
Lawyer

THE STATE BAR OF MONTANA

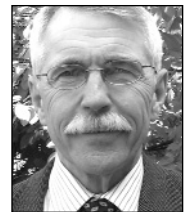
The Montana legal community's



state champs

*The 2008 State Bar
award recipients*

State prosecutor
John Connor
leads the pack



A new president-elect

3 new Bar trustees also seated
in the August member voting



**Rule changes
lay traps for
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THE MONTANA LAWYER

Published every month except January and July
by the State Bar of Montana, 7 W. Sixth Ave.,
Suite 2B, P.O. Box 577, Helena MT 59624. Phone
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SUBSCRIPTIONS are a benefit of State Bar membership; others purchase a year's subscription for \$25, pre-paid. Third Class postage paid at Helena MT 59601.

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POSTMASTER: Send address changes to Montana Lawyer, P.O.Box 577, Helena MT 59624.

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Printed in Billings
at Artcraft Printers

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Jock Schulte

PRESIDENT'S MESSAGE

A satisfying year of State Bar work

On values, Blackberries and lawyers' lives

So this is it, my last President's Message. Like the first one, this final article is started at my favorite place, Flathead Lake. Just like the incredible vistas that are my good fortune to experience, being president has allowed me to observe our profession with an expansive view.

What I have seen and experienced in the last year will forever impact my perception of lawyers, our role in society and how the privilege and responsibility of being a lawyer impacts us as human beings.

The most memorable and uplifting experiences I have had as president were the swearing-in ceremonies with the Montana Supreme Court to admit into the profession the new Montana lawyers. At each ceremony, there was an incredible positive energy with palpable excitement in the air. For the new admittees the hopes and dreams of becoming a Montana lawyer are finally achieved, with the next step being the reality of actually practicing law.

My first substantive act upon being elected was to focus the annual trustee retreat on gathering information about Bar members. This was accomplished by putting panel discussions together: a just-graduated-from-law-school panel; a one-to-five-years-in-the-practice panel; a fifteen-or-more-years-in-the-practice panel; a non-practicing panel; and a retired-lawyers panel. While some had determined that the traditional practice of law was not for them, they clearly still used their skills obtained as a lawyer in their current endeavors. It was also clear that most lawyers are very satisfied with the practice and their lives as lawyers. A change in work expectations was evident in some younger lawyers, with an increase in personal time away from the practice being a priority. Competency, dedication to clients, service to community, civility among attorneys, ongoing gender issues, respect for the judicial process and the judiciary, strong adherence to ethics, and constant vigilance aimed at providing access to justice were also some common themes that were articulated that day.

The Bar has increased its presence at the University of

Montana School of Law. Monthly luncheon meetings were held at the school where students were provided information on such things as the history of the bar, services, and benefits available, insights to obtaining and performing judicial clerkships, and opportunities in non-traditional areas of practice. The meetings continue this school year.

The Montana Values Task Force met and made a preliminary list of Montana Values that has formed the basis for discussion and the potential implementation of a set of core

values for Montana lawyers. (See: President's Message, March 2008

and the August 2008 *Montana Lawyer* article "The Search for Montana Attorneys' Core Values").

The proposed values were discussed at the Road Shows occurring this year at Kalispell, Hamilton, Great Falls, and Livingston. These discussions shall continue at next year's Road Shows and other Bar events, hopefully culminating with a resolution

passed at the 2009 Annual Meeting that adopts a statement of core values for Montana lawyers.

CHANGE IN THE PRACTICE of law is rapidly occurring on a worldwide basis. Some believe that multi-jurisdictional practice is a reality that is here to stay. Technology such as e-mail, e-filing, videoconferencing, video court appearances and electronic document dissemination have changed the way the legal professional functions. Most of us still remember the typewriter, mag-cards, CPT systems, and then the first computer word processors as vital tools in the practice. Now, cell phones, Blackberries, laptops, instant messaging, and constant high-speed access to the Internet are all apparently vital tools in the practice as well. Renowned UM Professor Albert Borgmann gave us some unique perspective on the importance of maintaining social interaction in the practice and the value of honoring tradition in the profession during this time of galloping technological change. (See: Dr.

My most memorable experience was watching excited law grads get sworn in as new attorneys.

More PRESIDENT'S MESSAGE, Page 13

John Connor receives the Jameson

Is first non-judicial public servant to earn Bar's top honor

John Connor, the chief criminal counsel for the Montana Attorney General's Office, is receiving the State Bar of Montana's top honor this year, the 2008 William J. Jameson Award.

The award was presented at the Annual Meeting in Butte this month.

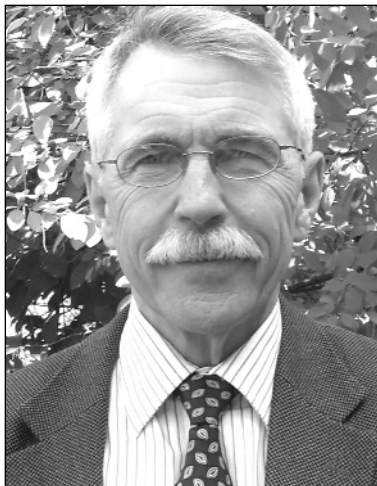
The Jameson Award, named after the late federal judge William J. Jameson of Montana, is given to the State Bar member who has exemplified the highest values of the legal profession throughout his or her career. Mr. Connor, who is planning to retire from his state office at the end of the year, is the first non-judge public official to earn the Jameson Award since it was first presented in 1989.

The following is the letter nominating Mr. Connor, written by Helena attorney Elizabeth Baker:

I DO NOT BELIEVE there is a lawyer in Montana more deserving of the Jameson Award than John Connor. Over the course of his 38-year legal career, John has tirelessly served the courts, the Bar, the legal profession, and the people of Montana. He has – with dedication, humility, compassion, and the humor essential to surviving three decades in the criminal justice system – done more to advance the cause of justice and the rule of law than could ever be described in a few paragraphs.

John Connor began his legal career in 1970 with the Litigation Unit of the Montana Legal Services Association. After a brief term as MLSA's state deputy director, he was hired by then-Attorney General Robert Woodahl to handle civil and criminal appeals, original proceedings in the Montana Supreme Court, and federal court cases. John was in private practice for approximately 10 years, first with the Helena firm of Gough, Shanahan, Johnson & Waterman, and then as a partner in Smith, Connor & Van Valkenburg in Missoula. There – among other things – John administered Missoula County's contract public defender program and operated the firm's branch office in Boulder, where he also served as city attorney for Boulder and Whitehall.

John became the Jefferson County attorney in October 1982 and served in that position for five years, when he was hired by Marc Racicot to work in the County Prosecutor Services Bureau of the Attorney General's Office. He has been in that office for the last 20 years.



John Connor: mentored and trained generations of attorneys and law enforcement officers.

As the State of Montana's chief prosecutor, John has handled many of the most high-profile and complex criminal cases from every corner of the state. He also has been called in to deal with lesser but politically charged offenses – such as official misconduct, false claims and embezzlement – involving local officers who present conflicts of interest for the county attorneys. In every case – whether it be premeditated brutal murder or petty theft – John is thorough, professional, discreet, and forthright. Driving to the far reaches of Montana, often bringing his own food and staying in low-budget motels, John prepares and tries the cases and then heads back to Helena, leaving the limelight for others.

THROUGHOUT HIS legal career, John has developed a reputation among judges, legislators, law enforcement officers, corrections officials, victims' advocates,

and defense attorneys as an honest, courageous, hard-working, and passionate prosecutor who always has justice and fairness as his objective. While he has been involved in every recent death-penalty case in Montana, there are many, many more in which his pragmatic counsel has resulted in the death sentence not being requested. John takes the big view and never pursues a course because of popular opinion or public pressure.

While John has served the public as a prosecutor, he also has given his time unselfishly to the court system and the Bar in many ways. John currently serves as chair of the Criminal Jury Instructions Commission, vice chair of the Commission on Rules of Evidence, and chair of the Commission on Unauthorized Practice. He has served many years and put in countless hours on each of those commissions. He also has served on the State Bar's Insurance & Client Security Committee, on the Board of Crime Control's Statewide Drug Strategy and Jail Recodification committees, on the Criminal Procedure Commission, and on the Board of the Montana County Attorneys Association.

IT IS PROBABLY NOT AN OVERSTATEMENT to say that John has provided training to all of the judges and most of the lawyers and peace officers in the State of Montana. From the early days of his career, where he assisted in training with

MLSA, to his many years of conducting semi-annual county attorneys' training seminars, to teaching at the law school's trial practice seminar and the Law Enforcement Academy, John has mentored and provided training to several generations of attorneys and law enforcement officers. John has served under and counseled five different attorneys general. He has provided biennial legislative reviews to the Montana Judges Association for close to 20 years.

Among state legislators, John is trusted and sought out. He is a constant presence in the judiciary committees of both the House and the Senate. He has educated many legislators on criminal law, and is widely respected for his candor, integrity, and common-sense advice. John never comes with a political

or personal agenda, except to make the legal system function better. John also has participated in innumerable public education activities, from presentations to civic groups to acting in "To Kill a Mockingbird" at a Helena Law Day celebration.

John Connor is a tireless public servant and a consummate professional. He is one of the state's pre-eminent trial lawyers, and one of the most quiet. He takes pride in the fact that his cases, which literally deal with matters of life and death, are done quicker, less expensively, and more efficiently than cases dealing "only" with money. He has worked in the background, for a modest public salary and with a self-deprecating sense of humor, for 38 years. His time for appropriate recognition from the Bar is long past due and very well deserved.

Desmond earns Professionalism Award

Missoula attorney Brenda Desmond, who has been a standing master for the 4th Judicial District Court for the past 14 years, has been awarded the 2008 George L. Bousliman Professionalism Award by the State Bar.

In her work as standing master, and also in her frequent mediations and settlement conferences, "Brenda excels at making people feel respect between litigants and for the court," said Missoula attorney Cyndy Smith, who also is chair of the Bar Board of Trustees, in her nomination of Ms. Desmond. "She is a model for showing courtesy to parties. She is also very creative in fashioning solutions that work well for all concerned."

Ms. Desmond, a co-founder of Missoula's Drug Court and a member of Missoula County's DUI Task Force, served as standing master for the Missoula District Court since 1994. She also serves part-time as chief justice of the Fort Peck Tribal Court of Appeals.

Ms. Desmond was admitted to practice law in New York in 1977 and in Montana in 1980. A graduate of the State

University of New York at Buffalo Law School, she has been involved in the planning and programming of the Missoula Youth Drug Court since its inception in 1996 and presides over the weekly drug court staffing and court session when Presiding Judge John W. Larson is absent. From 1999-2002, she was a member of the Tribal Advisory Committee of the National Association of Drug Court Professionals, in cooperation with the Tribal Law & Policy Institute and the U.S. Department of Justice Drug Courts Program. She has been a consulting faculty member for the U.S. Department of Justice Juvenile Drug Court Planning Initiative administered by the National Council



Brenda Desmond

More DESMOND, Page 18

Pro Bono Award goes to Ann Shea

Butte attorney Ann Shea has been awarded the newly named Neil Haight Pro Bono Award by the State Bar.

"Ann is a very active participant in the 2nd Judicial District's Pro Bono program – she does not refuse a case referred to her," said the Bar's Access to Justice Committee. "She also acts as guardian ad litem for the Drug Court in Butte. She volunteers monthly at the Belmont Senior Center, answering legal questions for seniors. She volunteered to be on the modest means attorney panel and has taken these cases referred to her outside the pro bono program."

In addition to her law-related volunteer activities, Ms. Shea sits on the Board of Directors for the Mining Museum in Butte and sits on the Alzheimer's Council for Butte. She also serves as the Area C trustee for the State Bar.

The Pro Bono Award has been named for Neil Haight of Helena, who was the long-time executive director of the Montana Legal Services Association and who died in August.

"With her active private practice, Ms. Shea is extremely busy and works hard as an advocate for children, handles wrongful discharge cases and family law," the Committee wrote. "Although she never lacks for business, Ann never says no to taking a pro bono case and assisting clients in need, free of charge. She always takes on the work joyfully and works as hard for her pro bono clients as does for those who pay."

Ms. Shea graduated from the University of Montana's School of Law in 1996. She joined the Butte-Silver Bow



Ann Shea

More on SHEA, Page 18

Butte pro bono program is award-winning model

New to Bar awards this year is the Community Pro Bono Award that recognizes a program that goes far beyond a single pro bono attorney. The first Community Pro Bono Award goes to what is being called a “model” for such programs – the 2nd Judicial District’s pro bono program in Butte.

