MONTANA LAWYER

State Bar of Montana

April 2013 | Vol. 38, No. 6

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MONTANA LAWYER

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E-mail: mailbox@montanabar.org

Montana Lawyer Staff
Publisher | *Christopher L. Manos*
Editor | *Peter Nowakowski*
(406) 447-2200; fax: 442-7763
e-mail: pnowakowski@montanabar.org

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"Disability, like death, is something many of us avoid thinking about. We hope it will never happen to us..."

Hope for the best, plan for the unexpected

The dreaded April 15 is upon us. Being a sole practitioner, I hate the stress of getting the taxes paid and trying to maximize my contribution to my retirement plan. Since entering the final decade of my practicing law, I often catch myself daydreaming about retirement. Am I prepared? Did I save enough?

I do know that waiting until I am eligible for Medicare, i.e., age 65, is necessary before I can even begin thinking about retiring. Without it, it would be difficult to retire and continue paying high health insurance premiums.

Then I stop dead in my tracks. What if I do not make it to retirement? What happens if I become disabled? Being a Social Security disability practitioner, I know only too well that any one of us can slip on the proverbial banana peel and become unable to practice law. What plans do any of us have in place in the event that day comes?

Assuming you are not related to Bill Gates, have Bakken oil royalties being deposited in your bank account every month, or some other source of income, you basically need to be looking at Social Security disability insurance benefits and private disability insurance benefits.

To be eligible for Social Security disability benefits, you need to be "fully insured" which means that you have worked and paid into Social Security for ten years over your life. Second, you need to have "insured status." This is met when you have worked and paid into Social Security five out of the last ten years.

Next, you will need to meet Social Security's definition of disability. Under the Social Security Regulations, you must be found to be incapable of engaging in substantial gainful activity by reason of a medically determinable physical or mental impairment which has lasted or can be expected to last for a period of at least twelve months.

There are different rules that come into play when making the decision of whether you meet the definition of disabled - age, education, past work experience, transferable work skills, etc. If you are under 50, Social Security does not give a hoot whether you can still practice law or what you earned before. If you can perform any minimum wage work you are not disabled.

If you are between 50 and 54, the issue becomes whether you can continue to work as an attorney, whether you can do jobs that you have acquired skills to perform, or whether you can do unskilled light jobs.

If you are 55 or older and cannot practice law, Social Security will look to see if you have transferable skills to jobs you can perform. Of course, as with any law, there are exceptions to these rules, but this gives you a general idea of what is required to be found to be disabled.

Oh yeah — if you live in Circle or Three Forks — no special treatment for where you live. If there are a significant number of jobs in the United States that you can perform, you are not disabled.

If you are found to be disabled, Social Security will pay your full benefit amount as if you are retiring at full retirement age. If you retire before your full retirement age (which for most of us baby boomers is age 66) your benefit will be reduced. If you are found to be disabled, you do not get paid for the first five months. This is considered a "waiting period." I can not even begin to give you a decent explanation for that one.

Next, you will become eligible for Medicare if you are found to be disabled. But this is the bad news — there is a two-year waiting period that begins with the first month you start to receive benefits. That is a long time to make Cobra payments or to continue to pay on a private health insurance policy.

You may be fortunate enough to have private disability insurance. The good news is that typically these policies only require that you are disabled from practicing law. The bad news is that these policies may require you to file for Social Security disability benefits, and then offset any benefits you receive. Typically, employer-paid policies are the ones which will offset benefits. If it is a disability policy that you are paying the premiums on yourself, you probably will not have your benefits offset. Check the fine print.

Disability, like death, is something many of us avoid thinking about. We hope it will never happen to us. If we prepare for the worse, then we can relax and start thinking about the "golden" years - which will hopefully consist of good health, adequate retirement funds, travel, fun and time with family and friends!

Gideon at 50

A public defense promise unfulfilled

By Scott Crichton | Executive Director of the ACLU of Montana

Clarence Gideon was convicted of burglarizing a Florida bar and sentenced to five years in prison based solely on the testimony of one questionable eyewitness. But Gideon's side didn't adequately challenge that eyewitness at trial. You see, Gideon handled his own defense. When he requested a public defender be appointed to him, the judge said that the state only had an obligation to do that in cases eligible for the death penalty.

Gideon disagreed and penciled his plea to the U.S. Supreme Court. On March 18, 1963 the Court ruled in *Gideon v. Wainwright* that the poor defendant was right. He and other indigent defendants are entitled to public defenders in criminal prosecutions under the Sixth Amendment of the U.S. Constitution. In a new trial, with an attorney at his side, Gideon prevailed.

But 50 years later, the promise of Gideon remains unfulfilled. In courtrooms across the country, including Montana, poor defendants relying on public defenders find their attorneys overworked, underpaid and without the resources to hire the investigators and experts they need for trial. Simply put, Montana is not investing enough resources in the Office of the Public Defender. And a few more dollars here and there for attorney salaries may staunch the worst bleeding, but it won't fix the problem. An infusion of $10 million is needed for the office to hire the attorneys it needs and provide the resources they need to fulfill the state's constitutional mandate.

Brandon Stanfield wrote the ACLU of Montana from Flathead County. He and 20 other prisoners in the Flathead County Jail said that they have not been given speedy trials in large part because of the excessive caseloads given public defenders.

In fact statewide Montana Public Defender caseloads routinely exceed the 125 threshold recommended by the American Bar Association. Turnover is high because public defenders are paid far less than other attorneys working for the state. When an opening comes up in another department, many jump. It doesn't help that public defenders aren't given the resources they need to try their cases. Expert witnesses and investigators (think law enforcement) and support staff are far easier for prosecutors to come by.

To be sure, these problems affect Montana's entire criminal justice system. When an overburdened public defender has not had a chance to meet with her client or to work on a case, hearings are postponed – often at the last minute – wasting the time of prosecutors, judges, law enforcement and witnesses, costing us all money. Delays cause these same defendants to spend more time in jail, overcrowding facilities and costing counties more money. These same problems delay justice for victims. No one wins when cases are slow to be resolved.

Most of all, we can't forget why we have public defenders. As the Supreme Court ruled in Clarence Gideon's case 50 years ago, every person has a right to a fair trial with an attorney able to defend his rights. If adequate counsel is not provided to poor defendants, individual liberty goes from being a right to being a commodity available to only those who can afford it.

"In our adversary system of criminal justice," wrote U.S. Supreme Court Justice Hugo Black in the Gideon v. Wainwright decision, "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.... Lawyers in criminal courts are necessities, not luxuries... The right of one charged with a crime to counsel may not be deemed fundamental in some countries. But it is in ours."

We must make sure that right is upheld in Montana.

> *".... every person has a right to a fair trial with an attorney able to defend his rights. If adequate counsel is not provided to poor defendants, individual liberty goes from being a right to being a commodity available to only those who can afford it."*

CLE affidavits due in April

CLE affidavits will be mailed to active attorneys on **April 15.**

Note: Although the CLE reporting cycle runs from April 1 to March 31 each year, there is a grace period for compliance. You may earn and report CLE credits without penalty until May 15.

To avoid a $50 late fee submit your affidavit postmarked by May 15. Check the CLE section of *www.montanabar.org* for more information.

State Bar of Montana elections

Election season is under way for State Bar positions. Letters have been sent to those whose terms are expiring. A copy of the nominating petition is at *www.montanabar.org*. The deadline for original nominating petitions is April 8. Ballots will be mailed on May 5. Ballots need to be postmarked or hand delivered by May 28. Ballots will be counted on June 7. The following positions are up for election: Area E, Area F, Area H, Secretary-Treasurer, President-Elect.

Bar seeks award nominations

Print nomination forms for the William J. Jameson Award and George L. Bousliman Professionalism Award are on pages 8-9 in in the March Montana Lawyer. The Karla M. Gray Equal Justice, and the Neil Haight Pro Bono awards forms are on pages 10-11 in this edition. Copies of the nomination forms for all awards are available online at *www.montanabar.org*. Information and criteria are listed on the individual awards.

Meet your ethics requirement

Most Montana attorneys will be required to obtain 5 Ethics credits, including 1 SAMI credit during this reporting year. The grace period for reporting and earning CLE is through May 15. The SAMI (Substance Abuse/Mental Impairment) requirement is part of the 3-year Ethics cycle. If you were admitted to the Bar after 2001, you might have a different reporting cycle. Check the upper-right portion of your previous-year CLE affidavit to determine the end of your individual reporting cycle. Check the CLE section of *www.montanabar.org* for more information.

Legislature bill watch list update

This is the most current list (as of print time) of the bills that the State Bar is actively following in the Legislature. The State Bar Executive Committee meets weekly to go over the list and may oppose or support bills. The committee will also discuss which bills to monitor.

- **HB 2** General Appropriations Act; *Support (judiciary budget)*
- **HB 172** Allow Montana state bar attorney member to serve as a judge pro tem. *Discussed: monitor*
- **HB 186** Require losing party in litigation to pay litigation costs in certain lawsuits. *Discussed: monitor. Bill tabled in committee.*
- **HB 206** Increase justice court filing fees. *Discussed: monitor*
- **HB 252** Revise notary public journal storage to secretary of state's office. *Oppose. Became law.*
- **HB 290** Provide that jury may judge facts and application of law to the facts. *Oppose. Bill not passed on second reading.*
- **HB 330** Limit the collection of personal identification information in Montana courts. *Discussed: monitor*
- **HB 352** Revise justice court laws. *Discussed: monitor*
- **HB 369** Revise laws for courts of limited jurisdiction. *Discussed: monitor*
- **HB 374** Authorize individual legislator standing to intervene in certain civil actions. *Discussed: monitor*
- **HB 400** Revise laws related to personal information privacy. *Discussed: monitor. Bill tabled in committee.*
- **HB 403** Revising fees collected by district court clerks. *Discussed: monitor*
- **HB 432** Generally revise laws related to child abuse and neglect cases; *Oppose. Bill tabled in committee*
- **HB 467** Require qualifications when justice of the peace is the court of record. *Discussed: monitor. Bill tabled in committee.*
- **SB 50** Eliminate report on expenditures of attorney license tax. *Discussed: monitor. Became law.*
- **SB 85** Revise laws related to judge disqualification. *Oppose. Bill tabled in committee.*
- **SB 119** Establish a cabinet-level position for veteran and intergovernmental issues. *Discussed: monitor. Bill tabled in committee.*
- **SB 152** Constitutional amendment revising qualifications for Supreme Court justices. *Oppose. Bill tabled in committee.*
- **SJ 22** Interim Study on Family Law Procedure Alternatives. *Discussed.*

Whipple joins wife at family office

On March 1, 2013, Todd Whipple resigned his position as the Chief Deputy Gallatin County Attorney to join his wife, Ashley Whipple, at Whipple Law Offices P.L.L.C. Todd will engage in general practice with an emphasis on criminal defense.

