendants, Appellees, and Cross-Appellants.

Oral argument is set for Friday, April 9, at 10 a.m. in the University Theater, University of Montana, Missoula, with introduction beginning at 9:30 a.m.. Appellants shall have 40 minutes for argument and Appellees shall have 30 minutes.

May

■ Case No. DA 09-0091 STATE OF MONTANA, Plaintiff and Appellee, v. BRIAN HAYDEN ALLEN, Defendant and Appellant.

Oral argument is set for Monday, May 3, at 10 a.m. in Ballroom A of the Strand Union Building, Montana State University, Bozeman, with introduction beginning at 9:30 a.m.. Appellants shall have 40 minutes for argument and Appellees shall have 30 minutes.

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

A postscript on tort reform

Thank you for reprinting my op-ed piece on medical malpractice costs (in your February issue). A minor correction; it first ran in the *Billings Gazette* and not *Guest* magazine.

Also, your readers might be interested in the following "postscript" summary of events that have taken place since the op-ed appeared. Interesting that while cutting plaintiff's attorneys' fees seems to be a Republican issue, 12 Republican U.S. Senators opposed the amendment to limit attorneys' fees in medical malpractice awards.

Since my *Billings Gazette* op-ed was written in November 2009, the U.S. Senate rejected [with the help of 12 Republican senators] an amendment to limit fees paid to the attorneys of persons injured by medical malpractice to one-third of any awards below \$150,001 and 25 percent of awards above \$150,000.

One reason given for opposing this amendment to limit plaintiff's attorney's fees was that malpractice defense costs are about twice as high as the costs that plaintiffs and their attorneys incur (not including an award). So Senator Durbin (D-Ill.) argued it was not fair to limit fees for one side (i.e., trial lawyers) and not the other (defense lawyers).

Another amendment, S.Amdt. 2931, to another S.Amdt. 2786 to require health-insurance company CEOs to disclose their compensation was laid on the table.

*- Russ Doty, CEO/General Counsel
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we decline to find that this violation occurred.

JUSTICE JIM NELSON dissented, concluding that “Disciplinary Counsel got it right” and seeking to send the case back to the Commission on Practice (COP) for further disciplinary proceedings. In his dissent, Justice Nelson wrote:

“Olson’s defense derails over his Clintonesque claim that he did not believe that the 13 photographs at issue were child pornography. Similarly, the COP’s decision runs off the track for the same reason – that ‘Olson had the good faith belief that the items taken from the Mortenson apartment following the search and release of the scene by the police were . . . not child pornography or contraband.’ [. . .] Since the COP never determined whether the photographs at issue were or were not child pornography [. . .] the adjudicative panel was hardly in a position to conclude anything about Olson’s good faith belief in possessing it or determining the bona fides of his defense.

“Suffice it to say that the photographs at issue are of pre-adolescent girls: one is dressed in a French maid’s costume,

others are completely naked, and others are partially clothed. All are posed erotically, and the photographs focus on the girls’ exposed genitals and breasts. If these photographs are not child pornography under §§ 45-5-620(1)(f) and 45-5-625(1)(e), MCA (2005), then I am at a loss to know what constitutes child pornography [. . .] Indeed, I believe that any “good faith” conclusion to the contrary would be absurd. See *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964) (Stewart, J., concurring).

“The COP, however, failed to make this elemental determination, and, as a result, rendered its decision on a faulty underlying premise – Olson’s good faith belief. The COP’s decision errs in its deference to Olson, and the Court’s decision fails in its deference to the COP. In my view, Olson, an experienced criminal defense attorney, could not hold a good faith belief that the photographs of which he took possession were not child pornography and, thus, were not contraband and evidence of the criminal acts of his client. Indeed, the photographs were exactly the sort of child pornography which formed the basis of the charges against Olson’s client. More to the point, if Olson really believed, in good faith, that the photographs were not child pornography, then he had no need to obtain the protective order from

Judge McKittrick in order to retain possession of the photographs.