Started by a loosely organized group of attorneys, the program was formalized by then sitting District Judges Whalen and Purcell. Now fully developed, every attorney practicing in the 2nd Judicial District knows that they are expected to participate in the pro bono program and accept cases when called upon to do so. The phrase, “It’s not mandatory, it’s alphabetical,” has been used jokingly in connection with the program for some time.

The program is staffed by part-time librarian, part-time program director Marijo MacDonald. Working through Montana Legal Services Association, Ms. MacDonald selects attorneys from her database case-by-case. Exceptions to taking a case are made, but only temporarily.

With full support from District Judges Kurt Krueger and

Bradley Newman, “Marijo makes sure that every attorney in the District does his part in supporting the program and helping Butte’s indigent litigants get their day in court,” said Montana Supreme Court Justice Brian Morris in prepared remarks for the presentation of the award at the Bar Annual Meeting.

To assist attorneys who do not practice in areas of family law and other types of cases likely to come to the pro bono program, the Butte Bar regularly sponsors CLEs addressing the legal substance of the most commonly assigned cases.

“While other communities have judicially-supported, well-functioning pro bono programs, we recognize the 2nd Judicial District’s program as a model program and the only ‘all-in’ program in the state,” Justice Morris said. “It would not be a success without the support of the judges, the assistance of Marijo MacDonald, and most importantly, the attorneys who practice in the 2nd Judicial District and who give their professional skills and time to help their neighbors in need of legal assistance.”

Matteucci receives the Haswell Award



Matteucci honored for excellent research and ‘beautiful writing.’

Billings attorney Sherry Matteucci has been given the State Bar’s Haswell Award for her *Montana Lawyer* magazine article about Ella Knowles, Montana’s first female attorney.

Members of the Bar’s Past Presidents Committee, who judge the Haswell Award, called her extensive profile of Ms. Knowles – who lived from 1860 to 1911 – as “well researched” and “beautifully written.”

The award, named after the late Montana Supreme Court Chief Justice Frank Haswell, who

left a monetary endowment to recognize the most useful and interesting article contributed in the past year to *The Montana Lawyer*, carries a \$200 prize.

Ms. Matteucci, a former U.S. attorney for Montana, submitted her article “Ella Knowles: a woman of courage” for the March 2008 edition of the magazine.

Three other authors who contributed articles for the magazine were recognized by the Committee for honorable mentions this year. They are:

■ John Dratz Jr., a Montana native now practicing law in San Diego, on “Big city law firm lassoed in Montana: The Seltzer art-appreciation case” (September 2007).

■ Patrick Davis, Ph.D., a Great Falls forensic psychologist, on “How lawyers and courts should choose forensic mental-health examiners” (November 2007).

■ Dr. Albert Borgmann, of the University of Montana Department of Philosophy, on “Digital law vs. analog lawyers” (February 2008).

New Equal Justice Award goes to namesake

The first presentation of the new Karla M. Gray Equal Justice Award, so named by the Access to Justice Committee, will go to . . . Karla M. Gray.

The annual award will honor a judge who is dedicated to improving all Montanans’ access to state and local courts, regardless of income. “It is my hope it will become the Jameson Award for judges,” said Beth Baker, a Committee member.

It also coincides with the “graduation” of Chief Justice Gray from her position on the Montana Supreme Court. “Chief Justice Gray leaves a legacy of commitment to equal justice like none

Montana has seen before,” Ms. Baker said. “Her work is the guidepost for this award and she is its inaugural recipient.”

The award is based on a judge’s involvement in supporting and developing state and local pro bono and self-help law programs. “The inception of this award,” Ms. Baker said, “coincides with the forthcoming adoption of a new Code of Judicial Conduct, which we expect will include language that specifically recognizes a judge’s ability to provide leadership in improving equal access to the justice system.”

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more
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awards
on
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Avoiding traps for the divorce lawyer

By James A Patten
and Craig D Martinson
Billings attorneys

The Bankruptcy Abuse & Prevention & Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005) (BAPCPA) makes several material changes with respect to domestic relations and bankruptcy. The definition of a domestic support obligation (DSO) is clarified in greater detail.¹ Also, the automatic stay, which is generally triggered upon the filing of a bankruptcy case, is no longer applicable to domestic relation matters, except property division.² Further, BAPCPA has made a significant change to whether or not an obligation arising out of a decree of dissolution that is not a DSO is dischargeable.³ Finally, DSOs, which include spousal maintenance as well as child support, enjoy the highest priority for distribution from a bankruptcy estate.⁴ A domestic relations attorney should be familiar with these changes in bankruptcy law if sound counseling and advice is to be given.⁵

DOMESTIC SUPPORT OBLIGATION

BAPCPA has modified the statement of what marital obligations are non-dischargeable by deleting the pre-BAPCPA 11 U.S.C. § 523(a)(5) in its entirety and simply stating in its place the phrase “(5) for a domestic support obligation.” BAPCPA added 11 U.S.C. §101(14A) which defines the term “domestic support obligation.” This new definition gives a more detailed description of what is included in non-dischargeable marital obligations. It makes it clear that accrued interest on an outstanding DSO is included in the non-dischargeable DSO, which was not specifically allowed under the prior definition.

The new definition also states that a DSO owing to or recoverable by a child's parent, legal guardian, or responsible relative or a governmental unit is non-dischargeable. These specific entities were not included in the prior listing of entities for whom such debts were non-dischargeable. The new definition of a DSO also states that any obligation in the nature of alimony, maintenance or support is not dischargeable whether or not such debt is expressly so designated. While there was pre-existing case law that has made such a determination, it is now clearly stated by statute as non-dischargeable.

LIMITATION OF AUTOMATIC STAYS IN DOMESTIC RELATIONSHIP PROCEEDINGS

Generally, when a bankruptcy case is filed, the “automatic stay” is immediately imposed which stays pending litigation concerning monetary claims against the bankrupt debtor or claims against property of the debtor.⁶ Prior to the enactment of BAPCPA the filing of a bankruptcy stayed child-support enforcement or modification actions, marriage dissolution, and

property-apportionment actions. The automatic stay continued, typically, until modified by an order of the bankruptcy court or until the debtor obtained a discharge.⁷ As a matter of practice, the filing of a bankruptcy case stopped all pending hearings and trials, including domestic relations trials.

Congress has now excepted most domestic-relations matters from the automatic stay. Specifically, the stay does not apply to:

- The establishment of paternity⁸;
- The establishment or modification of an order for domestic-support obligations⁹;
- Actions concerning child custody or visitation¹⁰;
- The dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate¹¹;
- Actions regarding domestic violence¹²;
- The collection of a domestic support obligation from property that is not property of the estate¹³ (i.e., post bankruptcy wages);
- Actions relating to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or statute¹⁴;
- The withholding, suspension, or restriction of a driver's license, professional or occupational license or recreational license under state law as specified in §466(a)(16) of the Social Security Act¹⁵;
- The reporting of overdue child support owed by a parent to any consumer reporting agency as specified in §466(a)(7) of the Social Security Act¹⁶;
- The interception of a tax refund as specified in §§464 and 466(a)(3) of the Social Security Act or under analogous state law¹⁷; and
- The enforcement of a medical obligation as specified under Title IV of the Social Security Act¹⁸.

The automatic stay will, however, continue to apply to the division of property.¹⁹ Since the stay does not apply to nearly all domestic-relation matters, a bankruptcy filing should have little affect on the initiation or continuation of any matters pending when the bankruptcy is filed.

DISCHARGE OF NON-DOMESTIC SUPPORT OBLIGATIONS

There is a significant change in BAPCPA concerning the discharge of obligations incurred by a divorce decree between the debtor and the debtor's former spouse that are not DSOs.

Child support and spousal maintenance have long been excepted from discharge.²⁰ However, property division obligations were dischargeable under the 1978 Bankruptcy Code until the 1994 amendments when they were excepted from discharge only upon the application of the debtor's former spouse and upon a showing that the debtor had the ability to pay the property division obligation, or that the benefit of the discharge to the debtor was outweighed by the detriment of the discharge to the debtor's former spouse.²¹ This involved a test balancing the effect of discharging the obligations between the debtor and the debtor's former spouse. The debtor's former spouse had to object to discharge within 60 days of the creditor meeting.²² The expense and uncertainty of such an objection resulted in infrequent filings. Effective Oct. 17, 2005, this prior statute was drastically modified with the elimination of the judicial determination of whether or not a non-support obligation was discharged in bankruptcy.²³ This amended statute makes it clear that a non-support obligation incurred in a dissolution proceeding very likely will not be discharged in a Chapter 7, 11 or 12. The issue is, how broad is this non-discharge right of the debtor's former spouse for marital obligations the debtor incurred by reason of a dissolution of marriage decree that does not fall in the definition of a non-dischargeable DSO?

This issue arises out of the language used in the amendment. The statute as amended states that the individual debtor is not discharged "...from any debt...(15) to a spouse, former spouse or child of the debtor...incurred... in the course of a divorce...".²⁴ This clearly states that if the dissolution of marriage decree required the debtor to pay an amount directly to the debtor's former spouse for any reason, that obligation is not discharged as to the debtor's former spouse.²⁵ This statute as amended clearly requires a divorce lawyer to be aware of this non-discharged obligation created when a direct payment that is not a DSO to the debtor's spouse arises out of the dissolution decree.

The issue that divorce attorneys need to be aware of is the likelihood that pre-dissolution of marriage marital debts for which the debtor is responsible to pay directly to a third party creditor in the dissolution decree will most likely be non-discharged as to the debtor's former spouse. While there is only limited case law analyzing this discharge issue, the cases to date hold that any such debt would not be discharged as to the debtor's former spouse, even though discharged as to the original creditor. Debtors have raised two arguments claiming such assumed debts should be determined to be discharged as to the debtor's former spouse. One argument is that this section applies only to debts that were "incurred... in the course of a divorce." By this argument, debtors have contended that because the obligation had been entered into with third parties prior to the dissolution of marriage proceeding, it was not "incurred" by reason of the divorce and therefore discharge-

able. This contention was rejected by the 9th Circuit prior to BAPCPA.²⁶ The Montana Bankruptcy Court in a post BAPCPA case confirmed this holding when it adopted the 9th Circuit statement from *Short*, Id. which stated "...a premarital debt becomes a divorced-related debt covered by 523(a)(15) when expressly included in a decree of dissolution."²⁷

Debtors have also argued that premarital debts for which they are obligated by reason of a divorce decree would be discharged when not payable directly to the debtor's former spouse because the Bankruptcy Code only exempts from discharge "... an individual debtor from any debt ...(15) to a spouse..."²⁸ The narrow reading of the statute would seem to support this interpretation. An early law review article on this exemption statute sustained such an interpretation when the author stated:

It is not unusual that during a divorce proceeding one or both parties come to the realization that a bankruptcy is necessary. If only one party comes to such realization, problems arise.

Now, only a marital debt owed "to a spouse, former spouse, or child of the debtor " comes within §523(a)(15). This means that where a debt is not "actually in the nature of alimony, maintenance or support," and the debt is payable by the debtor directly to a third party, such as a loan assumption provision or a "hold harmless " agreement, then the debt is not covered by either 523(5) or (15) and therefor it falls into the category of "nonpriority" or general unsecured debt, which is not excepted from discharge."²⁹

As of this date, no cases have been reported that would support such an argument. While there are only a limited number of cases that have discussed this issue of payment to a third party and not to the debtor's former spouse, those cases that have reviewed this issue have uniformly determined that any debt that becomes the obligation of the debtor in a dissolution decree to a third party is not discharged as to the debtor's former spouse notwithstanding there was only an assumption of a pre dissolution marital debt without any direct payment to the former spouse by the debtor. Such a position is consistent with other legal authorities:

Section 523(a)(15) now provides, unqualifiedly, that a property settlement obligation encompassed by section 523(a)(15) is nondischargeable. Thus in individual cases under chapters 7 and 11 and in cases under chapter 12, all of which base dischargeability on the subsections of section 523 (a), the distinction between a domestic support obligation and other types of obligations arising out of a marital relationship is of no practical consequence in determining the dischargeability of the debt.³⁰

See also Hon. William Houston Brown, "Bankruptcy and

More on DIVORCE & BANKRUPTCY, Page 31

It helps for child advocate to still be a boy himself

By **Alana Listoe**
Helena Independent Record

Peter Bovingdon's personality has many facets. But the one that may stand out the most is his ability to feel young.

He can relate to children and says he feels like a side effect of growing up is a lack of playing, but he refuses to live like that.