Harris and Warren relocate

Don Harris and Paul Warren are pleased to announce that they have relocated their office. They can be contacted at: Harris & Warren, P.L.L.P., 3936 Avenue B, Suite D, Billings, Montana 59102. Phone: (406) 294-2000; Fax: (406) 294-2010. E-mail: *don@harrisandwarren.com*; *paul@harrisandwarren.com*. Website: harrisandwarren.com.

Women's Law Section Spring Dinner

The Women's Law Section is pleased to invite you to attend our Annual Spring Dinner to celebrate and honor women in the legal profession. At the dinner, the section will announce the winners of the Fran Elge Scholarship and the Margery Hunter Brown Assistantship.

WHERE: The University of Montana School of Law Atrium. 32 Campus Drive (corner of Maurice and Eddy) Missoula, MT 59812-6552.

WHEN: Friday, April 26, 2013- reception begins at 6:30 p.m., dinner begins around 7 p.m.

RSVP: Kelly J. C. Gallinger at *KGallinger@brownfirm.com* or by phone at (406) 247-2824 by 5 p.m. on Friday, April 19.

There will have an amazing tapas style dinner, including appetizers and dessert for $33/per person. The menu will also include vegetarian and gluten free options so everyone can fully enjoy the meal.

Public Land Law Symposium

The University of Montana School of Law's Public Land and Resources Law Review and the American Bar Association Section of Environment, Energy, and Resources are pleased to announce the 35th Public Land Law Symposium and 41st National Spring Conference on the Environment: Balancing Act & Paradigm Shift: The Role of Public Lands in America's Energy Future. April 17-18 at the Universit of Montana School of Law and the UC Center Ballroom. For more information: *http://goo.gl/Uz1Xz* .

When you become your parents' caregiver

By Twyla Sketchley

As the population of the United States ages, more and more adult children become the caregivers of aging parents. The majority of long term care is provided by family and friends. Nearly 30% of the adult population in the United States is providing care for someone.[1] The majority are providing care for someone over age 50.[2] Two thirds of caregivers are women.[3] The total value of caregiving provided by family and friends exceeds what the United States spends on all Medicare recipients each year.[4] Caregiving is stressful[5], can lead to divorce[6], and causes financial hardship.[7]

Few become caregivers knowing these realities and few have a caregiving plan. Even fewer seek legal advice before becoming a caregiver. Caregivers, who do seek legal advice, generally do so in crisis. This is the most costly and least affective time to seek legal help. Because of the attorneys' unique role as counselor, we can be an invaluable asset to a caregiver As attorneys discuss legal issues unrelated to caregiving, they have an opportunity to provide good counsel on caregiving issues. This article is a review of the common issues that arise for a family caregiver and ways to avoid them.

Can the caregiver really be a caregiver?

This question seems obtuse when a family caregiver sees her[8] parent's need for help and the fear of financial and personal devastation due to care needs. However, desperation obscures the reality of caregiving. While there are many problems that impact the ability to provide care three of the most common are distance, employment and immediate family responsibilities.

Often, family members live at a distance from one another, making caregiving difficult, expensive, and less reliable. For example, my parents live in Montana. However, I live in Florida, my brothers live in Colorado and my oldest sister lives in Michigan. My youngest sister, who is disabled, lives near my parents. This distance makes it impossible to know how my parents and sister are doing. It makes responding to a medical or caregiving crisis more expensive because of travel costs. While my parents don't need care now, when they do, no one has the individual resources to be the sole caregiver. It is likely my parents will be moved near a child who has the ability to be the caregiver while the others contribute what they can.

If a caregiver works, she has to determine if her employer allows time off for caregiving and how much her salary will be reduced. While there are federal laws mandating unpaid leave for family medical reasons[9], these apply to only some employers and employees often fail to take the necessary steps to trigger these protections. As more caregivers lose jobs and benefits, litigation over employers' failure to accommodate caregiving will grow. These financial hardships can cause a caregiver to reduce her standard of living, neglect her own financial responsibilities or file bankruptcy.

If a caregiver has a family, she has to determine if she can provide for their needs while caring for an elderly parent. It is difficult for a mother of young children to provide hands-on care to an elderly parent while still maintaining a strong family. This strain can result in marital problems, educational difficulties for children and caregiver depression.

Where will the parent live?

If a caregiver can provide care, the next question is where the elderly parent will live. If the elderly parent is going to remain in his/her home, does the caregiver or the parent have the resources to provide in-home care? Is the caregiver going to be able to supervise paid caregivers in the home? Is the family caregiver expected to provide hands-on care? As discussed above, due to distance and expense, a parent may have to move closer to a family caregiver.

If the parent is not living in their own home, is the parent going to live with the caregiver? If the parent is going to live with the caregiver, does she have the space for the parent? To reduce friction in a relationship and accommodate durable medical equipment and nursing care needs of an elder, the parent should have his or her own room, immediate access to a restroom, and ability to engage in the entertainment and social interactions they enjoy. The home should also be clean, free of trip/fall hazards and handicap accessible.

If the parent is going to live in a facility, caregiving may be physically easier. However, the caregiver diligently supervise the care provided by the facility. This requires her to know what services the facility is providing, the rights of a resident in the facility[10], and ensure they are being provided. She must also know the appropriate agency with which to file a complaint when violations occur[11]. In addition, the caregiver must not sign contracts for facilities that would make her personally liable for the costs of care. This can lead to her financial devastation.

Who will make decisions for the parent?

Unfortunately, many families argue over who is will make decisions for an elderly parent. If an elderly parent is competent, the elder should be making decisions for him/herself. The elderly parent should also designated in writing, who will make decisions when he/she is no longer competent to do so.

Anyone 18 years or older can make a Living Will.[12] This helps guide the decisions about an incapacitated elder's health care. The elder should also appoint an agent to make other health care decisions when the elder is unable to do so.[13] To make financial decisions, an elder can appoint an agent under a durable power of attorney.[14] The elder should always be the client in developing these documents. Contributions by a caregiver can be interpreted later as undue influence or duress upon the elder.

When an elderly parent loses capacity, there are still ways in which decisions can be made for them. One common way is the Social Security Administration's appointment of a Representative Payee for Social Security benefits.[15] The Social Security Representative Payee will be the fiduciary for the management of the elder's social security and Medicare benefits. The Veterans Administration also has a fiduciary program allowing someone to manage a veteran's benefits.[16] If a caregiver is a joint owner on a bank account, she will be able to pay bills and, in most cases, deposit the elder's income into the account. However, this does not give her license to use the money for anything other than for the benefit of the elder. If a caregiver needs additional authority and there are no alternatives available, she may have to seek the appointment of a guardian or conservator.[17]

How will care be paid for?

Long term care is expensive. The caregiver, elderly parent and elderly parent's family must understand the costs of care and how care will be paid for. Disputes often arise is over the misunderstanding about the actual costs of care and what an elderly parent's insurance and income pays for.

There are several ways to pay for care, but each has its own eligibility standards and coverage restrictions. Medicare is available to all citizens over the age of 65 who have the requisite work history through themselves or their spouse.[18] Medicare covers hospitalization, rehabilitation, doctors' appointments, tests, and prescription drugs with some limitations. There are co-pays, premiums and co-insurance costs associated with Medicare benefits. Medicare does NOT cover long term care. An elderly parent may have a Medicare supplemental policy that pays some of all of Medicare's co-pay and co-insurance costs. However, it will not cover long term care.

Some elders have long term care insurance policies. These policies may cover some or all of the costs of long term care. However, every policy is different. A caregiver should get a copy of the policy and be familiar with its benefits, how to trigger benefits and how the policy pays for care. Some policies even pay family caregivers. If an elder has very limited assets and income, he/she may qualify for Medicaid benefits that cover the costs of long term care.[19]

In nearly every other instance, long term care must be paid for by an elderly parent's assets and income. Occasionally, an elderly parent pays a family caregiver to provide the care. If this option is being considered, the elder and family member should have a written contract that specifically sets out the caregiving duties and the rate of pay. This should be communicated to all family members to alleviate any impression of impropriety. An attorney with experience in Medicaid long term care issues should draft the contract in the event Medicaid becomes necessary in the future.

What the family doesn't know can cause litigation

A major cause of conflict in family caregiving arises out of the lack of communication between a caregiver or elderly parent and the rest of the family. It develops out of lack of time to communicate or a caregiver's reluctance to hear "criticism" by relatives who does not participate in care.

To avoid many of these conflicts, a caregiver should develop a simple communication plan and provide it the remainder of the family. Email is readily available so this is the easiest and most cost effective way to communicate. The caregiver should set aside specific time each week to write a summary of the week, including basic medical, financial and activity information, and email it to all family members. She should also make the elderly parent available to communicate with the family, which may require her to call family members for the parent. A sign of abuse and exploitation is isolation of an elder, marked by family members being unable to communicate with the elder. Another way to reduce claims an elder is isolated from the family is for the caregiver to regularly ask family members to provide a few days of respite care. Family members will have a difficult time arguing isolation when they are refusing take up opportunities to visit and help a parent.

While family caregiving can be a destructive force in families, it can also be rewarding and is a vital part of United States' long term care delivery system. Without family caregivers, millions more individuals would be in nursing homes or without care. Attorneys can be an integral part of a family caregiving support structure by helping caregivers avoid these and other common problems.

Twyla Sketchley *is Florida Bar board certified in elder law and is licensed in Florida and Montana. She is chair of the Elder Law Section of The Florida Bar 2012-2013. She is also the chair of the Elder Law Committee for the State Bar of Montana.*

1 Fact Sheet: Selected Caregiver Statistics, http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=439
2 Ibid.
3 Ibid.
4 Costs of Caregiving http://www.financialwise.net/Costs-of-Caregiving.c3750.htm
5 Family Caregiver Alliance http://www.caregiver.org/caregiver/jsp/home.jsp
6 Love and Marriage (and Caregiving):Caregiving.com's Marriage Survey
7 Family Caregiver Alliance http://www.caregiver.org/caregiver/jsp/home.jsp
8 The word "her" is used throughout the article due to the statistical likelihood the caregiver will be a woman. However, included in the reference are all male caregivers as well.
9 Family and Medical Leave Act Overview, http://www.dol.gov/whd/fmla/
10 Nursing Home Reform Act of 1987, 42CFR 483.10; Montana Long-Term Care Resident's Bill of Rights, Title 50, Chapter 5, Montana Code Annotated
11 Montana Long Term Care Ombudsman http://www.dphhs.mt.gov/sltc/services/aging/ltcombudsman.shtml
12 Rights of the Terminally Ill Act, Title 10, Chapter 9, Montana Code Annotated
13 72-5-501 MCA
14 Montana Statutory Form Power of Attorney 72-31-353 MCA
15 http://www.ssa.gov/payee/
16 http://www.benefits.va.gov/fiduciary/
17 Title 72, Chapter 5, Parts 3, 4 & 6 Montana Code Annotated
18 http://www.medicare.gov/pubs/pdf/10050.pdf
19 Medicaid for Long-term Care: The Basics, Sol Lovas, Montana Lawyer, Vol. 38, No. 5

Karla M. Gray Equal Justice Award

This award honors a judge from any court who has demonstrated dedication to improving access to Montana courts. Consideration for this award will be given to nominees who demonstrate this dedication and commitment with a combination of some or all of the efforts described below:

- Personally done noteworthy and/or considerable work improving access of all individuals, regardless of income, to the Montana court system.
- Instrumental in local Access to Justice efforts, including program development, cooperative efforts between programs, and support for community outreach efforts to improve understanding of and access to the courts.
- Active support of citizen involvement in the judicial system.
- Active support and commitment to increasing involvement of volunteer attorneys in representing the indigent and those of limited means.
- Other significant efforts that exhibit a long-term commitment to improving access to the judicial system.