“Having concluded that the photographs were contraband and evidence, I also agree with Disciplinary Counsel that Olson violated Montana Rules of Professional Conduct (MRPC) 3.4(a) [which provides that a lawyer shall not ‘unlawfully obstruct another party’s access to evidence, unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act.’ *Justice Nelson note*] This Rule required that Olson make the photographs available to the county attorney. The offense of tampering with or fabricating physical evidence under § 45-7-207(1)(a), MCA, is committed when one conceals evidence in an official proceeding or investigation. There is no exception in this criminal statute for the possession by defense counsel of actual evidence of the criminal conduct at issue. Regardless of what the ABA Criminal Justice Standards might suggest as ‘guidelines,’ these cannot supersede Montana’s statutes. I am, thus, persuaded that once a criminal defense attorney comes into possession of physical evidence of his or her client’s criminal conduct, that he or she is neither legally permitted under § 45-7-207, MCA, nor ethically privileged

under MRPC 3.4(a), to conceal that evidence from the authorities and from the prosecutor. I have a hard time understanding how, if defense counsel comes into possession of the bloody knife used to commit a homicide, that he or she can legally and ethically conceal that evidence from the police and prosecutor.

“While it goes without saying that the defendant is entitled to all exculpatory evidence in the hands of the prosecutor, *State v. Thompson*, 2001 MT 119, ¶ 31, 305 Mont. 342, 28 P.3d 1068, I believe that the law, likewise, requires that the prosecutor be entitled to inculpatory physical evidence and contraband in the hands of the defense, see *Clutchette v. Rushen*, 770 F.2d 1469, 1472-73 (9th Cir. 1985),

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cert. denied, 475 U.S. 1088, 106 S. Ct. 1474 (1986) (holding that a lawyer's conduct in possessing evidence of a crime is not protected by the Sixth Amendment right to counsel). Moreover, a lawyer's conduct in holding fruits and instrumentalities of a crime is not protected by the attorney-client privilege. *Wemark v. State*, 602 N.W.2d 810, 816 (Iowa 1999). That the former evidence may "chill" the prosecution and latter evidence may "chill" the defense [. . .], should not take precedence over the fact that our criminal justice system is fundamentally charged with searching for and finding the "truth." Or, so we claim. See e.g. *State v. Waters*, 228 Mont. 490, 495, 743 P.2d 617, 620 (1987) ("The purpose of Montana's discovery scheme is to enhance the search for truth."); *State v. Dezeewu*, 1999 MT 331, ¶ 16, 297 Mont. 379, 992 P.2d 1276 (holding that the trial court's exclusion of defendant's eyewitness to the altercation, when his only defense was self-defense, hindered the search for truth and, therefore, was an abuse of the court's discretion).

"The same is true here. The photographs were clearly evidence of the charges filed by the Cascade County attorney against Olson's client, and Olson had the legal and ethical obligation to make the photographs available to the prosecution. I agree with Disciplinary Counsel that Olson violated MRPC 3.4(a). We are not cited to any authority that permits a lawyer defending or prosecuting a criminal case to break the law in doing so.

"Similarly, Olson was charged with violating MRPC 8.4(b) [which provides that it is professional misconduct for a lawyer to 'commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ' *Justice Nelson note*]. Even though Olson was never charged with violating § 45-7-207(1)(a), MCA, that is not a bar to concluding that he, nonetheless, violated this Rule [. . .]. As already noted, having concealed evidence of his client's criminal conduct, I conclude that Olson violated this Rule as well.

"Finally, as to the ex parte, sealed protective order which Olson obtained from Judge McKittrick, there is evidence in the record that Olson misled the court

into believing that the photographs were obtained from the county attorney under that office's open-file policy. In regards to his conversation with Olson about the need for a protective order, Judge McKittrick testified:

I said, "Have you gone through discovery, did you get an open file from the County Attorney's Office?" . . . And he said, "Yes, open file, yes," and I said something to the effect, "Do you have what may be considered child pornography?" and he said, "Well, look at the Code," and he said, "Yeah, that's a problem." He said, "I'm very, very concerned about that. . . ."