If there's fresh powder, you can bet Bovingdon's on the ski hill. And if there's buff single-track, you'll find him on the bike trails — but if the thermals are rising off the mountain slopes, he's packing his hang glider up to the edge of a cliff.

Bovingdon, 39, [a Helena attorney] is officially the development specialist for Montana Legal Services, but he also contracts with the state to represent abused and neglected children in Lewis & Clark County.

It's easy for him to relate to children in general, particularly boys. "I know what they are interested in," he said. "We look at the world the same way."

He calls up his childhood fascination with "Star Wars" to help him understand how children feel about the world.

"Who they connect with tells a lot about them," he said after receiving a community service award recently at the Capitol Rotunda. "They are all engaged in epic battles and their planets are at stake."

SOME BOYS connect with Han Solo because when it comes down to it they make moral choices, but have to think about them, Bovingdon said.

One boy he worked with was done dealing with adults because it just seemed not to get him anywhere. He related most to Boba Fett, a bounty

hunter who's not on the dark side or with the Force, and he doesn't talk.

Bovingdon said understanding the boy's connection to Boba Fett helped him relate to how he was feeling about



Peter Bovingdon, at left, loves to talk Star Wars with children when he's not flying his hang glider, above.

Helena Independent Record photos

being stuck between two homes.

For another boy it's Yoda, small, and funny. It's C-3PO for another because he could be broken into pieces yet still work — a tough one for Bovingdon to talk about.

No one really relates to the movie's hero Luke Skywalker, he said.

Bill Collins, director of the Court Appointed Special Advocate program in Helena, said Bovingdon steps into the

lives of children at the worst time, assuring them he'll be there. And he always is. "He's been a gold mine for us," Collins said.

Bovingdon comes to his current cases armed with knowledge from a wide swath of the legal system. He was an assistant attorney general in Mike McGrath's office, and before that he worked in the public defenders office.

"He has a working knowledge from every direction," Collins said. "He's really just a compassionate guy for children and works really hard to do what's best for kids. He has a good rapport with kids because he can capture the world through their eyes."

DISTRICT Court Judge Jeffery Sherlock enjoys having Bovingdon in his courtroom. Beyond getting a kick out of the tan suede desert shoes Bovingdon wears, Sherlock said the attorney doesn't take things personally and understands that you win some and lose some.

Sherlock described Bovingdon as having a good sense of humor and said he's "quiet, polite and doesn't wander all over with questioning."

ALTHOUGH Bovingdon said he enjoys thinking about law, what he likes to talk about the most is hang gliding. And once he starts, it's more than

obvious that he may just be a little obsessed.

His love of soaring with the birds began as a desire to become a pilot in college, but when an opportunity to hang glide came his way, he was hooked.

"I knew right away it was a direction my life was going to take," he said.

More BOVINGDON, Page 34

Cynthia Smith is Bar's new president-elect

August election leads to 3 new members of the Board of Trustees

Missoula attorney Cynthia K. Smith, who has been chair of the State Bar's Board of Trustees for the past two years, was elected as the State Bar's president-elect in the August vote for officers and trustees.

Voters in Missoula, Great Falls, and Bozeman areas added three new faces to the Bar's Board of Trustees.

In Area B (Missoula area) Matthew Thiel of Missoula won a spot on the Board along with the other two Top 3 vote getters, Board incumbents Shane Vannatta and Tammy Wyatt-Shaw.

In Area D (Great Falls and surrounding area) Great Falls attorney Darcy Crum won election to the Board, while Trustee Jason Holden won re-election. Bar Trustee Gale Gustafson of Conrad lost his run for re-election, not finishing in the Top 2.

In Area G (Bozeman area), Bozeman attorney Lynda White was elected to the Board. She replaces Carl Borgquist of Bozeman, who resigned from the Board in July. Board incumbent Jane Mersen, a Bozeman attorney, was re-elected to represent Area G.

Others elected by the Bar membership in August were:

- Billings attorney Damon Gannett, re-elected as the Bar's ABA delegate.
- Bigfork attorney Randall Snyder was re-elected as a Bar trustee in Area A.
- Butte attorney Ann Shea was re-elected to the Board from Area C.

Although the officers and trustees take their positions immediately, Ms. Smith will not become the Bar president until September 2009 when the term of the current president, Chris Tweeten of Helena, expires.



Cynthia Smith

MS. SMITH was a non-traditional college student, starting college at the Salish & Kootenai College in Pablo when she was 30 and had three children. She received her undergraduate degree in Political Science from the University of Montana

More SMITH, Page 18

Comment period set for Bar's proposed fee-arb rule changes

The trustees of the State Bar of Montana and the Bar's Fee Arbitration Committee have petitioned the Montana Supreme Court to revise the Rules on Arbitration of Fee Disputes (see August 2008 *Montana Lawyer*). The petition requests a time period for receipt of public comments and that the petitioners be given the opportunity to respond to the comments prior to consideration of the proposed changes by the Court.

The Court has granted any interested persons until Oct. 3, 2008, in which to file comments, suggestions, or criticisms with the clerk of the Supreme Court regarding the proposed revisions. The Court said each commenter must file seven copies of any such comments.

See the proposed fee-arbitration changes at <http://courts.mt.gov/newrules.asp>

2008 STATE BAR AWARDS

The following awards were to be presented at the 2008 State Bar Annual Meeting, in addition to the awards listed on Pages 5-7:

Distinguished Service Awards

Carl Borgquist – Outgoing Trustee
 Max Hansen – Outgoing ABA Delegate
 Jim Lewis – Outgoing Chair of Fee Arbitration Committee
 Jim Murphy (posthumous) – Member of Health Benefits Trust and member and Chair of Lawyers Fund for Client Protection
 Amy Pfeifer – Outgoing member of Access to Justice and Judicial Relations committees
 Peggy Probasco – Past President, outgoing Chair of Lawyer Referral & Information Service

50-year pins for a half-century of membership in the State Bar:

John F. Blackwood, Bozeman	Daniel P. Lambros, Missoula
Jack H. Bookey, Bellevue WA	George McCabe, Great Falls
George Dalthorp, Billings	James E. Purcell, Butte
Earl Genzberger, Post Falls ID	Ward A. Shanahan, Helena

More Bar members comment on dues hike

After the announcement in the June/July Montana Lawyer that the State Bar is petitioning the Montana Supreme Court for a Bar dues increase, nine letters of comments were printed in the August edition. This month, we present all the letters about the dues that we have received since.

Montana should give consideration to creating a separate dues classification for government attorneys. Government attorneys do not have the same requirements for attorney discipline and personal support, as the oversight of government attorneys is different and more pervasive, with much more oversight of the attorney's work and client relationships. Also, all governmental agencies provide "malpractice coverage" to their employees acting within the scope of their employment.

Additionally, in most cases the services sought to be covered by the increased dues are duplicative of those offered by the government agency through its personnel programs.

Last, attorneys employed by the local, state and federal governments earn less than their counterparts in the free market arena. Please consider a graduated fee for government attorneys, as a one size fee does not fit all.

— Nancy Anderson Sinclair, U.S. Air Force
Black Eagle, Mont.

Thank you for waking me up! I have been paying inactive dues to the Montana Bar Association for over 25 years for no apparent reason. The *Montana Lawyer* has been my only benefit. Although I like hearing about my old friends and acquaintances, the magazine is hardly worth \$125 per year.

I suspect that there are a great many inactive lawyers who will drop their bar memberships when they see that the proposal is to raise active lawyers \$75 and to raise inactive lawyers \$50. Does anyone consider this an equitable division of your proposed dues increase?

If I were making my living practicing law in Montana, I certainly would have no opposition to paying bar dues of \$300; but my bar dues since leaving Montana (in 1984) have been a donation. The Montana Bar Association will cease to be one of my charitable contributions in the future.

— Brent Appelgren, Superstition Mountain, Ariz.

I'll submit something more formal, but I think the Bar may need to look at either some sort of income-based dues or a significantly lower dues requirement for attorneys working in state government.

In the private bar the firm, not the individual attorney, pays its attorneys' bar dues and expenses them for tax purposes. Most state attorneys have to pay their own bar dues and cannot

expense them unless they are able itemize them or can claim the dues as a business expense.

Moreover, it seems to me that the necessity of the Lawyers Fund for Client Protection and the Office of Disciplinary Counsel is driven exclusively or almost exclusively by the actions of the private bar. It's not that we're necessarily better, more ethical attorneys, but our clients are not likely to sue us for malpractice or seek reimbursement of funds we have stolen from them (we don't even have trust accounts) – we have a very different attorney-client relationship.

— David A. Scrimm, chief, Hearings Bureau
Montana Department of Labor & Industry

Why are you asking the memberships' opinion on a Bar dues increase. Are you trying to give the Bar members a false sense the we have a say in the matter? The Bar and Supreme Court have made it perfectly clear we have no say. My dues have gone up 300 percent and I haven't had a say.

I guess this is once again a case of: "You got to give them a fair trial before you hang them." In the 1970s the Bar members were promised that if they voted to make Bar membership mandatory, the Bar members would have a right to vote on any dues increase. With that promise the members were induced to vote for mandatory Bar membership.

We all know how well that turned out for the Bar members. To the smug satisfaction of the State Bar hierarchy, the dues were increased. The empire was increased with a larger bureaucracy than ever. Now the bureaucracy is trying to put it to us once again so they can get bigger.

I know some people would say "get over it, you lost." Well, I have bent over and accepted it. However, it is hard to "get over it" when the Bar keeps trying to make me believe I have any say in the matter.

So, to repeat the first question, why is the State Bar going through a pretense of asking for the "memberships'" opinion. (The Phrase "Be heard ..." is laughable). The State Bar will do what it damn well pleases in spite of what the members want.

— W. Lee Stokes, Bozeman

I believe the proposed dues increase is unacceptably high, and ask that you consider a lower amount, such as \$25 [instead of \$75].

The proposed dues increase is for funding the Lawyers' Assistance Program (LAP). The LAP serves an important function in working through severe personal problems that some members of the State Bar experience. Though the work of the LAP is laudable, the proposed dues increase comes soon after significant increases in other assessments paid by State

Bar members. The Disciplinary Counsel Assessment of \$125 was imposed by the Supreme Court less than two years ago. This assessment, added to the license taxes and membership dues, creates a significant financial burden for practicing lawyers. In addition, the total cost to practice law in Montana would become the highest among the states in our region.

I believe that a dues increase at this time is imprudent. If any dues increase must be considered, I request that you consider a lower assessment. A dues increase on the order of \$25 a year may be more appropriate.

– *Curtis E. Larsen, legal counsel,
Montana State Fund, Helena*

PRESIDENT'S MESSAGE, from Page 4

Borgmann's article "Digital law v. analog lawyers," February 2008 *Montana Lawyer*).

Of course, I have had the distinction (no doubt a dubious distinction in some people's minds) to explain to Bar members that a dues increase would be necessary in order for the Bar to keep performing its mandated duties. While an increase is needed just to address the general rise in the price of doing business, the Bar is also committed to the Lawyers Assistance Program, directed by Mike Larson. Mike stopped by my office a couple of weeks ago and described how he has been spending his time recently: assisting lawyers in crisis, closing down practices of disabled or otherwise unavailable lawyers, and setting up proactive programs that can be of benefit to all lawyers. There can be no reasonable doubt that the LAP is a vital and necessary program of the Bar. As such, it needs to be funded.

Even though my term seemed to fly by, I believe my presidency kept the Bar going in the right direction. So from my current vantage point, the perspective I have is one of satisfaction. I sincerely appreciate all of the fine and hard work performed by the Bar staff and Bar volunteers, without which no president could function.

Thank you for giving me the honor of being of service to the Bar as president.

○

STATE BAR CALENDAR

September 26

Construction Law CLE, Holiday Inn, Bozeman

October 2

Access to Justice Forum for the public, 4-6 p.m., Butte Public Library

October 3

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

October 7

Swearing-in Ceremony for new lawyers, 10 a.m., Montana House of Representatives chambers, Helena

October 8

Law Education & Information Committee conference call, 10 a.m.

October 16-17

Annual Bankruptcy CLE, Wingate Inn, Billings

October 17

New Lawyers CLE, DoubleTree Hotel, Missoula

October 23

Access to Justice Forum for the public, 3-5 p.m., Bozeman, location to be announced

October 25

Content and advertising deadline for November edition of *Montana Lawyer* magazine.