The Access to Justice Commission selects one award winner**.** Nomination materials will be retained and considered by the Access to Justice Commission for three years.

Nominee: _____

Address: _____

On a separate sheet of paper, please describe how the nominee has demonstrated dedication to improving access to Montana courts. Please attach additional pages as needed, and other supporting documents.

Your signature: _____

Print your name: _____

Your address:_____

_____

Your phone number: _____

Please mail the nomination by May 15, to:

Karla Gray Award
c/o Janice Frankino Doggett
State Bar of Montana
P.O. Box 577
Helena MT 59624

Neil Haight Pro Bono Award

This memorial award is named in honor of Neil Haight, the Executive Director of Montana Legal Services Association for more than 30 years.

Through Neil's leadership, MLSA survived numerous attacks during his many years at its helm. His effort left a solid foundation which eventually led to the current MLSA structure as a statewide law firm. His optimism carried MLSA staff through the darkest years when many thought all hope of civil legal assistance to the poor was lost. Despite numerous and endless attacks, Neil never lost faith in the vision and goal of MLSA.

After his retirement in 2002, Neil remained the icon of MLSA until his death in 2008. His passion for justice and his compassion for Montanans living in poverty was a model many lawyers, both within and outside MLSA, in those early years of "legal aid" in Montana.

The Neil Haight Pro Bono Award recognizes a person who exemplifies Neil's legacy of providing outstanding legal services to Montanans living in poverty. The nominee is a lawyer, other individual or organization which has provided pro bono services to those in need in Montana. While the nominee may be a lawyer who has provided direct pro bono legal representation, he or she may also be a court employee, paralegal, psychologist, or social worker who has provided pro bono services in aid of direct pro bono legal representation in Montana.

Nominations are also accepted for law firms, teams of lawyers, and associations of Montana lawyers and pro bono programs receiving no form of compensation or academic credit for doing pro bono work and whose work was not a non-legal public service.

Attorney nominees must be admitted to practice in Montana. Nominees cannot be employees of organizations which provide free or low-cost services to the poor.

The Neil Haight Pro Bono Award is conferred periodically after review of all nominations, by the State Bar Justice Initiatives Committee. Individual or organizations which submit the nomination may submit more than one nominee.

In honoring Neil, the recipient of this award should demonstrate some of the following:

a. be a dedicated, committed leader instrumental in the delivery of civil legal services to Montanans living in poverty; or

b. be a key person in the development of a pro bono program for a bar association or community organization; or

c. contribute significant work toward creating new and innovative approaches to delivery of volunteer civil legal assistance through a new or existing pro bono program sponsored by a bar association; or

d. perform significant and meaningful civil pro bono activity which resulted in satisfying previously unmet needs or extending services to underserved segments of the population; and/or

e. Successfully litigated pro bono civil cases which favorably resulted in the provision of other services to Montanans living in poverty.

Nominee Information:

Name:_____

Address: _____

Organization (if applicable) _____

Nominator Information:

Name:_____

Address: _____

Organization _____

Phone: _____

Email:_____

On separate pages, please describe the following:

1) Please describe the ways in which the nominee has provided outstanding pro bono services. This may include a compelling case that the nominee assisted with or litigated on a pro bono basis. Alternatively, this may include a history of dedication to the pro bono cause including expansion of pro bono effort in an under-served area, a willingness to continually accept pro bono work or difficult cases on a pro bono basis, or some other qualitative improvement to legal services for Montanans in need. If possible, please quantify the nominee's pro bono contribution by detailing the approximate number of hours donated or the number of cases in which he or she is or was involved. Please be comprehensive in your response, including details of the individual's or organization's work which mirrors Neil Height's dedication to pro bono.

2) Please briefly describe the nominee's professional career including a history of dedication to serving the under-served in Montana.

Nominations and supporting documents will not be returned. Send them no later than July 1 to:

Neil Haight Pro Bono Award
Justice Initiatives Committee
PO Box 577
Helena, MT 59624

Court cases from Jan. 22, 2012- Feb. 15, 2013

By Beth Brennan

State v. Andress, 2013 MT 12 (Jan. 22, 2013) (5-0) (Cotter, J.)

Issue: Whether Andress's attorney provided effective assistance at trial and sentencing.

Short Answer: No, but because the written sentence contained 26 terms and conditions not mentioned at oral pronouncement, the case is remanded for another sentencing hearing.

Facts: Under the terms of a permanent order of protection dated March 2009, Joshua Andress is prohibited from any contact with his ex-girlfriend, Sarah Nichols. In October 2010, while on felony probation for previous violations of the POP, he saw Nichols at a bar, left, and returned. He was within 1500 feet of her. Nichols called police and Andress was charged with violating the POP.

While in jail, Andress wrote various notes for his attorney. One note was obtained by his cell mate, Randleas, who claimed Andress gave him the note to give to a friend of Andress's after Randleas was released. The note asked the friend to lie to the police on Andress's behalf. Randleas gave the note to police upon his release and Andress was charged with witness tampering.

Procedural Posture & Holding: A jury convicted Andress of violating the POP and tampering with a witness. The district court sentenced him to 15 years on each charge, with 10 suspended on each, to be served concurrently. The written sentence contained terms and conditions not stated during oral pronouncement of the sentence. Andreas appeals, claiming his counsel was ineffective for offering jury instructions with the incorrect mental state, and failing to move to conform the written sentence with the oral sentence. The Supreme Court affirms in part and reverses in part.

Reasoning: The Court first finds that the jury was properly instructed as to the definitions of purposely and knowingly, and that based on the evidence, instructions that conformed to Andress's argument would not have changed the outcome. It then finds that Andress did not have an opportunity to respond to 26 terms and conditions contained in his written sentence but not addressed at the oral pronouncement, and remands for another sentencing hearing.

State v. Bekemans, 2013 MT 11 (Jan. 22, 2013) (5-0) (McGrath, C.J.)

Issue: (1) Whether the evidence supported the jury's conviction of Bekemans for felony criminal endangerment; (2) whether Bekemans' first lawyer provided ineffective assistance of counsel; (3) whether the district court properly noted Bekemans' lack of remorse; and (4) whether the district court erred in imposing a parole restriction on Bekemans when she was sentenced to the DOC, not prison.

Short Answer: (1) Yes; (2) no; (3) yes; and (4) yes.

Facts: Brandon Davis was killed when the vehicle he was driving collided with a small bus parked in the right lane of I-15 on a moonless night with no lights and no warning devices. Bekemans was driving the bus to Livingston after buying it in Utah. She could not restart the bus, and did not have flares or emergency reflective triangles. She did not know how to turn on her hazard lights, and turned the bus lights off to conserve battery. Other drivers saw Bekemans and swerved to miss the bus; one called 911 immediately. Professional truck drivers warned each other via CB radio. Davis, 18, was on his way home to Red Lodge from Boise. He was driving well above the speed limit, and the tox screen showed he had consumed a bottle of Robitussin cough syrup. Other drivers testified that his driving did not seem impaired. Davis did not see Bekemans until it was too late. He crashed into the bus and was killed.

Procedural Posture & Holding: Bekemans was charged with felony criminal endangerment and several misdemeanor traffic offenses. A jury convicted her of all charges. She was sentenced to the Department of Corrections for 10 years with all but 5 suspended, and ordered to complete a specific rehab program before she can be released. She appeals, and the Supreme Court affirms all but the rehab program requirement, and remands for modification of the sentence.

Reasoning: (1) The Court finds a jury could have reasonably concluded that Bekemans' conduct created a substantial risk of death or serious bodily injury, thus affirming the conviction for criminal endangerment. (2) It then finds that Bekemans' first lawyer did not violate his duty of confidentiality and loyalty to her, and moreover, withdrew as her counsel. Bekemans fails to show actual prejudice, and therefore fails to prove ineffective assistance of counsel. (3) The district court's observation that Bekemans showed no remorse was based on competent evidence and was not improper. (4) The state conceded that the lower court exceeded its authority by requiring Bekemans to undergo a specific rehab program before being released from custody. A judge who commits a defendant to the custody of the DOC cannot also impose a parole restriction; he can make recommendations, but the DOC has sole authority to decide whether to implement them.

State v. Fehringer, 2013 MT 10 (Jan. 22, 2013) (5-0) (McGrath, C.J.)

Issue: (1) Whether the justice court jury was properly called; (2) whether the complaint and notice to appear were defective; and (3) whether the jury should have been instructed on disorderly conduct as a lesser-included offense of partner/

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family member assault.

Short Answer: (1) yes; (2) no; and (3) no.

Facts: Fehringer and is wife fought, and he threw a box at his wife and pushed her into the refrigerator.

Procedural Posture & Holding: Fehringer was charged with partner or family member assault. A bench trial was set for Aug. 10, 2010. The omnibus hearing was held June 15, 2010. The omnibus order, signed by Fehringer and his counsel, stated a jury trial demand had to be made within 20 days, and that a jury demand made within 10 days of trial would be deemed a motion for a continuance. After two continuances requested by the prosecution, the justice of the peace recused himself. Fehringer's attorney demanded a jury trial, which the new JP granted. Fehringer refused to waive speedy trial, so the trial was set for the next day, Oct. 6, 2010. The jury convicted Fehringer, who was sentenced to one year in jail with all but 5 days suspended and a $500 fine. Fehringer appealed to the district court, which affirmed. Fehringer appeals, and the Supreme Court affirms.

Reasoning: (1) Fehringer does not complain that the jury pool was improperly drawn or that any particular juror was not qualified, or that he did not receive a fair trial. He complains that the record does not show that the justice court complied with § 3-15-313, MCA. Fehringer had the burden of proving this and did not do so. (2) The charging documents were sufficient to apprise Fehringer of the charges against him, and established probable cause that he had committed the offense. (3) Disorderly conduct is not a lesser included offense of partner or family member assault.

Thrivent Financial v. Andronescu, 2013 MT 13 (Jan. 22, 2013) (5-0) (Baker, J.)