"MRPC 8.4(c) makes it professional misconduct for a lawyer to 'engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ' Likewise, MRPC 8.4(d) proscribes a lawyer from 'engag[ing] in conduct that is prejudicial to the administration of justice . . . ' I conclude that these Rules were violated by Olson's lack of candor with Judge McKittrick concerning where and how he obtained the photographs. I also conclude that Judge McKittrick's testimony clearly and convincingly demonstrates that he was under the false impression that Olson obtained the photographs from the County Attorney's Office. Obviously, Olson did not obtain the photographs by way of the county attorney's open-file policy; and Olson was ethically obligated to be candid and truthful with the trial court when he applied for the order of protection. Attorneys should not put trial judges in the position of issuing orders based on the court's misapprehension of the facts."

ALTHOUGH CONCURRING with the decision to dismiss the complaint against Mr. Olson with prejudice, Chief Justice Mike McGrath wrote that "the dissent raises valid considerations.

Justice McGrath said, "Initially, in my view it is immaterial in this case whether the photographs in question are pornographic. The district court's protective order insulated Mr. Olson from criminal prosecution as well as claims of ethical misconduct." Justice McGrath also

believes that "the record does not contain sufficient evidence to conclude Olson misled the district court," adding, "Judge McKittrick testified that he specifically requested not to be told about the facts because he was sitting on the pending case against Olson's client."

However, Justice McGrath wrote, "The dissent is correct [. . .] that as a general matter, § 45-7-207, MCA, as well as MRPC 3.4(a), prohibit a criminal defense counsel from concealing contraband and physical evidence of a client's criminal conduct. This obligation pertains whether or not counsel intends to use the subject evidence at trial. Moreover, neither federal procedures nor ABA criminal justice standards is determinative of the rule in Montana. Unlike the federal system, Montana has a mutual discovery policy; see § 46-15-323, MCA; *State, ex rel. Carkulis v. District Court*, 229 Mont. 265, 746 P.2d 604 (1987).

"If the case against Olson's client had proceeded in state court and if Olson had intended to use the photographs at trial, he would have been required to disclose them," Justice McGrath said. ○



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should presume to know what goes through another's mind when the decision to die by suicide is made, and it is not our place to judge.

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the privilege of making that difference.

This is not to suggest that lawyers become mental health professionals. However, as members of one of the original healing professions, lawyers may be in a unique position to help friends, colleagues and clients out of a mental health crisis. We should prepare for these moments as if life depends on them. Sometimes it might.

ANN D. FOSTER, the director of the State Bar of Texas Lawyers' Assistance Program, is an attorney, a licensed professional counselor-intern, and a certified trainer in a method of suicide prevention called QPR (question, persuade, and refer). Her article appeared in the *Texas Lawyer* magazine on Feb. 3.

LEARN HOW to use the Montana Lawyer Assistance Program under Other Links of Interest at www.montanabar.org.

BOOK REVIEW

You be the judge

By **Jonathan Rauch**
for the New York Times

Not long ago, at a reception in Washington, I found myself talking to a prominent conservative commentator who was spitting mad because, he said, the Obama administration had

Justice

What's the Right Thing to Do?

By Michael J. Sandel

Farrar, Straus & Giroux
308 pp., \$25

blatantly, possibly criminally, favored unions over bondholders when dictating bailout terms to the automotive industry. Just the kind of lawless cronyism that had given liberalism a bad name!

I found his fury puzzling. After all, if not for the government's rescue,

General Motors and Chrysler would have crashed into bankruptcy court and smashed to bits, leaving the unions and the bondholders worse off. In any case, weren't the workers, with their livelihoods at stake and years of labor invested, in a quite different position, morally speaking, from the distant and anonymous bondholders? Was it such a crime for the government to treat differently situated stakeholders differently, even if doing so was unorthodox?

We were talking about federal policy, of course; but we were really talking about justice. Is justice absolute and process-driven, so that we should stick to rules, come what may? Or is it situational and outcome-aware, so that we should sometimes improvise to take account of special circumstances? Liberals and conservatives, Democrats and Republicans, are likely to disagree – often without realizing that it is justice, not just politics, that they disagree about.