November 1-8

CLE & Sea, Cozumel, Mexico

November 14

CLE Institute meeting, State Bar offices, Helena

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Federal Lands Agenda for the 21st Century 11.50 CLE credits. Presented by the *Public Land & Resources Law Review*, (406) 243-6568

September 24 Missoula – UM Law School

Jones Tamm Lecture: Justice Antonin Scalia 1.0 CLE credits. Presented by the UM Law School, (406) 243-4311

September 24 Helena – Metcalf Building, Capitol Complex

Documenting Disciplinary Action 3.0 CLE credits. Presented by the state Personnel Division, (406) 444-3985

September 24 via satellite

Hot Topics: New Texas Franchise Tax 2.0 CLE credits. Presented by Edward Jones Company, (314) 515-5848

September 25 Billings

Family Violence Conference 2.0 CLE credits. Presented by the Billings Area Family Violence Task Force, (406) 252-3680

September 25 Helena – Metcalf Building, Capitol Complex

Ethical Issues in Public Service 6.50 CLE credits, including 6.50 Ethics credits. Presented by the state Personnel Division, (406) 444-3985

September 25 Missoula – Missoula Courthouse

The Law, The Guardian & Supervised Parenting 1.0 CLE credit. Presented by the 4th Judicial District Court, (406) 258-4742

September 26 Bozeman – Holiday Inn

4th Annual Construction Law Institute 6.75 CLE credits. Presented by the State Bar CLE Institute and the Bar's Construction Law Section. See details of program, speakers and registration at CLE/Upcoming CLEs at www.montanabar.org

September 26 Helena – Hampton Inn

RIM at the Counsel Table 6.0 CLE credits. Presented by the Big Sky Chapter of ARMA, (406) 455-8451

September 26 Missoula – Grant Creek Inn

Settling Uninsured and Underinsured Motorist Claims 6.0 CLE credits, including 1.0 Ethics credit. Presented by the National Business Institute, (800) 930-6182

September 27 Missoula – UM Law School

UM Football CLE: Employment Law Developments 2.0 CLE credits. Presented by Prof. William Corbett. See www.umt.edu/law

October 9 Helena – Colonial Hotel

Montana Water Law 10.25 CLE credits, including 1.0 Ethics credit. Presented by The Seminar Group, (206) 463-4400

Other web & phone CLEs for Montana credit are:

■ 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/

October 16-17 Billings – Wingate Inn

Annual Bankruptcy CLE 10.0 CLE credits, including 1.0 Ethics credit. Presented by the State Bar and its Bankruptcy Section. See details of program, speakers and registration under CLE/Upcoming CLEs at www.montanabar.org

October 17 Missoula – DoubleTree Hotel

New Lawyers CLE Presented by the State Bar and its New Lawyers Section. Details to be mailed to Bar members

October 18

UM Football CLE: Developments Affecting the Criminal Law Practitioner 2.0 CLE credits. Presented by Prof. Andrew King-Ries. See www.umt.edu/law

October 20 Helena - Wingate Inn

1031 Exchange, Tenant-in-Common Real Estate, & Charitable Remainder Trusts & Investing 8.0 CLE credits. Presented by 1031 Exchange Solutions, (406) 586-0356

October 21 Great Falls - Holiday Inn

1031 Exchange, Tenant-in-Common Real Estate, & Charitable Remainder Trusts & Investing 8.0 CLE credits. Presented by 1031 Exchange Solutions, (406) 586-0356

October 21 Billings – Holiday Inn Grand

Montana Human Resource Conference 8.25 CLE credits. (406) 444-3982

October 22 Billings - Hilton Garden Inn

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October 22 Bozeman – Gran Tree Inn

Licensing Your Innovation 2.25 CLE credits. Presented by the Montana Dept. of Commerce, (406) 841-2749

October 23 Missoula – Hilton Garden Inn

Land Use Law & Growth Management 4.0 CLE credits. Presented by New West Publishing, (406) 829-1725

October 28 Billings – Western Clocktower Inn

Probate Practice: The Essential Basics 6.50 CLE credits, including 1.0 Ethics credit. Presented by the National Business Institute, (800) 930-6182

October 29 Billings – Crown Plaza Hotel

Insurance Coverage Litigation 6.0 CLE credits, including 1.0 Ethics credit. Presented by the National Business Institute, (800) 930-6182

October 29 via satellite

Lifecycle of an LLC Treated as a Partnership 2.75 CLE credits. Presented by the Edward Jones Company, (314) 515-5848

Oct. 31 – Nov. 1 Missoula – UM Law School

Annual Tax Institute 10.5 CLE credits, including 1.0 Ethics credit. Presented by the UM Law School. Details to be mailed to Bar members and posted at www.umt.edu/law

November 1 Cozumel, Mexico

CLE & Sea: General Practice 15.0 CLE credits, including 5.0 Ethics credits. Presented by CLE & Sea and the State Bar of Montana, (406) 677-6789

November 15 Missoula – UM Law School

UM Football CLE: What Family-Law Practitioners Need to Know About the Indian Child Welfare Act 2.0 CLE credits. Presented by Prof. Maylinn Smith. See www.umt.edu/law

November 22 Missoula – UM Law School

UM Football CLE: Developments in Insurance Law 2.0 CLE credits. Presented by Prof. Greg Munro. See www.umt.edu/law



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DESMOND, from Page 6

of Juvenile and Family Court Judges.

Since 2003, Ms. Desmond has directed planning and implementation of the Missoula Mental Health Court program, designed to divert individuals with serious mental illness charged with misdemeanors and non-violent felonies into treatment. She is also involved in Missoula Jail Diversion project, which began, in January 2007, to work with the GAINS TAPA Center for Jail Diversion to develop a community jail diversion plan for people in the criminal justice system with serious mental illness.

Ms. Desmond was on the faculty of the University of Montana School of

Law from 1985-1994 where she taught in the areas of appellate practice, legal writing, legislation, public land and resources law, and served as supervising attorney and then director of the Indian Law Clinic. Ms. Desmond has worked extensively in the field of Indian law: as court advisor for the Crow Tribal Court, as staff attorney in the Montana Legal Services office serving the Crow and Northern Cheyenne Indian Reservations, as staff attorney for the Montana Legislative Committee on Indian Affairs and as associate appellate justice for the Confederated Salish and Kootenai Tribal Court of Appeals. Ms. Desmond has also worked for the Montana Legislative Council and as staff attorney to the Montana House Judiciary Committee.

Gov. Brian Schweitzer appointed Ms. Desmond to the Montana Board of Crime Control in 2007. She is a member of the Board of the Western Service Area Authority, and the Missoula DUI Task Force. She has also served on the Missoula Forum for Children & Youths Oversight Committee, the Forum's Missoula Underage Substance Abuse Prevention Team, and the Missoula Indian Center Board of Directors.

Ms. Desmond has two sons, Erik who is in his senior year of high school and Ben, who just entered law school.

The Bousliman Professionalism Award is named in honor of George Bousliman of Helena, who was executive director of the State Bar for 17 years. ○

SHEA, from Page 6

County Attorney's Office as a deputy city-county prosecutor. As a prosecutor, she served on the Butte-Silver Bow

Inter-agency Juvenile Task Force, Butte-Silver Bow Child Protective Team, the Butte-Silver Bow Family Violence Council and the Butte-Silver Bow Adult Protective Team.

In June 2001, Ms. Shea joined the TouchAmerica legal department. In 2003, Butte District Judge Judge Kurt Krueger recruited her to develop Butte's first drug court. In 2004, she was hired full-time as the drug court's standing master. In 2005, she resigned the posi-

tion to focus solely on private practice.

Ms. Shea volunteers at the Butte-Silver Bow Belmont Senior Citizens' Center by providing a free legal clinic. She serves on the Butte-Silver Bow Bar Association's Pro Bono Committee and participates in the Montana State Bar's Modest Means Program. She serves on the Guardianship Committee for Southwestern Montana and she has resumed serving on the Butte-Silver Bow Adult Protective Team. ○

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SMITH, from Page 11

and then graduated from the UM School of Law in 1990. She clerked for Federal Judge Charles C. Lovell and then went into private practice in Missoula.

Ms. Smith currently practices in the firm of Jasper Smith Olson, emphasizing personal injury, criminal defense, and employment law. She has been involved with the State Bar throughout her legal career. She has been a Bar trustee for 10 years, including two years as chair of the Board of Trustees. She was president of the New Lawyers Section, then a member and later chair of the Judicial Relations Committee. She has been a member of the Ethics Committee for more than a decade and is a past chair of that committee. She currently serves on

the Professionalism Committee.

Ms. Smith is a 2004 graduate of Gerry Spence's Trial Lawyers' College, and has attended many graduate courses at the college since graduating. She also has taken five doctoral-level classes in Psychology.

She lives in Lolo with her husband of 37 years, Ed. They have two sons who are lawyers. Their oldest son, Brian, is a public defender in Missoula. Their younger son, Rob, is also a member of the State Bar of Montana and practices construction law in Minneapolis. Their youngest, daughter Holly, is a paralegal in Portland who is about to go to grad school. Ms. Smith has five grandkids. ○

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Seminar Schedule & Program Outline

7:45–8:30 am	Registration
8:30–10:00 am	Where Have all the Jurors Gone? <ul style="list-style-type: none">• Is there a crisis in confidence?• Jurors—in their own words Jury Deliberations <ul style="list-style-type: none">• How jurors reach conclusions How Jurors Learn <ul style="list-style-type: none">• Crafting a case that hits home• Choosing words that speak volumes
10:00–10:15 am	Break
10:15 am–Noon	Voir Dire—What You Really Need to Know to Make Good Decisions <ul style="list-style-type: none">• What you <i>must</i> ask, what you <i>should</i> ask, and what you should <i>never</i> ask Jury Selection Simplified <ul style="list-style-type: none">• Utilizing a 2-track rating system to simplify jury selection• Evaluating prospective jurors' "influence quotient"
Noon–1:00 pm	MDTL Meeting and Lunch (on your own)
1:00–2:00 pm	Jury Selection from the Judges' Point of View <ul style="list-style-type: none">• Hon. Donald W. Molloy, U.S. District Court (MT)• Hon. Edward P. McLean, 4th Judicial District• Hon. Jeffrey M. Sherlock, 1st Judicial District
2:00–3:15 pm	Jury Selection Simplified (continued) Opening Statements: "Attention!" <ul style="list-style-type: none">• Techniques that make your case come alive• 50 ways to leave an impression
3:15–3:30 pm	Break
3:30–5:00 pm	Opening Statements (continued) Witnesses... "Preparation Makes Perfect" <ul style="list-style-type: none">• Winning tools for witness preparation Closing Argument... "It Ain't Summation" <ul style="list-style-type: none">• Making your last impression resonate in the deliberation room• Motivating jurors to find for your client

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	On or Before Nov. 3	After Nov. 3
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Derek Bell – Tax Counsel, Montana Department of Revenue

Brenda Gilmer – Tax Counsel, Montana Department of Revenue

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One lawyer's tribute to the late Neil Haight

The following is excerpted from a eulogy presented at the memorial event for Neil Haight, former executive director of Montana Legal Services, who died in August:

By Susan Gobbs
Helena attorney

First off, let me say how sorry I am that I can't be there in person, but I am attending a conference in Vancouver and couldn't make it home in time for Neil's goodbye party; for this is what he wanted – no sermon in a church, just a gathering of family and friends to remember a wonderful, unique human being.

Other speakers will no doubt talk about Neil's professional and personal accomplishments of which there are many, so I'll concentrate on sharing my personal thoughts and feelings.

If you are very lucky in your life, you will come across individuals who will impact you in profound, life-changing ways. And so it was for me with Neil. I first met Neil 20 years ago when I interviewed for a Legal Services job in the Havre office. I'd just been out of law school a year but I was pretty sure most law firms didn't conduct interviews in a bar – but okay. I met Neil, Russ LaVigne, and Steve Bunch in a Helena watering hole. Neil was suspicious because I ordered a coke and that was my first indication that my life and my legal career were going to take a dramatic turn for the better.

We visited for a while, they checked my references and Neil called to tell me that I was hired on a probationary status. Later in my career, whenever he was annoyed, he would remind me that I was still on probationary status and I should watch my step.

Working with Neil was always interesting, *very* interesting, and I worked with him for almost 15 years at MLSA, 10 of which were in the Helena office. I started off by calling him Sir or Mr. Haight and he didn't like that, so we progressed to Unsir and eventually to Neil. He was never too busy to share thoughts and advice and, conversely, if you didn't have a client in your office, he'd come by to bounce ideas off you and get your opinion. He never made you feel that your youth or inexperience made your opinion less valuable. He gave credit where credit was due, but for him work was a team effort and "we" was most important, not "I."