Issue: Whether § 72-2-814, MCA, revokes the pre-divorce designation of an ex-wife as a life insurance beneficiary when the divorce was final prior to the statute's effective date.

Short Answer: Yes.

Facts: Brent Anderson bought life insurance in 1990, naming his then-wife Lucia as his first beneficiary, his parents as his second, and his sister as his third. In June 1993, Brent and Lucia divorced. In October 1993, § 72-2-814 MCA went into effect, providing that a divorce revokes "any revocable disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument." Brent died in August 2010, having never changed his designation of Lucia as his primary beneficiary.

Procedural Posture & Holding: Thrivent filed an interpleader action in federal court to determine the rightful beneficiary. The district court granted judgment on the pleadings for Lucia. On appeal, the Ninth Circuit certifies a question to the Montana Supreme Court, and the Supreme Court determines that § 72-2-814 operates to revoke Brent's designation of Lucia as a beneficiary.

Reasoning: The federal district court reasoned that § 72-2-814 did not apply because it became effective after Brent and Lucia's divorce. Life insurance policies, like wills, are applied at death. The official comments to the statute indicate the statute operates at the time the policy takes effect, i.e., at death. This is not retroactive application of the law; the beneficiary designation had no legal effect until Brent died, and the statute did not operate until then.

Harris v. State, 2013 MT 16 (Jan. 29, 2013) (5-0) (Wheat, J.; Rice, J., concurring)

Issue: (1) Whether Harris proved facts sufficient to take his claim out of the work comp exclusivity statute, and (2) whether his spoliation claim is an independent tort.

Short Answer: (1) No, and (2) no.

Facts: David Harris has been employed by the Montana Department of Corrections as a correctional officer at the state prison for about 13 years. He has been a member of the Special Response Team at the prison since November 2000. Membership is voluntary but selective; members are paid an extra $.50 per hour.

In 2006, the warden issued a policy that anyone who wanted authority to use a Taser must undergo training, which included five seconds of Taser exposure. Training was voluntary for all employees, but mandatory for the SRT members. Harris underwent the training, and sustained injuries to his spine, for which he received work comp benefits.

Procedural Posture & Holding: In July 2009, Harris filed suit alleging intentional infliction of personal injury and spoliation of the evidence for the loss of the DOC's video of the Taser training. Defendants moved for summary judgment, which the district court granted. Harris appeals, and the Supreme Court affirms.

Reasoning: (1) The statute defines intentional injury as one caused by an "intentional and deliberate act that is specifically and actually intended to cause injury," along with "actual knowledge that an injury is certain to occur." § 39-71-413(3), MCA. Harris failed to provide any evidence that the defendants' intent was to harm rather than to educate and train. Additionally, the defendants did not have actual knowledge that Harris's voluntary exposure to the Taser would injure him. His supervisors underwent the same tasing before he did, and he was amply warned about potential risks. A high degree of risk to the plaintiff is not an intentional injury; the statute requires a high degree of harm.

(2) Spoliation of evidence is an independent tort only against non-parties. When alleged against a party, there must be some other viable cause of action. Here, Harris's only independent claim is barred by the work comp exclusivity statute; he therefore has no basis for alleging spoliation of evidence.

Justice Rice's Concurrence: Justice Rice concurs with the judgment but disagrees with the Court's analysis, which he believes does not precisely state the law regarding work comp exclusivity. The 2001 amendments to the exclusivity statute were expressly intended to overturn prior judicial applications of the statute by redefining intentional injury. Pre-2001 cases are not useful; *Alexander v. Bozeman Motors*

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enunciates the proper standard. 2010 MT 135. Justice Rice would affirm on the basis that Harris's evidence did not meet the *Alexander* standard.

State v. Kime, 2013 MT 14 (Jan. 29, 2013) (5-0) (McGrath, C.J.)

Issue: (1) Whether Kime was properly designated a persistent felony offender; (2) whether Kime was properly sentenced to 30 days in jail for careless driving; and (3) whether Kime received ineffective assistance of counsel at sentencing.

Short Answer: (1) Yes; (2) no; and (3) no.

Facts: In August 2011, Kime drove through an intersection and hit another vehicle. He was charged with DUI, careless driving, and operating a motor vehicle while a habitual traffic offender. Kime was previously convicted of felony DUI in May 2009.

Procedural Posture & Holding: In January 2012, the state filed notice that it intended to seek persistent felony offender status based on Kime's May 2009 DUI conviction. Kime objected, the district court held a hearing, and the court denied the objection. Kim pled guilty to felony DUI, the state dismissed the habitual traffic offender charge, and the district court convicted Kime of careless driving after holding a bench trial. The court sentenced Kime to 10 years in prison with no time suspended as a persistent felony offender, 30 days in jail for careless driving, and credited Kime 246 days for time served. Kime appeals, and the Supreme Court affirms in part and reverses in part.

Reasoning: (1) Kime contends the felony DUI statute conflicts with the persistent felony offender statute, and that the more specific DUI statute should apply. A PFO is an offender who has been convicted of a felony and is being sentenced for a second felony within five years of the first. The Court has previously held that the intent of the PFO statutes is to replace the sentence for the underlying felony. Kime's sentence as a PFO is therefore lawful.

(2) The state concedes the lower court exceeded its statutory authority by imposing a 30-day jail sentence on Kime for careless driving. However, the state argues that Kime's credit for 246 days served already discharged that sentence, so no effective relief can be given. Kime argues the charge should be dismissed but does not attack the legality of the conviction; thus, there is no basis for voiding the conviction. The Court reverses the sentence and remands with instructions to strike the illegal jail time.

(3) Kime claims ineffective assistance of counsel because his attorney did not argue for less than the 10-year sentence. After closely examining the record, the Court finds that the record clearly demonstrates that counsel's performance was not deficient. Failing to meet the first prong of the *Strickland* test, Kime's claim fails.

Thompson v. J.C. Billion, Inc., 2013 MT 20 (Jan. 29, 2013) (5-0) (Rice, J.)

Issue: (1) Whether Billion waived its argument that Thompson was exempt from overtime pay as a salesman under 29 U.S.C. § 213(b)(10); and (2) whether Thompson was entitled to overtime pay under the Fair Labor Standards Act and the Montana Wage Protection Act.

Short Answer: (1) No; and (2) no.

Facts: Thompson was the manager of the auto repair and services facility within Billion's auto dealership from March 2009-July 2010. During his tenure, Thompson worked 819.1 hours in excess of a standard 40-hour work week, and did not receive overtime pay. Thompson was paid $800 a month plus commission. If his salary and commission did not exceed $2,400 a month, he would receive that amount as a guaranteed salary. He received an annual bonus, which in 2009 was $1,000, and $1 for every "report card" issued on a car.

Procedural Posture & Holding: Thompson resigned on July 31, 2010, and filed a claim for $17,015 in overtime wages. Billion contends Thompson was a managerial employee and a salesperson of auto services, both of which are exempt under overtime laws. Thompson argued he was neither. The Department of Labor & Industry ruled in Billion's favor, and Thompson requested a hearing. The hearing officer found that Thompson was a salesman, although not a manager.

Thompson petitioned the district court for judicial review, arguing Billion did not timely argue the salesman exemption, and a federal regulation defining salesman should control. The district court held Billion did not waive the salesman exemption argument, and found the regulation's definition was impermissibly narrower than the statutory definition, affirming the agency. Thompson appeals, and the Supreme Court affirms.

Reasoning: (1) Billion raised the salesman exemption in its first written response to Thompson's claim. The district court properly denied Thompson's waiver argument. (2) Federal and state statutes exempt from overtime pay a salesperson engaged in selling or servicing automobiles if employed at an auto dealership. The regulation implementing the federal statute is narrower than the statute in its definition of salesman. Following two federal circuit courts of appeal, the district court concluded the regulation conflicted with the statute The Supreme Court agrees, holding that the regulation carries no weight.

Kelly v. State, 2013 MT 21 (Jan. 29, 2013) (5-0) (Rice, J.)

Issue: Whether Kelly's petition for postconviction relief was sufficiently pled.

Short Answer: No.

Facts: Kelly was pulled over for speeding in February 2010, and arrested for DUI. Based on Kelly's previous DUI convictions, the state charged Kelly with felony DUI and petitioned to revoke Kelly's suspended sentence for a previous DUI conviction. Kelly pled guilty to the felony DUI charge without entering into a plea bargain with the state, and admitted he had violated the terms of his suspended sentence. The district court accepted his plea and revoked his suspended sentence. Kelly was sentenced to prison for 40 years with 25 years suspended for the felony DUI, and 15 years for the previous DUI for which his suspended sentence had been

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revoked, with the sentences to run consecutively.

Procedural Posture & Holding: Kelly petitioned for postconviction relief, asserting ineffective assistance of counsel at sentencing. He contends that just before sentencing, his attorney told him for the first time that the state had made a more favorable plea before he changed his plea to guilty that would have resulted in a lesser amount of time to be served. The state responded by pointing out the lack of factual support in the record for his allegations, and the district court dismissed the petition. Kelly appeals, and the Supreme Court affirms.

Reasoning: Kelly attached a one-page affidavit to his opening brief in which he states that he was told after entering his plea that a less harsh plea was available, but would require him to forfeit sentence review, and that if he been told of this he would have acted differently. The Court agrees with the state that it is not properly part of the record, as it was not presented to the district court. Even if it were, however, its conclusory statements are insufficient as a matter of law.

Lucas v. Stevenson, 2013 MT 15 (Jan. 29, 2013) (5-0) (Cotter, J.)

Issue: Whether a plaintiff has standing to bring legal malpractice claims arising from a civil action that was part of her bankruptcy estate.

Short Answer: No.

Facts: In October 2004, Tamara Lucas was arrested and charged with DUI. Her husband, James, was told he could visit her once she was booked and transported to the jail. James refused to leave and was arrested for obstructing a peace officer. He attempted to kick an officer while being searched for weapons, making contact with the officer's shoulder and chest, and was taken to the ground by officers. James contends the officers slammed his head to the concrete floor, causing permanent brain damage and injuries. He was charged with disturbing the peace and felony assault of a peace officer. The Lucases hired attorney Mat Stevenson to defend James.

In June 2005, the Lucases filed for bankruptcy. The Lucases initially disclosed the potential civil lawsuit against the police department as an asset in bankruptcy, but later removed it, telling their bankruptcy attorney that they had consulted several attorneys and believed their claims were meritless. The bankruptcy closed in June 2006.

Stevenson began representing Lucases in their civil action against the city in the fall of 2006, and filed a complaint on Oct. 30, 2006.