Michael J. Sandel, a professor of government at Harvard University, seeks to bring implicit arguments over justice into the open, and to persuade liberals that there is nothing wrong with being judgmental. In debates ranging from affirmative

action and surrogate parenting to abortion and same-sex marriage, we must talk, he says, about virtue and desert, not just compassion and choice. "Justice is inescapably judgmental," he writes. "A politics emptied of substantive moral engagement makes for an impoverished civic life. It is also an open invitation to narrow, intolerant moralisms. Fundamentalists rush in where liberals fear to tread."

"Justice," the book, is based on a course Sandel teaches at Harvard, which is one of the most popular classes on campus and has been made into a 12-part PBS series. To undergraduates suckled on open-mindedness at any cost, the repudiation of value-free politics may seem surprising, but it is hardly new territory. Almost 20 years ago, in his 1991 book "Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State," William A. Galston – a center-left political theorist and strategist who later served in the Clinton administration – argued, more probingly than Sandel does here, that modern liberalism cannot and should not fix upon neutrality as its pole star. "Like every other political community," Galston wrote, the liberal state "embraces a view of the human good that favors certain ways of life and tilts against others." Partly at the urging of Galston and other "new Democrats," Bill Clinton and Barack Obama have brought values, and specifically the notion that some values are better than others, back into the mainstream of progressive politics.

What "Justice" does, and does very well, is teach. Sandel explains theories of justice based on utilitarianism (minimize social harm), libertarianism (maximize personal freedom) and communitarianism (cultivate civic virtue) with clarity and immediacy honed by years of classroom presentation; the ideas of Aristotle, Jeremy Bentham, Immanuel Kant, John Stuart Mill, Robert Nozick and John Rawls have rarely, if ever, been set out as accessibly. Sandel's virtuosic untangling of Kant's notorious knots, in under 40 pages, is worth the price of admission by itself. If "Justice" breaks no new philosophical ground, it succeeds at something perhaps no less important: in terms we can all understand, it confronts us with the concepts that lurk, so often unacknowledged, beneath our conflicts.

JONATHAN RAUCH is a senior writer with *National Journal* and a guest scholar at the Brookings Institution.

NEWS ABOUT MEMBERS

Francis J. (Hank) Raucci, of counsel partner with Gough, Shanahan, Johnson & Waterman of Helena, has been elected as a fellow of the Academy of Court Appointed Masters. There are currently 83 fellows in the United States serving as Rule 53 masters in the federal court systems. Mr. Raucci is the only fellow in Montana.

Debbie M. Churchill announced the opening of her law firm, Churchill Law Office, at its new location in the Mountain West Bank Building, 2728 Colonial Dr., Suite 202, on the corner of Colonial Drive and Broadway in Helena. Ms. Churchill has been in private practice in Montana for nine years. She specializes in estate planning, probate, guardianships and conservatorships, special needs trusts, and elder law. She earned her bachelor of science degree, with high honors, from the University of Great Falls in 1996, where she majored in Paralegal Studies with an emphasis in Business Administration. She received her juris doctorate from the University of Montana School of Law in 2001. Ms. Churchill is a fifth-generation Montanan. She grew up on a ranch south of Chinook in the Bears Paw Mountains.




The Billings law firm of Ragain Christensen Fulton & Filz announced that **Patience A. Llewellyn** has become a partner. Ms. Llewellyn joined the firm after receiving her LL.M. in Taxation from the University of Washington School of Law in 2004. She graduated from Lewis & Clark Law School in 2003 and from the University of Montana in 1999 with a degree in Political Science. Ms. Llewellyn practices in the areas of estate planning, estate administration, taxation, and business planning. She is admitted to the practice of law in Montana and Oregon.