Leaving Legal Services was not an easy decision, and Neil never really understood why I left. But he supported me, gave advice and offered help even after I left MLSA.

Neil and Betty have always had a warm and gracious home. My family has had many fun times on the boat and



at the house, as have numerous others. I lived in their basement one summer when we were moving to Helena and I couldn't find a place to live. I, however, didn't seek to repeat the wallpaper down there in my own home.

Neil and Betty have acted as honorary grandparents in our family – teaching my daughters many skills from shooting pool, to driving the boat, to skiing. They have supported Rick and me through difficult times and celebrated happy events. One of Neil's favorite stories involved my daughter Sarah, when she was about 13. He knew we were starting to have some teenage troubles, so he went to great lengths one night on the boat to tell her how smart I was and how he valued me at the office. She looked at him and said "I don't think she's so smart!" He just loved that because it reminded him of Leslie [Neil's daughter].

Thank you, Leslie and Randy, for sharing your Dad. He was very proud of you both. But knowing your Dad, I'll bet he didn't necessarily tell you that very often – but he told us how he felt about you. Betty, I think you know how he adored you and what a good team you made. Neil was never effusive with praise, if you got a compliment, you cherished it because it was hard-earned. The highest compliment he could give is that you were a "good hand."

So good-bye, Neil, you were a very good hand – and we shall miss you very much.

10 Things I learned from Neil

By Susan Gobbs

1. Clients are people, no less worthy of respect than any other individual.
2. Herding cats is not easy, but can be very rewarding.
3. If you screw up it's not the end of the world, just admit it and move on.
4. Shorter briefs are usually better.
5. Support staff are to be treated with respect, they usually

know more than you do.

6. At the end of the day, when tough decisions need to be made, make them. No dodging the bullets.
7. How to be passionate about the work and still have a full life outside the office.
8. Flair pens are the best writing instruments in the world, and fudge is the best food.
9. When confronted with your own preconceived notions, feel free to change your mind.
10. It's okay to drive down the middle of a two-lane road – until you meet another car.

By Paul Schorn

How solos can gain financial flexibility

Quick beats big when it comes to linebackers and law practices. One of the solo practitioner's greatest weapons is his nimbleness. Without meetings to attend or committees to persuade, a solo can react quickly to developments in a case or trends in the marketplace.

But this advantage often is wasted by solos who leave themselves without the financial resources to take advantage of new situations. As Benjamin Franklin observed, "There are three faithful friends: an old wife, an old dog — and ready money." Here are three basic tips for solo practitioners who want to protect their financial flexibility.

Type it yourself. Every solo ought to know how to type well, at least 60 words per minute and, better yet, 100. I started practicing law in the age of the Dictaphone (obtained by crossing a gramophone with a brontosaurus), but I haven't had any one type anything for me in years.

My ability to type has saved me tens of thousands of dollars in secretarial wages and just as many hours of reviewing pointless drafts of simple letters. Not a week goes by that I don't think of Mrs. Fleming, my stern, blue-haired, 10th-grade typing instructor. Lawyers who are not lucky enough to have their own Mrs. Fleming can find amazing, interactive computer programs for less than \$30 that will teach them to type in a matter of weeks. They will never, never make a better investment in their practices.

Learning to type also expands the hours the solo can work to include evenings, weekends and holidays, when support staff are off leading normal, healthy lives. I love having opposing counsel tell me they absolutely refuse to produce important documents on a Friday afternoon — and making sure a motion to compel is sitting on their fax machine when they come into work on Monday morning.

If it doesn't plug in, buy it used. The retail markup on office furniture is obscene. Refuse to pay it. According to the U.S. Small Business Administration, about one-third of new employer establishments fail in the first two years and about 56 percent in the first four years. I half-suspect that many of these folks' businesses go under because they overpaid for their conference tables, armchairs and credenzas. Find their furniture, and you'll save a bundle.

Most major cities have stores whose business it is to buy large lots of office furniture from failed operations and resell it. Their stock usually runs the gamut from shabby brown plaids to pristine Herman Miller Aeron chairs. Be prepared to sweat while you shop, as these places usually keep the overhead low by operating out of old warehouses, but the savings

are worth it. A large, high-end metal file cabinet can run \$900 or more new. The same cabinet, after just a couple of years and perhaps a few small scratches, can be picked up at one of these resale shops for about a third of that. The same goes for desks,

chairs, tables, lamps and virtually anything else your office might need.

As an alternative, consider antique furniture. Even good-quality antiques are usually cheaper than the furniture made specifically for businesses. A plain, medium-size conference table can cost \$2,500 new, while a little hunting might turn up an 8-foot oak table with barley-twist legs for a quarter of that price. And antiques generally are more than adequate for the light duty they receive in a solo's office.

Keep the money moving. Money is to a law office what blood is to a body: You've got to have enough, and it has to keep moving, or you die.

I fought the idea of a line of credit for a long time. If I liked being beholden to others, I'd have stayed at a firm and never become a solo. But that changed as my caseload grew in volume and value. A small case in my field might require \$500 in expenses and take three months to resolve, while a large case can gobble up \$25,000 and drag on for two or three years. Carrying 20 or so cases at a time, those numbers can add up. Eventually, I had to accept some occasional debt so as not to be strapped for cash and unable to fly off to Tulsa, Okla., or Topeka, Kan., on short notice for that crucial deposition or to take a good case to trial because of the state of my operating account. Sometimes my line is fairly burdened, sometimes it's paid off, but it's always there. That allows me to do what I need to do, when I need to do it.

Another tool in the solo's financial arsenal is the sweep account. This is a type of bank account in which funds are automatically transferred or "swept" into an investment vehicle of some kind (such as a money market or mutual fund) each night or Friday evening and then transferred back to be available when business resumes. This process can pay real dividends over time, especially when a few highly productive months swell a solo's operating account with large amounts of money she doesn't need right now — but will eventually.

Taking advantage of opportunities for saving money and putting some basic financial know-how into play can put solos in the best possible position to respond quickly to opportunities. And that's just good business.

PAUL SCHORN is a solo practitioner with offices in Lockhart and Austin, Texas.



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District court rules involving jurors are amended

The Montana Supreme Court issued the following order on Aug. 20:

IN RE THE PROPOSED AMENDMENTS TO THE MONTANA UNIFORM DISTRICT COURT RULES

As of October, 2007, the law now provides for jurors to be selected from lists of drivers and ID card holders as well as voters. In light of this change, the Uniform District Court Rules Commission has requested that we amend the Rules to reflect the present state of the law and adopt an amendment concerning access to answers given in the juror questionnaire.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the Uniform District Court Rules are amended as follows:

The following language [amended to include judges by a Sept. 10 Court order] shall be added at the end of Rule 9.

Rule 9. Juror Questionnaire.

The completed forms will only be available to the parties to the action, the attorneys for the parties, judges and court employees. Others requesting the completed forms must file a Request for Private Information with the Court. The jury questionnaire will be destroyed by the clerk's office within a reasonable length of time after the conclusion of the jury term.

Memoriam set for late Justice Morrison

On Nov. 20, 2007, the Montana Supreme Court appointed a Memoriam Committee to recognize and honor former Justice of the Montana Supreme Court "and consummate attorney" Frank B. Morrison Jr., who died last year.

The Memoriam in honor of Justice Morrison's life and service have been completed, the Court said.

The Court ordered that the memoriam will be publicly read into the record – in the presence of his family, friends, and former associates – on Friday, Sept. 26, at 11 a.m. in the Supreme Court chambers in Helena. Copies of the memoriam will be given to Mr. Morrison's family, his colleagues on the Supreme Court, and others, the Court order said.

Question 19 of the Form "B" Questionnaire shall read as follows:

In order to serve as a trial juror, you must be 18 years of age or older, a resident for at least 30 days of the state and of the city, town or county in which you are called for jury duty, a citizen of the United States, and not convicted of malfeasance in office or any felony or other high crime, the sentence of which has not yet expired or the fine not yet paid.

Court appointments

● **Commission of Continuing Legal Education:** Reappointed for new 3-year terms are attorneys Casey J. Heitz and K. Paul Stahl, and non-attorney Kimberly Obbink.

● **Commission on Self-Represented Litigants:** Shirley Faust was reappointed to a new 3-year term.

● **Gender Fairness Commission:** Jennifer Brandon, clerk of the 18th Judicial District, and Billings attorney William D'Alton have been appointed to 3-year terms, replacing Roger Barber and Carol Graham, whose terms expired. Julianne Burkhardt, Commission chair, Michael Best, and Shelly Hopkins have been reappointed to new 2-year terms.

ORAL ARGUMENTS

These oral arguments have been scheduled before the Montana Supreme Court:

September 2008

■ Case DA 07-0170 – ROBERT JACOBSEN, Plaintiff, Appellee, and Cross-Appellant, v. ALL-STATE INSURANCE COMPANY, Defendant and Appellant.

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

■ Case DA 07-0353 – REBECCA E. MATTSON, et al., Plaintiffs and Appellants, v. MONTANA POWER COMPANY, a Montana Corporation, et al., Defendants and Cross-Appellants.

Oral argument is set for Wednesday, Sept. 24, at 1:30 p.m. in the courtroom of the Montana Supreme Court, Helena.

October 2008

■ Case DA 07-0592 – ROBERT EDWARDS, DANIEL KOHM, JOHN DOE, LOUIS GOAZIOU, DAVID ZROWKA, and RAY ST. ONGE, Plaintiffs and Appellants, v. CASCADE COUNTY SHERIFF'S DEPARTMENT, DAVID CASTLE, in his individual capacity, and CLYDE "BLUE" CORNELIUSEN, in his individual capacity, and CASCADE COUNTY, Defendants and Appellees.

Oral argument is set for Wednesday, Oct. 29, at 1:30 p.m. in the courtroom of the Montana Supreme Court, Helena.

How to successfully redact document text

Black lines don't cut it anymore

From the **U.S. District Court of Montana**

Out of sight, but not gone

To protect the privacy of litigants, the Federal Rules of Practice & Procedure require that certain personal data identifiers be modified or partially redacted from federal court case files. These identifiers are Social Security numbers, dates of birth, financial account numbers, and names of minor children, and in criminal cases, also home addresses. In all cases, it is the responsibility of the attorney and the parties in the case to redact the personal identifiers.

But redaction, once a matter of drawing a heavy black line through the words on paper, has changed with the electronic filing of documents. A black bar drawn over the text is no longer enough to block it from view. In an electronic file, the obscured text still lurks beneath the highlighter box and can be readily recalled. The text is hidden, not excised.

One example of redaction prior to creating a PDF is to replace numbers with X's, i.e., Social Security numbers as xxx-xx-5325, birthdates as xx/xx/2001.

Attorneys filing pleadings recently in a Connecticut case learned that lesson the hard way. They created black boxes to cover text they wished to redact. Unfortunately, simply pasting the text into a Word file revealed the hidden information. Changing the text color to white so it disappears against the white screen/paper is similarly ineffective.

To redact text, its metadata – literally the information about the data – must be removed. For best results, delete the text from the file before creating a PDF file and save it with a new name. Commercial software designed specifically to redact is also available.

While the Court does not endorse any specific method, and the responsibility for redacting personal identifiers rests solely with the parties, the following software and site references may be useful to you. Commercially-available software can be used to redact, not just hide, the sensitive information.

Redax (www.appligent.com) and RapidRedact (www.rapidredact.com) are two examples of commercial products used by some. And Adobe Acrobat 8.0 Professional and WordPerfect XIV both contain redaction tools.

IF YOU HAVE QUESTIONS, contact *Leandra Kelleher*, (406) 542-7261, U.S. District Court, District of Montana.

DISCIPLINE

Gazette loses in its court case on lawyer-discipline records

By **Greg Tuttle**
The Billings Gazette

Releasing to the public the disciplinary records of a former Billings city attorney whose misconduct resulted in a public censure and license suspension would be unfair to the attorney, the Montana Supreme Court has ruled.

In a unanimous ruling, the justices also said that the lawyer's disciplinary records should not be made public because a legal challenge to the Supreme Court's rules of lawyer discipline by *The Billings Gazette* was not properly filed.

The justices upheld a decision by a district judge who said he did not have jurisdiction to decide the lawsuit involving rules written by the Supreme Court,

according to the eight-page opinion written by Justice Patricia Cotter.

"In the current rules, we have declared that certain procedures are confidential," Cotter said. "The District Court does not have authority to issue a contrary ruling."