Stevenson and his co-counsel, John Velk, learned of the Lucases' bankruptcy in January 2009, and contacted the trustee to ask whether the civil case was an asset of the bankruptcy estate. On the trustee's motion, the bankruptcy court reopened the bankruptcy in Feb. 2009. The trustee asked Stevenson and Velk to stop working for the Lucases, and filed an application to appoint Stevenson and Velk to continue working on the civil case as attorneys for the trustee. The bankruptcy court approved the appointment in Oct. 2009, after which the attorneys represented the trustee, not the Lucases.

The bankruptcy estate settled with the city for $98,000 for Lucases' claims. In January 2010, the trustee filed a notice of motion to approve the settlement, which stated objections must be raised within 14 days, and served the Lucases' bankruptcy attorney. The court approved the settlement without objection in Feb. 2010; in March 2010, the Lucases received a check for almost $32,000. The remainder went to creditors, trustee fees, and attorney fees and costs.

Procedural Posture & Holding: In Nov. 2011, Tamara filed a pro se complaint alleging legal malpractice against Stevenson for several claims, including failure to press criminal charges against the police, failure to properly investigate and plead, and mismanagement of litigation funds. She sought $700,000 in damages. Stevenson moved to dismiss and moved for summary judgment. The district court held a hearing, after which it granted summary judgment to Stevenson. Tamara appeals, and the Supreme Court affirms.

Reasoning: Tamara may not assert claims on behalf of her husband, and she lacks standing to bring any claims against Stevenson arising from the civil action. Because the civil action accrued prior to the Lucases' petition for bankruptcy, it was always an asset of the bankruptcy estate; it never belonged to Lucases. Because Tamara never owned the action, she has no standing to bring these claims. Moreover, her contention that Stevenson violated the Rules of Professional Conduct does not state a prima facie case of legal malpractice; violation of the MRPC does not create a private cause of action or a presumption that a legal duty has been breached.

In re the Marriage of Klatt, 2013 MT 17 (Jan. 29, 2013) (5-0) (Baker, J.)

Issue: (1) Whether the district court complied with the statute in amending the parenting plan, and (2) whether the district court erred in determining the best interests of the Klatt children.

Short Answer: (1) Yes, and (2) no.

Facts: Shiloh and Sheila Klatt married in 1993, and had three children between 1998-2002. After Sheila petitioned for dissolution in 2006, the Klatts entered into parenting plan, under which the children would alternate parents every two weeks.

In Sept. 2009, Sheila moved to modify the parenting plan, stating that the children were spending substantially less time with their father than allowed in the parenting plan. She stated that during tax season, the children were with Sheila full-time, to which Shiloh responded that the parties had agreed to increase Shiloh's work during tax season because of Sheila's underemployment.

Procedural Posture & Holding: The parties went to mediation, stipulated to hiring a guardian ad litem, and entered into a temporary agreement under which the children lived with Sheila from Sept. 1, 2010 until May 31, 2011, with varying

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weekend visitation with Shiloh, and then alternated parents over the summer. The GAL issued his report in October 2011, recommending the parenting plan be modified to reflect the temporary agreement. He stated the children strongly preferred residing with their mother, expressed frustration with their father's provision of basic needs, and related instances in which their father frightened them.

Shiloh moved to dismiss the GAL and to strike his report. The district court held a hearing in Feb. 2012, discussed the § 40-4-212 factors and ordered a new parenting plan under which the children live primarily with Sheila during the school year. Shiloh appeals, and the Supreme Court affirms.

Reasoning: (1) Although the district court did not explicitly find changed circumstances, it found several facts supporting that conclusion. Additionally, the parties entered into a temporary parenting plan and stipulated to the GAL, reflecting their agreement that the original plan could be modified. Testimony about the father's anger and "over-disciplining" of the children also suggests a change in circumstances. The lower court did not err. (2) The court was within its discretion when it concluded that the wishes of the children, the continuity and stability of their care, and other factors weighed in favor of modifying the parenting plan.

Simpson v. Simpson, 2013 MT 22 (Jan. 31, 2013) (4-1) (Wheat, J., for the majority; Cotter, J., concurring & dissenting)

Issue: (1) Whether the district court properly denied Dennis' motion to modify child support, and (2) whether Larissa was estopped from denying the validity of a stipulation to amend the final decree.

Short Answer: (1) Yes, and (2) yes.

Facts: Dennis and Larissa married in 1988; Larissa petitioned for dissolution in Oct. 2006. At the time of dissolution, the parties had three minor children. Dennis's primary source of income was Bozeman Hot Springs, of which he is an owner, affording him an income of about $1.5 million a year. Larissa was a homemaker. The parties entered into an agreement distributing their property. Dennis agreed to pay Larissa $10,000 a month for life starting the month after their youngest child graduated from high school, and $500,000 by Jan. 7, 2009. Dennis agreed to make Larissa's car payments, and give her a lifetime membership to a fitness center. Dennis also agreed to pay Larissa $10,000 a month in child support until their youngest child graduated from high school. The agreement stated it "shall not be modified in any future legal proceeding under the authority of § 40-4-201(6), MCA."

Dennis began to fall behind in child support payments, and in August 2008, Larissa moved for contempt. Shortly after, a fire at the Hot Springs caused significant damage, which Dennis claimed impaired his ability to pay. The parties went to mediation in May 2009, at which they agreed to amend the final decree in several particulars. Their agreement was memorialized in a document titled "Stipulation and Order Amending Final Decree," and signed by Larissa, but not by Dennis. In Nov. 2010, the district court held a hearing and ordered Dennis to pay child support per the stipulation. Dennis then moved to modify his child support obligation, and Larissa moved to invalidate the stipulation.

Procedural Posture & Holding: The district court denied Dennis's motion to modify child support based on the parties' intent to provide Larissa $10,000 a month regardless of parental responsibilities. The court also denied Larissa' motion to invalidate the stipulation. The parties cross-appeal, and the Supreme Court affirms.

Reasoning: (1) The lower court did not abuse its discretion by considering the context of the parties' agreement, i.e., the intent for Dennis to provide Larissa $10,000 a month for life regardless of her parental responsibilities. The general rule prohibiting extrinsic evidence does not preclude all reference to the circumstances of the agreement. Moreover, the Court is not bound by the parties' labels. The Court concludes that Dennis' obligation to pay Larissa $10,000 a month in child support was undertaken in exchange for Larissa's agreement not to get any marital property in the dissolution. The lower court did not err by concluding the "child support" obligation was a form of property settlement not subject to modification.

(2) The lower court held that Larissa was estopped from denying the validity of the stipulation when she had previously acknowledged it, and also found there was sufficient consideration because it settled a dispute about arrearages. The Supreme Court affirms on the basis of estoppel, and does not address consideration. Larissa frequently acknowledged the stipulation in court filings, and repeatedly sought to enforce its terms. She may not now deny the stipulation's validity.

Justice Cotter's Concurrence & Dissent: Justice Cotter dissents with the Court's resolution of issue one, and concurs with issue two. The Court goes to tortuous lengths to rationalize its conclusion that the parties did not truly intend for Dennis's child support obligations to be child support. Nowhere in the documents did the parties or the court say or infer that the child support was intended as a form of property settlement. The Court rewrites the parties' documents. An agreement speaks for itself; the duty of the Court is to apply the language as written. Justice Cotter would reverse and remand for consideration of Dennis's motion to modify child support under the child support statutes.

Northern Cheyenne Tribe v. Roman Catholic Church, 2013 MT 24 (Feb. 5, 2013) (5-0) (Morris, J.)

Issue: Whether the lower court properly granted judgment to the Diocese and the school on the tribe's claims of (1) unjust enrichment and constructive trust; (2) contract and fraud; and (3) the constitutional tort of cultural genocide.

Short Answer: (1) No, this claim is remanded; (2) yes; and (3) yes.

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Facts: St. Labre Home for Indian Children and Youth is a Catholic school offering preschool through high school education, and housing for at-risk students who attend the school. A Catholic nun first claimed the majority of land upon which the schools sits in April 1884. Six months later, the President issued an executive order creating the Northern Cheyenne reservation, exempting from transfer those lands already located, resided upon, and improved by bona fide settlers. Pres. McKinley expanded the reservation in 1900, explicitly exempting from transfer land belonging to the St. Labre Mission. The 1926 Northern Cheyenne Allotment Act exempted lands used by St. Labre "so long as they continue to be used solely in the advancement of religious and welfare work for the benefit of the Northern Cheyenne Indians." In 1929, the Secretary of the Interior granted St. Labre's request for the temporary use of 2.5 additional acres, which St. Labre still uses.

Although originally funded by the government, St. Labre has increasingly relied on private donations since the early 1950s. Its current endowment is about $90 million. Its primary fundraising is done through direct mail.

The tribe and St. Labre have disputed the tribe's right to a portion of the money St. Labre raises for almost 30 years. The tribe alleges that St. Labre solicits money on behalf of the Northern Cheyenne people, but does not regularly disburse any of the money to the tribe or its members. St. Labre used to give money whenever the tribe demanded it, until January 2005, when it denied funds, prompting this lawsuit.

Procedural Posture & Holding: The tribe alleges nine causes of action, which the Court categorizes as constructive trust and unjust enrichment; contract and fraud; and a constitutional tort of cultural genocide. The district court granted St. Labre judgment on the pleadings for the constitutional tort claims, summary judgment on the contract and fraud claims based on a lack of evidence of an express or implied contract, and summary judgment on the constructive trust and unjust enrichment claims, determining the unjust enrichment claims from fundraising prior to March 2002 were barred by the statute of limitations. It granted summary judgment to the Diocese on all of the tribe's claims based on the same rationale. The tribe appeals, and the Supreme Court affirms in part, reverses in part, and remands.

Reasoning: (1) Wrongful acts are not necessary for the imposition of a constructive trust. "[I]t is sufficient that the defendant gained something that it should not be allowed to retain." ¶ 38. The tribe must show (a) a benefit conferred on St. Labre by another; (b) an appreciation or knowledge of the benefit by St. Labre; and (c) inequitable retention of the benefit by St. Labre, and (d) no other remedy. The Court reverses summary judgment on this claim and remands for development of facts supporting unjust enrichment and constructive trust. It also remands for determination of facts as to when the tribe learned of St. Labre's assertion of an adverse interest in the constructive trust.

(2) The Court affirms summary judgment on the tribe's contract and fraud claims due to a lack of admissible evidence based on personal knowledge.

(3) Because the tribe's unjust enrichment claim survives, and can address the principal harm alleged, the Court declines to address the dismissal of the tribe's constitutional tort claims.

Olsen v. Johnston, 2013 MT 25 (Feb. 5, 2013) (5-0) (Morris, J.)

Issue: Whether Olsen and Johnston formed an enforceable contract.

Short Answer: Yes.