Juliane E. Lore has become an associate with the Billings law firm of Patten, Peterman, Bekkedahl & Green. Ms. Lore earned her BS degree from Colorado State University in 1994, and was a member of both the Beta Beta Beta Honorary Biological Society and the cycling team. After working in the fields of financial software and real estate investment, Ms. Lore moved to Sacramento in 2003 to attend the University of the Pacific-McGeorge School of Law, earning her juris doctorate and International Law diploma. She served as the McGeorge chapter president of the American Constitution Society, and won an award in the individual oralist category at the Willem Vis International Commercial Arbitration Moot Court in Vienna. She was also the recipient of the Witkin Award for Academic Excellence in Agency Law, and the Soroptimist International Scholarship Award. Ms. Lore was a public defender in rural Nevada and Eastern Montana after passing the California bar exam, and returns to Vienna each

spring to act as an arbitrator and judge the prestigious Vis moot competition. She recently filed an amicus curiae brief with Anthony Caso and Ed Meese on behalf of the Center for Constitutional Jurisprudence in the upcoming U.S. Supreme Court property rights case *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*. Ms. Lore is a member of the Yellowstone County Bar Association, the International Law Association, and the Austrian Arbitration Society. She is admitted to the District of Montana and the 9th Circuit Court of Appeals, and serves as a member of the 9th Circuit pro bono appellate panel. Her practice will focus on bankruptcy law.

Thomas C. Orr has joined the Missoula law firm of P. Mars Scott. Mr. Orr is a 1990 graduate of the University of Montana School of Law. For the past 10 years he has practiced as a solo attorney in Missoula in the areas of land use, family law and civil litigation. Prior to entering private practice, he was employed as a deputy city attorney for the City of Missoula and he clerked for Helena District Judge Jeffrey Sherlock. Mr. Orr will continue to specialize in the areas of government regulation, land use, real estate, and family law.




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DEATHS

Joe Sabol, Bozeman attorney

Bozeman lawyer Joseph W. Sabol died on Jan. 17 at age 75.

Mr. Sabol was born in Endicott, N.Y., and studied Civil Engineering at the Virginia Polytechnic Institute, where he received a master's degree in Geology.

After college, Mr. Sabol entered the Army and was stationed at Fort Belvoir outside of Washington, D.C., where he taught in the engineering school. During this same time, he researched, wrote and published paleontological publications in conjunction with the Paleontological Research Institute at Cornell University in New York.

Mr. Sabol met his wife, Ellie Czerw, while in the service at Fort Belvoir. They were married in Washington, D.C., in 1960, and for the next several years, they lived in Springfield, Va. During this time, Mr. Sabol served as project engineer on the installation of a nuclear research reactor at Walter Reed Hospital and the FDIC facilities in downtown Washington.

In 1968, the Sabols moved to Bozeman and settled in Bridger Canyon. In 1970, he worked as a law clerk for Montana Supreme Court Chief Justice Frank Haswell. While at the Court, Mr.

Sabol "read the law" and in 1971 passed the Montana bar exam.

Gov. Forrest Anderson appointed Mr. Sabol to the newly created Board of Natural Resources & Conservation, where he was appointed chair of the Board by Gov. Tom Judge. During this period, the Board was involved in the highly controversial Colstrip 3 and 4 power plant sitings, and the Yellowstone River water reservation program. At the conclusion of his term on the Board, he represented the Board as its general counsel.

Mr. Sabol began his practice of law in Bozeman in 1971 as a sole practitioner. In 1987, his son, Joby, joined him. The two practiced together until the elder Mr. Sabol's retirement in 2001.

Mr. Sabol's practice was highlighted by his representation of Big Sky Lumber Co. and his involvement in 1993, and subsequently in 1998, in land exchanges with the U.S. Forest Service that placed upwards of 100,000 acres of privately held land into public ownership. He also was instrumental in resurrecting the land exchange in Park County involving the Forest Service, Rocky Mountain Elk Foundation, and the Church Universal & Triumphant. He was especially pleased

with his involvement in the transfer of the Ousel Falls Park land to the Big Sky community.

In the early 1980s, Mr. Sabol established the Bridger Canyon Tree Farm. He had no former horticultural training but delighted in raising the many trees, shrubs and perennials that rapidly grew to a full-time business operation. The farm is presently owned and operated by Joe's son, Justin.

Mr. Sabol was an avid fly fisherman and raised bonsai trees. After his retirement from the practice of law, he continued on to be involved in the Bridger Canyon Tree Farm, and became passionately involved in astronomy.

Mr. Sabol is survived by his wife, Ellie, two sons and a daughter.