Moira D'Alton admitted to acts of misconduct with the understanding that, under the Supreme Court rules, details of her misconduct would be kept confidential, the opinion states. It would be unfair to D'Alton now to release those details to the public.

"D'Alton was not put on notice that at some future time, under circumstances over which she had no control, her file could be open to the public," Cotter said. "To now issue such a ruling would be a

violation of D'Alton's entitlement to due and fair process."

D'Alton, a former prosecutor for the city of Billings, now works as a deputy public defender. She was fired from the city job in 2004 and recently prevailed in a wrongful-termination lawsuit against the city.

In 2006, the Supreme Court found that D'Alton violated four provisions of the Montana Rules of Professional Conduct, the guidelines written and enforced by the Supreme Court to govern the actions of lawyers.

D'Alton's discipline included a public censure, a 30-day suspension of her license and two years of probation.

The newspaper sought release of D'Alton's disciplinary records, arguing that the public has a right to know the details of misconduct by a lawyer in public service that results in disciplinary action. Previous rulings by the Supreme Court have established the public's right to know in such cases involving elected

officials, police officers and teachers.

The newspaper in May 2006 filed a lawsuit in Lewis & Clark County District Court against the state of Montana and the Supreme Court's Commission on Practice and Office of Disciplinary Council after requests for D'Alton's disciplinary records were denied. Judge Thomas Honzel later ruled that he did not have jurisdiction to order D'Alton's records released because they are confidential under rules established by the Supreme Court.

The *Gazette* appealed Honzel's ruling to the Supreme Court last October.

The *Gazette's* attorney, Mike Meloy of Helena, argued in the appeal that the Supreme Court's rules on lawyer discipline violate the state's constitutional guarantee of the public's right to know.

The *Gazette's* appeal was joined by The Reporters Committee for Freedom of the Press, a national organization that supports media efforts to obtain public records. The Montana Attorney General's Office argued against the release of D'Alton's disciplinary records.

Meloy said he was disappointed that the Supreme Court's ruling did not tackle the issue of whether its own rules on lawyer discipline violate the state constitution.

"As I read the ruling, the case was dismissed because the Supreme Court has the exclusive right to rule on the constitutionality of its own rules, not the district court," Meloy said. "Since the matter was squarely before the Supreme Court, it seems odd they would sidestep the constitutional conflict. And it bodes ill for any challenge to a Supreme Court rule because the court has total discretion to accept an original proceeding." Meloy said he believes the Supreme Court will "eventually have to deal with this issue."

Lucy Dalglish, executive director of the Minnesota-based media organization that joined the *Gazette's* appeal, said she also was disappointed that the Montana high court did not rule on the constitutional issue presented in the case.

"I can't say I'm surprised," Dalglish said. "I'm a lawyer and I'm here to tell you that there is no group of people on earth who are more protective of people in their group when it comes to discipline. They protect that information like you wouldn't believe."

A spokeswoman for the Attorney General's Office declined to comment on the ruling. A message left for D'Alton at the Public Defender's Office in Billings was not returned.

Guardian ad litem seminar set for Nov. 7 in Missoula

A CLE seminar packed with information and tools for the Montana guardian ad litem in divorce and parenting plan cases will be held Friday, Nov. 7, in Missoula.

The seminar will be from 8:20 a.m. to 5 p.m. at the DoubleTree Hotel.

Topics will include Effective Strategies, Ethical Dilemmas and Challenges, Thorough Investigations, Assessment of Children's Psychological Needs, and Perspectives from the Bench.

The target audience for the event includes current guardians ad litem (GALs), individuals interested in serving as GALs, and other individuals (attorneys, therapists, teachers, etc.) who are in contact with GALs.

Presenters include experienced attorneys, clinicians, and judges, most of whom have served in the role of GAL in Montana.

The registration fee is \$75 for those who desire CLE credits, which have been applied for. For further information, contact Jennifer Robohm, at (406) 243-6890, or jennifer.robohm@umontana.edu.

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U.S. eases pressure tactic over legal help for employees

By Eric Lichtblau
The New York Times

The U.S. Justice Department has rolled back a controversial set of rules that penalized companies if they insisted on paying employees' legal fees or protecting their confidential communications with corporate lawyers.

The long-awaited new guidelines, officials said, will no longer allow federal prosecutors to indict a company that takes such measures with its employees. Deputy Attorney General Mark Filip announced the new policy on Aug. 28 at the New York Stock Exchange, a site of strong symbolic importance because Wall Street firms and their lawyers have attacked the old restrictions as onerous and unconstitutional.

"Penalizing a company for paying the legal fees of its employees is simply outrageous," said Mercer Bullard, a securities law professor at the University of Mississippi Law School. "In cases where they say 'we are going to bring down your company unless you waive attorney-client privilege,' that has to stop."

The Justice Department imposed the tough corporate fraud guidelines in 2003 after the collapse of Enron and a subsequent wave of corporate fraud scandals. Justice Department officials maintained at the time that the aggressive tactics were meant to encourage executives to cooperate in investigations into possible wrongdoing rather than risk seeing their companies indicted — often a death knell for a corporation.

A company's willingness to cooperate in an investigation is one of the factors prosecutors weigh in deciding whether the company itself should be indicted.

But the measures quickly drew fire not only from Wall Street lawyers but from politicians and judges as well.

IN THE MOST SIGNIFICANT case that grew out of the policy, Judge Lewis A. Kaplan of the United States District Court in Manhattan dismissed criminal charges in 2006 against 13 of the defendants in a major tax-shelter prosecution against KPMG, saying that prosecutors had violated their constitutional rights by pressuring KPMG to cut off their legal fees.

The judge wrote that KPMG had refused to pay the defendants' legal expenses "because the government held the proverbial gun to its head," and he said the government had "let its zeal get in the way of its judgment."

In the face of the attacks, the Justice Department eased the rules in late 2006, with then-Deputy Attorney General Paul McNulty issuing new guidelines that said prosecutors could seek to have a company waive the attorney-client privilege only when there is a "legitimate need."

But the changes did not go far enough in the view of many corporate lawyers and their clients. Leading lawmakers in

Washington took up the cause as well, holding hearings on the issue and proposing legislation to

curb the tactics and override the Justice Department guidelines.

A bill to strengthen a company's right to safeguard attorney communications has already been approved by the House, and a similar measure proposed by Senator Arlen Specter, Republican of Pennsylvania, is pending in the Senate. It appears to have support from both Democrats and Republicans.

THE NEW GUIDELINES are partly an effort to head off action by Congress. Mr. Filip, the deputy attorney general, acknowledged as much in a letter last month to Mr. Specter and Senator Patrick J. Leahy, the Vermont Democrat who leads the judiciary committee, when he asked them to give the Justice Department time to enact new guidelines and review their effect before taking up legislation.

In the letter, Mr. Filip set out general principles that he said the Justice Department was likely to follow in formulating the new policy. Among them, he said that a company's "cooperation" in a federal investigation should be judged not by whether the company waives the attorney-client privilege, but by the extent to which it disclosed relevant facts and evidence to the government.

Also, the government would no longer demand that a company turn over confidential attorney-client documents as a condition of its cooperation, he said. And a company will not be penalized, as in the case of KPMG, for paying its employees' legal fees. In his letter, Mr. Filip acknowledged "the foundational role that the attorney-client privilege plays in our legal system."

Justice Department officials said Mr. Filip is expected to stick to the same basic outline that he laid out in his letter last month while filling in key details about how the policy would be implemented. Mr. Specter, for one, said he found the principles set out by Mr. Filip to be troublingly vague in some areas, like the disclosure of confidential legal documents.

THE JUSTICE DEPARTMENT has been meeting in recent weeks with lawmakers and key interest groups, including the Chamber of Commerce, in advance of Thursday's announcement. But several officials said that while they were eager to see the final details of the policy, they expected that Congress was still likely to move ahead with its own legislative remedy to give attorney-client confidentiality the weight of law.

○



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Judge Mark Painter

How to fix bad writing



Let us begin with a recent example from *OBar* [the Ohio Bar journal]. I won't give the citation because the authorship is not important. Plus I have enough enemies. This is just one paragraph; you can imagine the rest.

In considering a plaintiff's request for leave to amend, "a trial court's 'primary consideration is whether there is actual prejudice to the defendants because of the delay.'" *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 251, 743 N.E.2d 484, citing *Schweizer v. Riverside Methodist Hosp.* (1996), 108 Ohio App.3d 539, 546, 671 N.E.2d 312. Although we have held in a case involving the assertion of a new claim against an existing defendant that the plaintiff must make "at least a prima facie showing [of] support for the new matters sought to be pleaded," that consideration is meant to aid in determining whether the amendment is "simply a delaying tactic, [or] one which would cause prejudice to the defendant." *Wilmington Steel Products*, 60 Ohio St.3d at 122, 573 N.E.2d 622, quoting *Solowitch v. Bennett* (1982), 8 Ohio App.3d 115, 117, 8 OBR 169, 456 N.E.2d 562. Indeed one federal court has refused to allow a proposed new party, yet unserved, to appear at all, even as an amicus, in opposition to a motion to add it as a party-defendant in an existing action. *Paradigm Ins. Co. v. Walters Diving & Marine, Inc.* (E.D.La.1999), No. 98-1617, 1999 WL 232669. See, also, *In re Everfresh Beverages, Inc.* (1999), 238 B.R. 558, 569, fn. 8 (observing in ruling on a motion to add additional defendants pursuant to Fed.R.Civ.P. 15(a) that "[t]he Proposed Additional Defendants' rights, including objecting to the Plaintiffs' complaint on the ground of timeliness" were not before the court).

The paragraph is unreadable. It's littered with quotes, and quotes within quotes. There are letters and numbers jumbled up in the middle. And it even cites a footnote. It has some redeeming values — the author at least didn't write "aid in the determination of" instead "aid in determining." And mercifully, there are no passive sentences. But its word-per-sentence count is 42. The Flesch-Kincaid readability score is 24 (out of 100).

First, we take out the worst offense and remove the citations to footnotes, and we have this:

In considering a plaintiff's request for leave to amend, "a trial court's 'primary consideration is whether there is actu-

al prejudice to the defendants because of the delay.'"¹ Although we have held in a case involving the assertion of a new claim against an existing defendant that the plaintiff must make "at least a prima facie showing [of] support for the new matters sought to be pleaded," that consideration is meant to aid in determining whether the amendment is "simply a delaying tactic, [or] one which would cause prejudice to the defendant."² Indeed one federal court has refused to allow a proposed new party, yet unserved, to appear at all, even as an amicus, in opposition to a motion to add it as a party-defendant in an existing action.³

¹ *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 251, 743 N.E.2d 484, citing *Schweizer v. Riverside Methodist Hosp.* (1996), 108 Ohio App.3d 539, 546, 671 N.E.2d 312.

² *Wilmington Steel Products*, 60 Ohio St.3d at 122, 573 N.E.2d 622, quoting *Solowitch v. Bennett* (1982), 8 Ohio App.3d 115, 117, 8 OBR 169, 456 N.E.2d 562.

³ *Paradigm Ins. Co. v. Walters Diving & Marine, Inc.* (E.D.La.1999), No. 98-1617, 1999 WL 232669. See, also, *In re Everfresh Beverages, Inc.* (1999), 238 B.R. 558, 569, fn. 8 (observing in ruling on a motion to add additional defendants pursuant to Fed.R.Civ.P. 15(a) that "[t]he Proposed Additional Defendants' rights, including objecting to the Plaintiffs' complaint on the ground of timeliness" were not before the court).

Still difficult, but a start. Next, let's try to cut down the sentence length by purging some of the quotes.

In considering a plaintiff's request for leave to amend, the primary consideration is prejudice to the defendant.¹ In a case involving the assertion of a new claim against an existing defendant, we have held that the plaintiff must make a prima facie showing of "support for the new matters sought to be pleaded." But that consideration is to help the trial court determine whether the amendment is a delaying tactic, or one to prejudice the defendant.² One federal court has even refused to allow a proposed new party, yet unserved, to appear at all, even as an amicus, to oppose a motion to add it as a party-defendant in an existing action.³ (footnotes omitted).

This revision gets words-per-sentence down to 24 from 42, and readability up to 39 from 24. But it's still not very good. One problem is that I can't really tell what this paragraph is about. So I went back and read the case again. The paragraph is redundant, so it can be cut altogether. That makes 0 words-per-sentence.

MARK PAINTER is a judge on Ohio 1st District Court of Appeals and an adjunct professor at the University of Cincinnati College of Law. He is the author of five books, including "The Legal Writer 2nd Ed.: 40 Rules for the Art of Legal Writing." Judge Painter has given more than three dozen seminars on legal writing. Contact him through his website at www.judgepainter.org.

domestic Relations Manual,” §1:3 (2006).