Facts: Judy Olsen and Kristy Johnston are sisters. With their mother, Joyce, they owned as tenants in common 78 acres of real property. Joyce left her interest to Johnston when she died in 2008. In July 2009, Johnston sent a letter to Olsen offering to buy out Olsen, or sell her interest to Olsen. Her letter said, "If you choose not to sell, you may purchase my 2/3 share for $300,000." Olsen wrote back a week later and said, "I accept your offer and will purchase your interest for $300,000." Thereafter, Johnston told Olsen she had made the same offer to their brother, Dave, and that he accepted by phone prior to Johnston receiving Olsen's letter.

Procedural Posture & Holding: Olsen filed suit in September 2009, and moved for summary judgment the following July. The district court granted summary judgment to Olsen based on an enforceable contract that satisfied the statute of frauds, and awarded Olsen specific performance. Johnston appeals, and the Supreme Court affirms.

Reasoning: Although Johnston's letter to Olsen said, "Please respond to [attorney] Bruce Townsend by August 15, 2009," Olsen wrote directly to Johnston. The Court affirms the lower court's determination that this offer did not limit Olsen's potential modes of acceptance. It did not use words of limitation, and did not come from Townsend, but from Johnston. Moreover, the letter satisfied the statute of frauds. Olsen's acceptance was therefore an acceptance, not a counteroffer.

State v. Whalen, 2013 MT 26 (Feb. 5, 2013) (5-0) (Wheat, J.)

Issue: (1) Whether Whalen's sentence is illegal; (2) whether the probationary conditions are reasonable and constitutional; (3) whether the district court illegally obtained Whalen's guilty pleas; and (4) whether sentence review is constitutional.

Short Answer: Because Whalen did not raise issues (1) and (2) at the district court, and inadequately briefed (3), the Court declines to address them. Issue (4) is not ripe because Whalen has not yet gone through sentence review.

Facts: In September 2009, Whalen, a licensed commercial bus driver driving a school bus full of students, struck and seriously injured a 15-year-old girl crossing the street in a crosswalk. He stopped and ran to the girl, but did not identify himself or report the accident. After taking the students on his bus to school, Whalen returned to the accident scene. A field sobriety test led to his arrest; at the jail, Whalen's BAC was .118.

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Procedural Posture & Holding: Whalen pled guilty to one count of felony negligent vehicular assault and one count of felony criminal endangerment. He argued for a three-year deferred sentence for both counts; the state recommended a 10-year commitment to the DOC for each count, with the last five suspended, to run concurrently, and a fine. Whalen objected to having to undergo additional chemical dependency evaluation and treatment, and to the suspension of his driver's license. The court sentenced Whalen to the DOC for six years with 18 months suspended on each count, to run concurrently, recommended Whalen be considered for a community program, and ordered 100 hours of community service. Whalen was given credit for the chemical dependency and treatment he had already completed, but his driver's license was suspended. Whalen appeals, and the Supreme Court affirms.

Reasoning: (1) Whalen argues his sentence is illegal but did not raise any of his arguments at the district court. The Court determines the *Lenihan* exception does not apply, and declines to consider Whalen's arguments. (2) Whalen challenges 12 probationary conditions, none of which he objected to at the district court. The Court again declines to apply the *Lenihan* exception. (3) Whalen did not brief this issue, and the Court refuses to consider it. (4) It is unknown whether Whalen will apply for sentence review, and if he does, what the result will be. Thus, this issue is not ripe for judicial determination.

Britton v. Brown, 2013 MT 30 (Feb. 12, 2013) (5-0) (Baker, J.)

Issue: Whether the district court erred by denying defendant's request for an evidentiary hearing after presenting offers of proof challenging the partition referees' final report.

Short Answer: Yes.

Facts: Since 1992, sisters Elise Brown and Helen Britton have owned 10.88 acres of Flathead Lake property as tenants in common. The property has 1,270 feet of shoreline, a cabin built in 1910, and other improvements.

Procedural Posture & Holding: In 2007, Britton filed an action seeking equitable partition of the property or sale of the property with an equal division of net proceeds. Brown answered and admitted the property could be partitioned. The parties each appointed one referee and those referees selected a third. The referees asked for proposals from the parties, visited the premises twice, met in person several times, and solicited information regarding costs of developing the property.

The referees asked the parties to provide feedback on their preliminary report. Brown submitted comments questioning the recommended partition, and challenging conclusions relied upon by the referees. She alleged the proposed partition was inequitable. The referees filed their final report, explaining why they disagreed with Brown's objections. Brown objected and asked for permission to depose the referees.

One month after the court viewed the property and indicated it was inclined to adopt the referees' report, Brown moved for a trial and filed 11 affidavits attacking the referees' conclusions. The district court did not act upon this motion, and ordered partition as proposed by the referees. It asked Britton to prepare a final judgment, to which Brown objected. The court adopted the proposed final judgment, and Brown appeals. The Supreme Court reverses and remands.

Reasoning: Brown contends her due process rights were violated by the lower court's refusal to hold an evidentiary hearing and allow her to depose the referees. The Court cannot determine whether the final partition was supported by substantial credible evidence because there is no record. No documents, including the referees' final report, were ever admitted into evidence, and their credibility was never tested.

The power to partition resides solely in the judiciary; the referees' report is subject to judicial review. When a party makes a substantiated claim of factual or legal error in a referees' report, due process and equity require the district court to hold an evidentiary hearing. Brown's objections were sufficient to place the final report in legitimate dispute. The lower court must hold an evidentiary hearing, at which the parties may call the referees as witnesses. The scope of pre-hearing discovery from the referees is subject to the Rules of Civil Procedure and the trial court's discretion.

Situ v. Smole, 2013 MT 33 (5-0) (Cotter, J.)

Issue: (1) Whether the district court properly dismissed Situs' complaint on statute of limitations grounds, and (2) whether the court should have applied equitable estoppel to resurrect Situs' claims.

Short Answer: (1) Yes, and (2) no.

Facts: In October 1989, the Situs bought a Helena restaurant. The real property on which the building was located was owned by Lois Murphy. Situs and Murphy entered into a ten-year lease, which gave Situs the option to buy the property when the lease expired in 1999. The lease provided the sale price would be determined by the parties' agreement, or "mutually acceptable independent qualified appraisers at mutual expense." Situs claim they gave written notice to Murphy of their intent to buy the property, and that Murphy agreed in September 2000 to an independent appraiser, but never got one.

The parties did not execute a new lease. Situs continued paying rent of $175/month until April 2008, when Murphy notified them that rent was increasing to $650/month. Situs ignored the notice and continued paying $175/month. Murphy served Situs with written notice of termination in March 2009, demanding unpaid rent of $5,700. Situs continued sending $175/month, but Murphy rejected all payments after the termination notice.

Procedural Posture & Holding: In August 2009, Situs filed a complaint seeking declaratory judgment and an order requiring Murphy to select an independent appraiser and sell the property to Situs, and damages for loss of sales from Murphy's breach of the lease. Murphy counterclaimed for unlawful detainer, and moved to dismiss on statute of limitations. The district court dismissed Situs' complaint, and

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Murphy moved for summary judgment on her counterclaim. The court granted summary judgment for Murphy, ordered Situs to pay the unpaid rent, trebled for amounts due after May 1, 2009, and ordered Situs to vacate the property. Situs appeal the dismissal of their complaint, but not the court's order on Murphy's counterclaim. The Supreme Court affirms.

Reasoning: (1) Situs had eight years to bring a claim. Situs were holdover tenants until receiving notice of termination in 2009. The option to buy was not a term of the tenancy, and thus accrued in October 1999. The statute of limitations began to run when Situs exercised the option, a date they did not establish below. Even if that date is September 2000, when Situs allege Murphy agreed to an appraiser, the lawsuit is untimely.

(2) The doctrine of equitable estoppel has no application under these facts. Situs had eight years to file an action on the contract.

Green v. Gerber, 2013 MT 35 (Feb. 12, 2013) (6-1) (Cotter, J., for the majority; McGrath, C.J., concurs and dissents)

Issue: (1) Whether a district court loses jurisdiction to rule on a Rule 60(b) motion after 60 days have passed and the motion is deemed denied; and (2) whether the district court erred in granting Stockton's motion to set aside a default judgment.

Short Answer: (1) No, overruling several cases; and (2) yes, clarifying the requirements under Rule 60(b)(6).

Facts: In Dec. 2008, Linda Green was driving when a truck owned by Stockton Oil and driven by Ronald Gerber struck her car, causing bodily injuries and property damage. Stockton's insurer paid $139,247 of Green's medical bills.

Gerber sued Stockton Oil and Gerber in Jan. 2011. Stockton was served; Gerber was not. Stockton did not appear, and its default was entered in Feb. 2011. The court held a damages hearing and entered judgment against Stockton for $308,200 in April 2011. Green did not disclose the amounts already paid by Stockton's insurer. On Oct. 11, 2011 a writ of execution was served on Stockman Bank, and $138,273 was collected from both Gerber's and Stockton's accounts. These funds were eventually returned.

Procedural Posture & Holding: On Oct. 19, 2011, Stockton moved to set aside the default judgment; 68 days later, the district court granted Stockton's motion. On Jan. 17, 2012, Stockton answered Green's complaint on behalf of itself and Gerber.

Green appeals, arguing that the district court lost jurisdiction to rule on Stockton's motion after 60 days under M.R. Civ. P. 60(c)(1), and that Stockton failed to meet the elements of Rule 60(b). Stockton cross-appeals, arguing that if the lower court's motion was deemed denied under Rule 60(c)(1), the denial was an abuse of discretion. The Supreme Court reverses and remands.

Reasoning: (1) The Court reviews several cases to clarify the distinction between rules that establish deadlines and a district court's subject-matter jurisdiction. Although those cases involve parties who failed to comply with a deadline, and here it was the court, the Court finds that the analysis is the same. "Quite simply, unless a statute, rule, or constitutional provision expressly imposes jurisdictional limitations, the expiration of a time bar does not deprive a district court of the jurisdiction to further act in the matter before it." ¶ 24. It overrules a number of cases that state otherwise.

(2) The same cases that the Court overruled insofar as they equate time bars with jurisdiction also stand for the rule that the time limits in Rules 59 and 60 are mandatory and should be strictly enforced. Although the lower court had jurisdiction to act after the deemed-denied deadline, it erred in doing so. Once the motion was deemed denied, Stockton's recourse was to appeal. Stockton's motion was brought under Rule 60(b)(6), the "catch-all" provision. The Court determines that the proper test to apply is *Essex v. Moose Saloon* rather than *Maulding*, and overrules *Maulding* to the extent it imports the good cause standard for setting aside a default into the rule that governs setting aside a default judgment. A person seeking to set aside a default judgment must meet all three prongs of the test set forth in *Essex*. Stockton fails to establish extraordinary circumstances or blamelessness, and Green's conduct is not gross neglect or actual misconduct.