Rosemary Boschert, attorney and activist

Longtime Billings resident, pioneer anti-discrimination attorney, feminist, activist, and mother of nine, Rosemary C. Boschert, 84, died Jan. 28 after a long illness.

Ms. Boschert was born in Sioux City, Iowa. In 1950, she was one of only three women graduates at the Marquette University School of Law, where she met her husband, Ernest F. Boschert. They moved to Billings after marrying in 1950.

Ms. Boschert spent her first 25 years in Montana raising nine children, as well as involving herself in a variety of activist causes such as Yellowstone County Democratic Party politics and Women's Rights. She worked for passage of the Montana Equal Rights Amendment and helped to establish the Women's Resource Center. Once, when testifying before the Montana Constitutional Convention about the need to keep an elected superintendent of public instruction, she said, "I will not vote to give away my right to vote!"

She started practicing law with her husband in 1972, specializing in labor and anti-discrimination



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law. She won her first case, representing a woman in a labor dispute and, on appeal to the Montana Supreme Court, she also prevailed. As a single attorney with one paralegal, she often challenged the entrenched powers, as in the case of three separate anti-discrimination suits against Montana Power, which she won.

Ms. Boschert "was an inspiration and mentor to women attorneys," her obituary said. She served on the Montana Board of Pardons & Parole, and was a founding board member of Sage Towers, Alternatives Inc., and the Montana chapter of the National Museum of Women in the Arts.

She was a member of the Mayor's Committee on the Homeless, an active member of Holy Rosary Parish, lecturer on the encyclical *Pacem in Terris*, teacher for the Great Books Program, volunteer for Habitat for Humanity, and supporter of the Montana Council of the Arts and Women in the Arts.

Ms. Boschert was a 1991 YWCA Salute to Women honoree and, in 2008, was recognized by the ACLU with the Jeannette Rankin award. She also received numerous awards and honors from the Yellowstone Democratic Party, AAUW, Zonta Club of Billings, and Alternatives Inc.

Mr. Boschert was preceded in death by her husband, Ernest, in 1987. She is survived by six daughters and three sons.

Ted Corontzos, Great Falls attorney

Retired Great Falls attorney Theodore "Ted" Corontzos, 79, died of natural causes Feb. 13 at Peace Hospice in Great Falls.

Mr. Corontzos graduated in 1948 from Great Falls High, where he was an outstanding athlete in basketball and track. In 1954, he graduated from Gonzaga University as an ROTC cadet captain. He then attended the University of Montana School of Law, graduating in 1960. He was on the National Moot Court Team, *Montana Law Review*, and the Board of Editors. He was a Neil Wilson Scholar.

Mr. Corontzos served in the U.S. Army as a personnel psychologist in the Adjutant General Corps from 1955 to 1957.

Mr. Corontzos was a six-year member of the Great Falls Park Board of Recreation and a past member of the UM Alumni Association House of Delegates. He was a past district vice

president of the Montana Bar Association, served on the YMCA board of directors as well as the Multi-Sports Complex board, was a member of the "Y" Athletic Club board of directors, and was a past president of the Meadow Lark Country Club.

He was associated with local law firms until 1984, when he and his brother Robert formed the private practice of Corontzos & Corontzos.

Survivors include his wife of 54 years, Connie Corontzos of Great Falls; two daughters, and two sons.

Grover Schmidt, Fort Benton city attorney

Longtime Fort Benton attorney

Grover C. Schmidt Jr., 94, died Jan. 24 at a Bozeman hospital.

Mr. Schmidt was a Navy veteran. He served as Chouteau County attorney for three years, and as Fort Benton city attorney for 38 years. He was active in numerous civic and community organizations.

Mr. Schmidt is survived by his wife of 67 years, Geraldine, three daughters and a son. He was preceded in death by a daughter.

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158, Whitefish MT 59937-0158 or to cstearns@cityofwhitefish.org. Apply by 5 p.m. Friday, April 2, 2010. A detailed job description with salary information and application information is available at: the City of Whitefish website at www.whitefish.govoffice.com under Employment Opportunities or by writing to PO Box 158, Whitefish MT 59937, or by calling (406) 863-2406.

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