To date, courts that have visited this issue have been consistent in determining that “...an obligation incurred in connection with a separation agreement incorporated into a dissolution decree is excepted from discharge as non-support divorce debt notwithstanding that the debt is payable to a third party and the agreement lacks specific “hold harmless” language.”³¹ See also *Douglas v. Douglas (In re Douglas)* 369 B.R. 462 (Bankr. ED AR. 2007), *Tracy v. Tracy (In re Tracy)*, Case No. 06-8040, 2007 Bankr LEXIS 360 (Bkcty ID., 2007); *Davis v. Hosterman (In re Hosterman)*, Case No. 07-01082, 2007 Bankr. LEXIS 1391 (Bkcty ND OK, October 9, 2007).

The argument is still open in Montana and the 9th Circuit as to whether or not a pre-dissolution obligation that the debtor is obligated to pay to a third party and for which there is no indemnity agreement by reason of a divorce decree is dischargeable. While in the *Lulow* case, Judge Kircher recently ruled on this discharge section, he only resolved the issue that payment to a former spouse on a pre-existing debt was an obligation that arose out of a divorce proceeding. In that case the straightforward ruling was that the debtor had been held liable by the divorce decree for payments to his former spouse for funds he had taken from the children’s trust accounts. Because the debtor’s spouse had been expressly awarded a judgement against the debtor as the children’s trustee, this debt was not discharged. This was not a decision where the debtor only assumed certain joint debts. Therefore there is still uncertainty of a discharge for assumed debts in Montana.

The above discussion does not relate to the discharge allowed by a Chapter 13 case. When there is a discharge issued in a Chapter 13 bankruptcy, certain debts held as non-dischargeable in Section 523 for a Chapter 7 case are also non-dischargeable in Chapter 13.³² However, these do not include those debts described in 11 U.S.C. 523 (a)(15). Therefore, a spousal obligation that is not a DSO is discharged upon the completion of a chapter 13 plan.

It is not unusual that during a divorce proceeding one or both parties come to the realization that a bankruptcy is necessary. If both parties come to this realization there is no problem and the usual strategy is to file a joint bankruptcy and thereafter complete the divorce with the marital debts discharged. If only one party comes to such realization, however, problems arise; if one party files for bankruptcy prior to the entry of the divorce decree, the divorce court could order that party to be responsible for certain debts even though that party discharged the very debts in bankruptcy. Consequently, the usual strategy is to file for bankruptcy *after* the divorce decree was entered. Prior to BAPCPA, the debtor’s former spouse would then have the burden of quickly objecting to discharge and asking the bankruptcy court to engage in the balancing test. If the bankruptcy court determined that a discharge of a debt was more detrimental to the debtor’s former spouse than excepting the discharge would be to the debtor, the debt would be excepted from discharge and the debtor would continue to

be liable for it. If the bankruptcy court came to the contrary conclusion, the debt would be discharged and the debtor’s former spouse would have to pay it even through the divorce decree provided otherwise. Either way the bankruptcy court was the final arbiter of discharge.

The effect of BAPCPA is that a divorce attorney must now be much more careful about the assumption of liability for debts. A bankruptcy discharge certainly does not discharge any debt that the debtor in bankruptcy was obligated to pay to the debtor’s former spouse and it would appear there also is not a discharge for marital debts assumed by the debtor in the dissolution of marriage decree as to this debtor’s former spouse. While the bankruptcy court was formerly the arbiter of whether a property division debt was dischargeable, that role has effectively been shifted to the divorce court. Hereafter, it is the divorce court that must be convinced of the burden imposed upon the debtor spouse. The divorce court will have to decide whether the debtor spouse will be required to pay marital debts otherwise discharged in bankruptcy. This will by necessity become an issue to be resolved in the divorce case. It can no longer be assumed that the issue can be deferred until after the divorce. It must be raised in the divorce.

PRIORITY OF DOMESTIC SUPPORT OBLIGATIONS

Finally, DSOs will enjoy enhanced treatment in a bankruptcy. As noted, a DSO obligation has not been dischargeable since the adoption of the 1978 Code, and while given a priority status, it was one of the claims with a lower priority for payment. DSOs are now the first priority for payment in a bankruptcy case,³³ meaning that if there are assets to be distributed by a bankruptcy trustee, the DSO will be paid before any other creditor; only a trustee’s fees and expenses are paid before a DSO.³⁴ Moreover, a bankruptcy trustee is now charged with the duty to notify the DSO recipient of the bankruptcy and the recipient’s right to use the services of the state child support enforcement services.³⁵

CONCLUSION

Attorneys practicing domestic relations law must be aware of how divorce obligations, both support and property division, are now treated in a bankruptcy case. An attorney must also know when a bankruptcy filing brings a pending domestic relation matter to a stop due to the automatic stay. Reliance on past practices is imprudent because of the changes in the Bankruptcy Code. Without a basic understanding of how a bankruptcy now affects domestic relations, an attorney can not provide good counsel to the client.

Notes

1. A domestic support order is defined at 11 U.S.C. §101(14A) (2007) as:
The term “domestic support obligation” means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is –
(A) owed to or recoverable by –
(i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or
(ii) a governmental unit;
(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so

designated;
 (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
 (i) a separation agreement, divorce decree, or property settlement agreement;
 (ii) an order of a court of record; or
 (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
 (D) not assigned to a non-governmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

2. 11 U.S.C. §362(b)(2)
3. 11 U.S.C. §523 (a)(5) and (15)
4. 11 U.S.C. §507 (a)(1)

5. Unless otherwise noted, all citations in this Article shall be to the Post-BAPCPA Bankruptcy Code.

6. 11 U.S.C. §362(a)
7. 11 U.S.C. §362(c)(1) and (2)
8. 11 U.S.C. §362(b)(2)(A)(i)
9. 11 U.S.C. §362(b)(2)(A)(ii)
10. 11 U.S.C. §362(b)(2)(A)(iii).

11. 11 U.S.C. §362(b)(2)(A)(iv). Property of the estate in a Chapter 7 case is all property owned by the debtor as of the commencement of the case, 11 U.S.C. §541(a)(1) but does not include property acquired thereafter, such as post-filing income. In a chapter 13, however, property of the estate does include post-filing income. 11 U.S.C. §1306.

12. 11 U.S.C. §362(b)(2)(A)(v)
13. 11 U.S.C. §362(b)(2)(B)
14. 11 U.S.C. §362(b)(2)(C)
15. 11 U.S.C. §362(b)(2)(D)
16. 11 U.S.C. §362(b)(2)(E)
17. 11 U.S.C. §362(b)(2)(F)
18. 11 U.S.C. §362(b)(2)(G)
19. 11 U.S.C. §362(b)(2)(A)(iv)
20. 11 U.S.C. §362(a)(5) (both pre and post BAPCPA)
21. *Graves v. Myrvang* (In re Myrvang), 232 F. 3d 1116, 1120 n.2 (9th Cir. 2000)

22. 11 U.S.C. §523(c) (pre BAPCPA) and Bankruptcy Rules 4004 and 7001(6);
23. 11 U.S.C. §523(a)(15)
24. *Id.*
25. *Lulow v. Lulow*, Cause No. 07-00035, 2007 Bankr LEXIS 4332 (Mont Bkty, filed December 20, 2007)
26. *Short v Short* (In re Short), 232 F.3d 1018, 1022 n. 1 (9th Cir. 2000).
27. *Lulow* at 9
28. 11 U.S.C. 523 (a)(15)
29. Austin, "For Debtor or Worse: Discharged of Marital Debt Obligations Under the Bankruptcy Abuse Prevention & Consumer Protection Act of 2005," Vol 51, No. 4 Wayne L. Rev. 1369, 1371 (2005).
30. 4 Collier on Bankruptcy 523-118-523-119 (2006).
31. *Johnson v. Johnson* (In re Johnson), Case No. 07-5054, 2007 Bankr LEXIS 3645 (Bkty ND OH., Oct 23, 2007)
32. 11 U.S.C. §1328 (a)(2)
33. 11 U.S.C. §507(a)(1)(A)
34. 11 U.S.C. §507(a)(2)
35. 11 U.S.C. §704(a)(10) and (c)

LETTERS

Enforce ethics rules, don't bother to define values

As a non-attorney and victim of legal malpractice, I read with interest your article "The Search for Montana Attorneys' CORE VALUES," (August 2008 Montana Lawyer).

I have never read such a self-serving and useless exercise as the one described by the task force. If the legal community of Montana was really interested in giving a moral compass to attorneys, they need to do only one thing – enforce the first sentence to Montana Ethical Rules: "A lawyer shall always pursue the truth."

Unfortunately, I have found from personal experience that the Commission on Practice and errant lawyers in this state do not have the slightest interest in enforcing the ethical rules or in making the process of dealing with bad lawyers transparent.

Lawyers often complain about bad doctors covering for each other when questions of medical malpractice arise, but I have found that the Commission on Practice is no better. And I have found that our legal community is no better.

Don't waste your money creating "Montana Values" plaques for courtroom doors and lawyers' offices. Instead, place a compass pointing to the lodestar of Truth in Lady Justice's hand, keep her blindfold secure, and don't allow golf friends, hunting, easy money, or nepotism to tip her scales.

I, for one, intend to petition my representatives to take away lawyer oversight from the Commission on Practice since they clearly cannot do it themselves. I suggest a panel of non-lawyers (perhaps composed of those who have been victimized by bad lawyers) in a transparent and open proceeding. Let us decide complaints against unethical lawyers in this state and you will quickly find errant lawyers knowing the meaning of "values."

— Kathleen Rakela, Livingston

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Self-help law centers spread across the U.S.

By Grant Schulte
USA Today

All 50 states have established centers for lawyerless citizens

The busy daily activity in attorney Susan Ledray's two Minneapolis courthouse offices is a mix of custody disputes, divorce battles and other legal problems – all being contested by Minnesotans without lawyers.

The Hennepin County Self-Help Center offices she heads, where people seeking to litigate without counsel can get advice and instruction from legal volunteers, draw 50 to 100 people per day, Ledray says.

Last year, she says, e-mail, phone and in-person contacts totaled about 43,000, the most since the program began in 1997.

"It's incredibly popular," Ledray said. "The public is very, very pleased with this service. It helps them feel empowered."

Small-claims courts have long provided a venue for handling civil cases involving modest amounts of money without legal counsel. Now more Americans are handling other kinds of cases, including domestic disputes, divorces and child custody matters, with little or no help from attorneys, say judges, lawyers and studies from the National Center for State Courts compiled by Madelynn Herman.

RICHARD ZORZA, coordinator for the Self-Represented Litigation Network, which helps courts with their self-help services, says that although there are no definitive national studies on the topic, there's no doubting the trend.

"Courts are becoming much more aware of this problem," he said. "There's a lot of training of judges, there's forms, computer programs, self-help centers."

All 50 states and the District of Columbia have established self-help centers for lawyerless citizens, according to a National Center of State Courts data-

base. [The Montana Supreme Court recently hired a Self-Help Law coordinator to run the program established in the state last year.]

"I'VE WATCHED THIS for the past 12 or so years now, and it really is amazing how we're coming to a tipping point," said M. Sue Talia, a California family law judge and national expert on

'As a citizen who's doing this, you certainly have to know what you are doing and how to make your own case,' said a woman who has sued retail chains without using an attorney.

limited-scope representation.

"Unfortunately, that trend is real, and we do not see the numbers improving," added Bill Neukom, president of the American Bar Association.

The trend springs from a combination of factors, said Will Hornsby, an Illinois attorney who has extensively studied pro se (for oneself) cases.

Some Americans, he said, perceive lawyers as too expensive or believe their claims are too small. Others, he added, disdain lawyers or believe their legal dispute is simple enough to tackle alone.

SELF-REPRESENTATION cases began to grow in the state courts in the mid-1990s, said John Greacen, a New Mexico lawyer and consultant for courts on pro se cases.

The greatest pro se increase in the past few years has come from family law cases, such as divorces and custody battles, Greacen said.

The self-representation experience can be intimidating at first, admits Mary Bach, 63, of Murrysburg, Pa. Without a lawyer, she has sued retail chains she alleged charged more than they advertised without a lawyer.

"As a citizen who's doing this, you certainly have to know what you are doing and how to make your own case," she said.