Chief Justice McGrath's Concurrence & Dissent: The chief justice concurs in the judgment, but dissents from the application of the three-part test from *Essex*. He would simply instruct the district courts to apply the plain language of Rule 60(b)(6). He takes issue with the requirement that a movant demonstrate blamelessness. "Its inclusion as an essential element muddles our analysis and detracts from what should be the court's focus – whether justice requires relief from judgment." ¶ 48.

In the Matter of JSW, 2013 MT 34 (Feb. 12, 2013) (5-0) (McKinnon, J.)

Issue: (1) Whether plain error review is warranted for JSW's claim that her right to testify was violated, and (2) whether JSW's attorney's assistance was ineffective.

Short Answer: (1) No, and (2) no.

Facts: JSW voluntarily admitted herself to the hospital after police brought her in for a mental assessment. After six days, JSW requested discharge, but the county attorney's office petitioned for further commitment for evaluation and treatment.

Procedural Posture & Holding: JSW appeared before the district court that day. The court appointed her a statutory friend and a public defender, and held a hearing the next day. The state's only witness was a nurse at the behavioral unit, who testified that JSW was disorganized, unable to do her daily activities, and a danger to herself and others. JSW testified.

At the end of the hearing, the district court determined that JSW suffered from a mental disorder requiring treatment, and that Warm Springs was the least restrictive, most appropriate alternative. The court committed JSW for no more than 90 days, and included an order for involuntary medication. JSW

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appeals.

Reasoning: (1) The Court first determines that plain error review is not warranted, as JSW's alleged error – that the district court limited her testimony to three minutes – did not actually occur. JSW fails to establish that there is an error to review, let alone that failure to review will meet the second prong of the plain-error test. (2) JSW contends she was denied effective assistance of counsel when her counsel failed to object to the three-minute limitation imposed on her testimony. *Strickland* does not apply to civil commitment proceedings; instead the Court looks to five "critical areas" to measure the effectiveness of counsel's assistance. Based on the Court's review of the record, JSW fails to make a substantial showing of evidence that counsel did not effectively represent her interests.

State v. Haldane, 2013 MT 32 (Feb. 12, 2013) (5-0) (Cotter, J.)

Issue: (1) Whether the officer had particularized suspicion to stop Haldane based on an obstructed license plate; (2) whether Haldane's counsel's assistance was ineffective; and (3) whether Haldane's sentence violated his due process rights.

Short Answer: (1) Yes; (2) no; and (3) yes.

Facts: In Jan. 2011, two police officers stopped Haldane's car. When the officers pulled up behind Haldane's car at a red light, they noticed the license plate was obstructed by snow and a trailer hitch. The car had temporary plates, as Haldane had just bought it two days earlier. The car came with a trailer hitch; Haldane did not know the license plate was obstructed.

Upon being stopped, Haldane could produce only his driver's license. He was observed "fervently" smoking a cigarette, and had bloodshot eyes. When asked how much he had been drinking, Haldane slurred and said he'd had 2-3 beers. The field sobriety tests indicated impairment; Haldane refused a breathalyzer and became belligerent.

Procedural Posture & Holding: Haldane was arrested and charged with DUI, driving with an obstructed plate, and operating a vehicle without insurance. In the municipal court, he moved to suppress based on lack of particularized suspicion; the court denied his motion, and the jury convicted him. The court initially sentenced Haldane to six months with all but three days suspended and $935 in fines, but doubled the sentence to one year to give Haldane more time to make monthly payments. Haldane appealed to the district court, which affirmed. Haldane appeals to the Supreme Court, which affirms in part, reverses in part, and remands for new sentencing.

Reasoning: (1) The plain language of § 61-3-301, MCA, says a license plate may not be obstructed from plain view and must be obviously visible. An officer may perform a traffic stop if the officer has particularized suspicion that the person has committed, is committing, or is about to commit an offense. The officers were authorized to stop Haldane, speak to him, and request certain documentation. Their observations of his appearance and behavior during the stop enlarged the scope of the stop to include a possible DUI. The motion to dismiss was properly denied. (2) Haldane argues his counsel rendered ineffective assistance by failing to elicit certain testimony from the officers and not renewing the motion to dismiss based on those facts. Because Haldane's argument is predicated on his counsel's failure to take an action that, under the circumstances, would not likely have changed the outcome, he fails to demonstrate prejudice, a required showing under *Strickland*. (3) Although Haldane failed to object to his sentence when it was announced or on appeal to the district court, the Court applies the *Lenihan* exception. Basing a sentence on the defendant's ability to pay restitution or a fine violates the defendant's due process rights. The municipal court improperly imposed the maximum sentence because of Haldane's financial circumstances, and violated his constitutional rights. The Court remands for a new sentence.

Stokes v. Ford Motor Co., 2013 MT 29 (Feb. 12, 2013) (5-0) (Rice. J.)

Issue: (1) Whether the district court properly denied Stokes' motion for default judgment as a discovery sanction against Ford, and (2) whether the district court evidentiary rulings and jury instructions were within its discretion.

Short Answer: (1) Yes, and (2) yes.

Facts: In Nov. 2002, Peter Carter, an Australia resident, rented a Ford Explorer in Bozeman after flying to Montana for work. He was driving near Ennis when Todd Durham made a left turn in front of Carter, causing Carter's vehicle to roll five times. Carter was partially ejected and killed. Dennis Stokes, the PR of Carter's estate, brought a wrongful death and survival claim against Ford, the rental car company, and Durham, alleging strict products liability and negligence.

Procedural Posture & Holding: After a ten-day trial in Sept. 2011, the jury unanimously found Durham was liable for negligence, and Ford and the rental car company were not liable. Stokes appeals, and the Supreme Court affirms.

Reasoning: (1) Stokes moved for a default judgment on liability against Ford as a sanction for withholding evidence of other incidents, and the district court denied the motion, stating it did not find wanton disregard of its order or intent to slow down discovery. Discovery sanctions are appropriate when counsel or a party acts willfully or in bad faith, and the party requesting default judgment must show prejudice. The Court cannot conclude the district court abused its discretion. (2) The district court was within its discretion to exclude evidence of other incidents. The Court affirms the lower court's evidentiary rulings on evidence of standardization of certain safety equipment, and affirms the lower court's instruction on products liability, and affirms the lower court's rulings on the admissibility of the indemnity agreement between Ford and the rental car company.

Public Land/Water Access Assn. v. Jones, 2013 MT 31 (Feb. 12, 2013) (5-0) (Baker, J.)

Issue: Whether the lower court properly dismissed the Association's lawsuit seeking declaratory relief and damages against Jones for his removal of the Boadle Bridge.

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Short Answer: No.

Facts: Jones bought property in Teton County in 2000. Boadle and Canal Roads intersect on his property, connecting across Sun River Slope Canal via the Boadle Bridge, which Teton County periodically maintained and then rebuilt in 1990. The public has used the roads and bridge since the early 1900s for recreation, moving cattle, travel to work, and access to Choteau. In 1999 or 2000, Jones' predecessor erected a gate on Boadle Road and posted signs indicate the road was closed to the public. Jones continued to deny public access after buying the property.

In its first lawsuit against Jones, the Association established a public prescriptive easement across Boadle Road and Boadle Bridge. While that case was pending, a wildfire destroyed the bridge and Jones replaced it in April 2002 with a flatbed railcar that he owned. This Court held he could not deny access just because he built and owned the bridge.

Procedural Posture & Holding: In Nov. 2011, the Association petitioned for supplementary declaratory relief and filed a complaint for damages alleging Jones had wrongfully destroyed the Boadle Bridge, placed "no access" signs along Boadle Road, and built a new bridge accessing a private road, which he marked with no trespassing signs. The suit alleged tortious interference with a public easement, public nuisance, and actual malice, and sought punitive damages as well as an order requiring Jones to pay for a new bridge, remove all signs indicating the bridge was closed, and pay costs and attorneys' fees. Jones moved to dismiss, arguing no court had addressed public rights to the bridge, and to the extent the public had an interest in a bridge over the canal, it was in the bridge that burned. The district court granted Jones' motion, agreeing the public easement was in a bridge destroyed by fire, and that Jones had no duty to facilitate public access. The Association appeals, and the Supreme Court reverses and remands.

Reasoning: The Court agrees with the Association that the issue of whether Jones could remove his personally owned bridge from the roadway was squarely addressed in its 2004 decision. By definition, an easement is the right to use property owned by another. The scope of a prescriptive easement is determined by its use during the prescriptive period. The Court did not address ownership of the bridge in its earlier decision because the bridge was within the easement's scope, and ownership was not necessary to its decision that the bridge was part of the public's right of access. Because this issue has already been resolved, it is the law of the case and cannot be relitigated.

Case briefs courtesy of Beth Brennan, who practices in Missoula with Brennan Law & Mediation, PLLC.

Editor's note and correction: *The following summary ran in the February edition, and mistakenly referred to the State Fund as the defendant. The Uninsured Employers' Fund was the actual defendant. Here is a corrected version, with apologies to the State Fund for the error.*

Elk Mountain Sports, Inc. v. Montana Dept. of Labor & Indus., 2012 MT 261 (Nov. 20, 2012) (5-0) (Morris, J.)

Issue: (1) Whether the Uninsured Employers' Fund materially breached an interim agreement reached with Elk Mountain, and (2) whether the district court properly determined damages.

Short Answer: (1) Yes, and (2) yes.

Facts: Elk Mountain (EM) operates an auto and motor sports. Timothy Wilson was injured at work in January 2004. EM did not have work comp insurance. Wilson filed a claim with the Uninsured Employers' Fund, which accepted the claim. The Fund sought indemnity, but struggled to obtain payment. The Fund issued liens on EM's bank account and eventually assigned its claims to collection. In 2009, the parties agreed to an interim payment plan, and the Fund pulled EM's account from collection. The parties abided by this agreement until May 2010, when the Fund sent a letter proposing a new payment agreement, which EM rejected. The Fund sent EM's account back to collection, claiming it could do so because four of EM's payments had been late and EM had made no effort to pursue settlement.

Procedural Posture & Holding: EM sued the Fund for breach of contract, and the parties filed cross-motions for summary judgment. The district court granted judgment to EM, and held a bench trial to determine damages. The court awarded $198,749 in consequential damages. The court declined to award EM 10 years of lost profits. The Fund appeals, and the Supreme Court affirms.

Reasoning: (1) Who materially breached first? The Fund argues EM did because it failed to turn over financial information; however, no language in the contract required such disclosure. Alternatively, the Fund argues EM's late payments allowed it to terminate the agreement. However, the Fund's acceptance of those payments waives the default. Thus, the district court properly granted summary judgment to EM.

(2) The Fund argues the district court erred in awarding consequential damages. The Court finds the evidence supports a causal connection between the Fund's breach and EM"s damages. It further finds that the Fund should have foreseen that referring a business to collection could create difficulties for the business in obtaining financing. Additionally, EM warned the Fund that doing so would "devastate" EM's business. Damages are affirmed.