The most recent research compiled by Herman for the National Center for State Courts shows:

■ The percentage of family court cases in San Diego with at least one unrepresented party rose to 70 percent in 2004 from 54 percent in the early 1990s, according to a study conducted by San Diego County court administrators.

■ A 2004 study by a joint task force of the Iowa Judges Association and Iowa State Bar Association ordered to address "the increasing number of citizens who represent themselves in court" found that 58 percent of the 125 court cases in Woodbury County, Iowa, in one week involved at least one party not represented by a lawyer.

■ New Hampshire residents who try cases without lawyers account for 85 percent of the civil cases in district court and 48 percent in superior court, according to a 2004 study by a New Hampshire Supreme Court task force.

The task force reported an unspecified "dramatic increase" in self-represented residents in recent years, specifically in cases involving child support, landlord-tenant issues, divorces and estates.

Lawyers, in response, have begun to offer "unbundled legal services" that allow them to help in a case while

leaving certain duties to their clients.

SELF-HELP CASES pose challenges for courts, said Tim Eckley, an attorney with the American Judicature Society in Des Moines. Judges, who strive to keep cases fair, must often help untrained citizens without giving them an advantage, he said.

“Both lawyers and judges are rightly concerned about maintaining the appearance of impartiality from the bench when one litigant is pro se and may not be familiar with procedural matters,” he said.

The situation challenges court officials, he said, “but most judges, most of the time, do a pretty good job.” ○

BOVINGDON, from Page 10

The things he liked least about the airplanes he’s flown – the dashboard, the multitude of organizational components and the sliver of sky he got to enjoy – weren’t there with a hang glider.

For years when the wind was blowing at 17 mph from the northwest he would be on his way to a ridge miles away.

That has changed some with the birth of his daughter, one-year-old Gillian. Now the trips aren’t as frequent because he likes to hang out with Silly Gilly and his wife.

There’s a lot of analytical thinking while in flight, he said, but it’s the point where complete relaxation hits him he enjoys most. A worrier by nature, flying

gives Bovingdon a feeling he gets nowhere else.

“It’s one of those rare experiences where you don’t think about other things,” he said.

BOVINGDON IS humble and freely speaks about how much he has to learn about many aspects of his life. He doesn’t claim to be a renowned hang gliding pilot or a die-hard, intimidating lawyer.

“Even after all my education and experience I’m still learning,” he said. He likes working children, and there’s no arguing that.

“They are generally some of the nicest people I know,” Bovingdon said.

○

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From review for *Scribes Journal*

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NEWS ABOUT MEMBERS



The Great Falls firm of Ugrin, Alexander, Zadick & Higgins announced that **Jordan Y. Crosby** has joined the law firm as an associate attorney. Ms. Crosby received her bachelor of arts degree, with high honors, from the University of Montana in 2001. She received her juris doctorate, with honors, from the University of Montana School of Law in 2004. After graduating from law school, Ms. Crosby clerked for U.S. Magistrate Judge Carolyn S. Ostby from 2004 until 2007. She was in private practice in Great Falls before joining Ugrin, Alexander, Zadick & Higgins.

Christopher D. Meyer has formed the CD Meyer Law Firm, PLLC, in Bozeman. Mr. Meyer received his BA from Harvard and his JD from the University of Colorado School of Law, where he was a *Law Review* articles editor. He clerked for Justice W. William Leahart on the Montana Supreme Court from 1998 to 2000 and for Chief Judge Joseph P. Bellipanni, Boulder District Court, Colorado, from 1997 to 1998. He was an associate with Hoyt & Blewett in Great Falls from 2001 to 2007. His practice continues to emphasize significant personal and business injury, environmental law, and water law. He can

be reached at (406) 522-0067 and Christopher@cdmeyerlaw-firm.com.

The law firm of Crowley, Haughey, Hanson, Toole & Dietrich announced that **Benjamin P. Hursh** has become associated with the firm. Mr. Hursh joined the Commercial Department in the firm's Missoula office on Aug. 1. He moved from Cederberg Law Offices where he had been working since September 2003. He graduated from Montana State University in 1999 with a BA in History, and from the University of Montana School of Law in 2003. He is admitted to practice before the state and federal courts in Montana and the U.S. Court of Appeals for the 9th Circuit.

The Holland & Hart law firm announced that **Michael Manning** has joined the firm's Billings office as an associate. Mr. Manning will be a member of the firm's Business group. Prior to joining Holland & Hart, he served as a law clerk for Judges Thomas G. Nelson and N. Randy Smith, both of the U.S. 9th Circuit Court of Appeals. Mr. Manning earned his JD from the University of Montana School of Law with honors and his BBA, cum laude, from the University of Notre Dame.

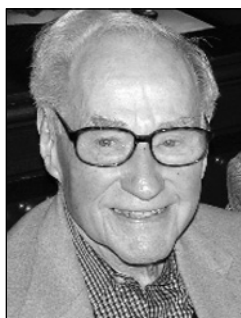
DEATHS

Henry Loble, former district judge

Henry Loble, former District Judge of the 1st Judicial District Court (Lewis & Clark and Broadwater Counties) died at his home in San Francisco on Aug. 11 at the age of 91. He was twice elected to the District Court and served from 1983 through 1989 when he retired because of failing eyesight. He presided in the same courtroom in which his father, Judge Lester H. Loble, presided years earlier.

Judge Loble was born in Helena, a fourth generation Montanan. He married Grayce Eckhardt in 1941. They had two sons: Lester H. Loble II, an attorney who now lives at Big Sky, and C. Bruce Loble, the state Water Judge, Bozeman. The Lobles divorced in 1979. Judge Loble married Doris McKeever, of San Francisco, in 1996. He had moved from Helena to San Francisco in 1993.

In his youth, he attended Central Grade School and Helena High School, where he was a member of the Helena High School football team which won the 1932 state championship.



He attended Stanford University (BA, 1938) and the University of Montana Law School (JD, 1941).

Judge Loble began the practice of law in Helena in 1941, joining his father, Lester H. Loble. His law practice was interrupted by World War II during which he served as a pilot in the Army Air Corps for 3-1/2 years, and was honorably discharged from the Air Force Reserve in 1958 as a captain. Following the war, he returned to private law practice until he was elected judge. Both his sons Les and Bruce joined Judge Loble in the Helena law practice following their graduation from law school at the University of Montana.

Judge Loble had a broad private practice; spent decades as a lobbyist; practiced before governmental agencies and federal and state courts; and developed a specialty in water law. He served as the first chair of the Montana Reserved Water Rights Compact Commission. He was a long-time member of the Western States Water Council. Early in his career, he was city attorney for East Helena, and attorney for the Montana Aeronautics Commission.

Judge Loble served three terms in the Montana Legislature (House of Representatives) from 1947 to 1953. In his second term he was majority floor leader and in his third, the minority floor leader. He was president, director, or officer of many Helena organizations. He was president of the

Montana State Bar Association, and under his leadership it was transformed from a voluntary association to the unified State Bar of Montana. He was president of the Western States Bar Association and chancellor of the Jack Rabbit Bar Association. He was chair of the Montana State Board of Institutions, a member and president of the Helena Lions Club and the Fraternal Order of Eagles, a board member of the YMCA, and twice president of the Montana Club. He was a member and ordained elder in the First Presbyterian Church in Helena.

Judge Loble enjoyed the outdoors. From the age of 14 he would disappear into the Bob Marshall or Heart Lake area for weeks at a time. He was an expert fly fisherman, hunter, backpacker, cross-country skier, licensed airplane pilot, certified SCUBA diver, and licensed backcountry wilderness guide. With his son, Les, he formed High Country Adventures and guided people into the wilderness areas of Montana on week-long backpacking expeditions. He was a runner for over 35 years and ran in many road races in Montana and other states.

Judge Loble is survived by his wife, Doris, of San Francisco, and his two sons.

Martin Carl Jacobson, PSC attorney

Public Service Commission staff attorney Martin Jacobson, 56, died from cancer on Aug. 24.

Mr. Jacobson was born in California and raised in Hardin, where he participated in the Boy Scouts, Key Club, band, ski club and football.

After graduating from Hardin High School in 1970, Mr. Jacobson alternately attended both Montana state universities and worked in a variety of jobs, primarily as a laborer. He entered the Army in 1975, rising to sergeant in the 101st Airborne Division (Ranger) in Fort Campbell, Ky.

After his discharge in 1978, Mr. Jacobson returned to Montana State University and received a bachelor of arts degree in Political Science in 1981. He was accepted into law school at the University of Montana, and received a juris doctorate in 1984.

Following graduation from law school, Mr. Jacobson clerked for Justice William Hunt on the Montana Supreme Court, was in private law practice, and worked for two years for the Montana Department of Commerce.

In 1990 he began a nearly 18-year career as a staff attorney for the Public Service Commission. His practice and responsibilities involved nearly every area of PSC jurisdiction, including natural gas, electricity, telecommunications, and transportation. He drafted and implemented important PSC rules, and represented the PSC on judicial review and in other judicial actions, both state and federal. "Mr. Jacobson was courteous to PSC staff and the regulated industries," his family said. "He was an excellent administrative lawyer whose public service reflected well on the State of Montana." He retired from the PSC in 2007.

Mr. Jacobson had many talents and interests. He was an excellent carpenter – completing a major remodeling of his home – and was generous about sharing his knowledge of that craft. At various times in his life he was passionate about biking, fishing, boating, golf, bowling, astronomy, quilting, pho-

tography, archery, welding, and origami.

He is survived by his wife, Ann, two sons and a daughter.

John Kurtz Jr., Helena attorney

Attorney John K. Kurtz Jr., 49, of Helena, died Aug. 6 at the University of Washington Medical Center in Seattle, following a lengthy illness.

Mr. Kurtz was born on Coronado Island, Calif. He joined the Army out of high school and served as a military policeman, stationed in Germany. Later, he graduated from Pierce College, Cal-State University at Northridge and the University of Montana School of Law. He was a gifted athlete, most notably as a football player, during his high school and collegiate years. He passed his love and knowledge of the game on through coaching.

Before becoming an attorney, Mr. Kurtz was a professional bodyguard, traveling the world providing threat assessment and personal protection to many well-known celebrities and their families. He was also an accomplished journalist and photographer.

"John received a great deal of satisfaction from his work as a court-appointed guardian ad litem for children, and through hunting dog rescue work," his obituary said. He was also an outdoorsman, fisherman and bird hunter.

Mr. Kurtz is survived by his wife, Leanne Smith, and by his parents, who live in Elk, Wash.

Rae Kalbfleisch, Shelby attorney

Rae Virgil Kalbfleisch, 78, of Shelby, died of natural causes on Sept. 8 at a Great Falls hospital.

Mr. Kalbfleisch was born in Dunkirk, Mont., and graduated from Shelby High School. He received his degree in Business from the University of Montana. He then enlisted with the ROTC and served in the military in Texas. He soon went back to Missoula, graduating in 1957 with a degree in Law from UM.

Mr. Kalbfleisch has practiced law for the past 51 years in his hometown of Shelby. He spent 30 years of his professional career serving the public as county attorney, and was a president of the Montana County Attorney Association.

Mr. Kalbfleisch was a member of the Shelby Elks, Shelby Jaycees, Kiwanis, Galata American Legion and St. William Church. He also helped with the start-up of the Toole County Education Foundation, which financially assists young adults in the community achieve a higher education. He also played a key role in obtaining the large veteran flag that flies at the entrance to Shelby.

Mr. Kalbfleisch was married to his wife Ann for 42 years before her death in 1999. He is survived by two daughters and two sons.

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LAWYER / TRAINING COORDINATOR: Montana Department of Justice, Prosecution Services. Located in Helena, #41103001. Closes Sept. 24, 2008. Excellent state benefit package. For more information contact Workforce Services, Justice Human Resources at (406) 444-1910, or e-mail dojapps@mt.gov.

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MLSA STAFF ATTORNEY: The Montana Legal Services Association has an opening for a staff attorney in Helena to serve as MLSA's advocacy coordinator. This position will be responsible for coordinating a broad range of proactive client advocacy strategies. More information is available at www.mtlsa.org. MLSA is funded in part by the Montana Justice Foundation. Salary depends on experi-

ence. Send a letter of interest, resume, and three references to: Montana Legal Services Association, 616 Helena Ave., Suite 100, Helena MT 59601, or hiring@mtlsa.org.

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PARALEGAL: The Montana Legal Services Association has an opening for a paralegal in Missoula. More information available at www.mtlsa.org. Send a letter of interest, resume and three references to: Montana Legal Services Association, 616 Helena Ave., Suite 100, Helena, MT 59601, or hiring@mtlsa.org.

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