(3) The Fund argues that EM did not plead consequential damages, and that the Fund had no notice. However, the Fund failed to object to EM's evidence in support of consequential damages, and therefore waived its right to object on appeal. Additionally, the Fund argues the judgment should be set aside due to a mistake of fact, i.e., that EM was going to lose its Arctic Cat dealership. Mistake generally means a mistake that existed at the time of trial, not a fact that changes due to future events. Arctic Cat had advised EM to wind down its dealership by June 2011. The lower court did not award damages for lost profits from losing the dealership. This is not a mistake that warrants a new trial.

MLSA establishing new development committee

Dan McLean | Chair of MLSA Board of Trustees

As the chair of the Board of Trustees for Montana Legal Services Association (MLSA), I am very proud of MLSA's 45-year legacy of serving low-income Montanans with legal issues affecting their basic needs. Many people don't realize that, in America, and throughout Montana, people become homeless, have their wages garnished, or lose custody of their children to abusers without the right to an attorney. Throughout its history, MLSA attorneys have helped tenants avoid illegal evictions, vulnerable populations maintain their public benefits, consumers protect their assets, and families escape domestic violence. MLSA recognizes there is much more work to do, and continues to assess its performance, adjust its service delivery, and leverage its limited resources as effectively as possible to move toward equal justice under the law. I ask all Montana lawyers and law firms to support MLSA in these efforts.

MLSA is forming a development committee to identify and implement creative strategies to increase MLSA's revenues and expand its ability to serve low-income Montanans. For example, MLSA intends to expand on its community-based partnership models, including the medical-legal partnership with RiverStone Health in Billings, and placing an MLSA attorney with Community Action Partnership in Kalispell. The committee and MLSA staff likely will implement individual fundraising activities, such as special events and mailings. MLSA board members Gary Zadick, Tara Veazey, and Craig Buehler will sit on the development committee, along with other legal professionals and community members.

Having discussed this new development effort with several fellow attorneys, I have come to understand that it may be appropriate to answer certain questions to a broad audience. Accordingly, I address some common questions here.

Why is MLSA engaging in this effort now?

Just as the current economic climate has affected low-income Montanans and increased the need for legal aid, MLSA itself also experienced significant financial challenges in recent years. Most notably, MLSA has undergone major layoffs in 2009 and 2011, largely due to reductions in funding available under federal grants and Montana's IOLTA program. MLSA does not receive funding under a state appropriation, as do legal aid programs in most other states. Many private foundations also limit their grants in light of diminishing resources. MLSA restructured and made every effort to focus and prioritize services, but still must increase its revenues in order to meet the demand for services. Accordingly, MLSA has coordinated with the Montana Justice Foundation, the State Bar, and other interested parties as it engages in its first ever private fundraising campaign.

What is the difference between MLSA and the Montana Justice Foundation?

MLSA and the Montana Justice Foundation (MJF) are two separate entities. MJF engages in a number of advocacy efforts, administers IOLTA funding, raises money through private fundraising efforts, and makes grants to MLSA and other equal justice organizations in the state. Each year, MLSA and other organizations apply to MJF for funding, and MJF's Board decides how to allocate the amount available. MJF grant funding is crucial to MLSA's operations. We consider MJF an important partner in the access to justice movement. MJF supports MLSA's intent to engage in new development activities, and MLSA and MJF will continue to communicate to avoid duplication and confusion. Both organizations encourage funding for each other, as we share similar goals.

Don't State Bar dues support legal aid work?

State Bar dues support State Bar operations, not legal aid. That said, certain bar sections have at times voted to give money in their section accounts to MLSA. For example, the Bankruptcy Section recently granted MLSA $10,000 to purchase bankruptcy-related software and otherwise support our bankruptcy-related work. MLSA greatly appreciates the financial support of bar sections, along with the support of State Bar staff as we partner on various projects.

What is the relationship between pro bono and legal aid?

You can truly make a significant difference by providing pro bono services to a low-income person in need. MLSA

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receives approximately 7,500 requests for assistance per year, and about 190,000 Montanans are eligible for MLSA services because they live at or below 125% of the federal poverty level (currently $19,530 for a family of three). Think of that: almost 20% of Montanans are eligible for legal aid, one in five! MLSA has approximately 13.0 FTE case handling attorneys on staff, who simply can't meet all of the civil legal needs of low-income Montanans by themselves. MLSA coordinates with local pro bono programs throughout the state, in part by screening clients for financial eligibility. MLSA also has independent pro bono programs, including its low income taxpayer clinic and bankruptcy program. While the vast majority of clients waiting for pro bono attorneys have family law issues, MLSA also has opportunities for attorneys who wish to take on other types of cases.

In these difficult economic times, how can MLSA ask attorneys to make financial contributions?

MLSA is sensitive to those attorneys experiencing financial challenges in their practices and personal lives, due to the current economic climate or otherwise. At the same time, MLSA is also aware that the current economic situation has been even more devastating for low-income people, many of whom could avoid falling further into poverty if they were better able to assert their legal rights. Of course, we don't expect anyone to compromise their own financial stability to support legal aid. We simply ask that legal professionals consider contributing to MLSA or MJF, and preferably prioritize equal justice organizations in charitable giving for the coming year.

How can you support MLSA's efforts?

You can support MLSA in the following ways:

- Contact Elaine Dahl (edahl@mtlsa.org or 406-442-9830 x138) to express interest in joining the development committee, share ideas for community partnerships and funding opportunities, or pose questions and concerns.
- Make a donation to MLSA or MJF. To donate to MLSA, go to the online donation page at *www.mtlsa.org* or mail a check to MLSA, 616 Helena Avenue, Suite 100, Helena, MT 59601. To donate to MJF, go to the online donation page at *www.mtjustice.org* or mail a check to P.O. Box 9169, Missoula, MT 59807-9169.
- Attend any fundraising events sponsored by MLSA or MJF.
- Sign up to receive email updates about MLSA by contacting Christine Mandiloff (*cmandilo@mtlsa.org* or 406-442-9830 x 131).
- Take a pro bono case. Contact Angie Wagenhals (*awagenhals@mtlsa.org* or 406-543-8343 x 207) to learn about available pro bono opportunities.
- MLSA truly appreciates the support of the Bar and its members, including any support provided to the Montana Justice Foundation, MLSA, and any other access to justice organizations. You are an important factor in bringing equal justice under the law in Montana within reach.

Prior statements in Montana: Part I

Introduction and prior inconsistent statements

By Cynthia Ford

Wendy, the witness, testifies in court, recounting the assault. She claims that she was raped against her will; Dan, the defendant, insists that the intercourse was consensual. (This might sound a little familiar?) As the prosecutor, wouldn't you want to augment Wendy's in-court statement with all the other statements she made before trial, in which she said exactly the same thing to other people? If she said the same thing before to different people on different occasions, don't we think it's more likely that she is now telling the truth? And if you are the defense lawyer, shouldn't the jury know that Wendy described the event differently to someone else before trial from what she has just told the jury? In real life, isn't one important way to tell whether the person is telling the truth to find out if she said the same thing before?

Under the Montana Rules of Evidence, these two things—prior consistent statements and prior inconsistent statements—are treated very differently from each other, and in some respects, very differently from the Federal Rules of Evidence. The purpose of this article is to explore the Montana approach to prior inconsistent statements. Part II, to be published next issue, will deal with the treatment of prior consistent statements. (A discriminating reader has suggested that my previous Evidence Corner columns may be too long. I agree, and apologize. Henceforth, I will try to curb my enthusiasm and reserve some of the "how-to" material for the forthcoming "Montana Evidence Handbook.")

Introduction: Prior Statements and the Hearsay Rule

M.R.E. 802 is the hearsay rule: "Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state." M.R.E. 801 provides the definition of "hearsay," and thus governs what is prohibited and what is not under Rule 802. The general definition is in 801(c): "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

All prior statements, consistent and inconsistent, satisfy the first part of the hearsay definition: they are all necessarily out-of-court statements. The fact that the person who made the statements is now a witness in court does not change those earlier statements into in-court, non-hearsay statements. The rule against hearsay provides three things: the evidentiary statement is made under oath, the jury has the chance to observe the witness while she makes the statement to them, and cross-examination. The fact that the same person who spoke out of court earlier is now a witness in court does provide cross-examination, but cannot supply either oath or observation of the earlier statement at the time it was made.

A. If the out-of-court statement is offered to prove something other than the fact it asserts, such as for impeachment purposes, it is not hearsay, but then its use is limited to impeachment.

The second half of M.R.E. 801(c) confines hearsay treatment to those out-of-court statements which are not being offered in court to prove the fact that they assert. If the previous out-of-court statement is being offered for any other reason, it is not hearsay and is not barred by 802. The Montana Evidence Commission Comment to M.R.E. 801 observes:

> from the phrase " ... offered in evidence to prove the truth of the matter asserted," statements offered for purposes other than to prove the truth of their contents are not hearsay. …
>
> It is theoretically correct to say that statements not offered to prove the truth of their contents are not hearsay because their reliability is not in issue, only whether or not the statement was made. Hearsay statements are ordinarily not admitted because their reliability cannot be tested by oath, cross-examination, and the presence of the trier of fact, the three ideal conditions under which testimony is given by witnesses. *Advisory Committee's Note, 56 F.R.D. 183, 288 (1972).* When a statement is introduced for purposes other than proving the truth of its content, the witness testifying as to the making of the statement by the hearsay declarant is doing so under the three ideal conditions. Therefore, statements which are offered for purposes other than to prove the truth of their content are not hearsay under the definition.

Thus, a lawyer can always meet "Objection! Hearsay!" by responding "This is an out of court statement, Your Honor, but I am not using it to prove the truth of its content."

The technical judge should then ask: "Well, what are you using it for, if not the truth of the content?" You must satisfy the judge that you have some relevant reason for introducing the statement, other than to prove that what was said outside of court is true. One of the primary "purposes other than to prove the truth of their content" is to show the credibility or incredibility of the witness on the stand. You are not using the statement to prove the fact it asserts, but instead to show that the statement just made in court by the witness is false or true. This

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out-of-court statement (OCS) will support your closing that "witness X speaketh with forked tongue, so you can't believe what she said here in court." Therefore, you can skate by the hearsay objection and get the OCS in merely by saying "Your honor, I am introducing this OCS for impeachment purposes only." (M.R.E. 401[1] explicitly states that "Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.")

If the only permissible use of the OCS is impeachment or rehabilitation of an in-court witness, the fact-finder may not use the contents of the OCS in deciding the facts of the case. The only permissible use of the OCS is for the jury to consider it in deciding if the witness was truthful on the stand. If no other evidence of the fact asserted in the OCS is introduced, that fact is not proven. Under M.R.E. 105, the party opposing the OCS is entitled, upon request, to a limiting instruction on this point. (Lawyers, judges and commentators are divided on the efficacy of such an instruction.) If you are able to get an OCS in for a limited purpose, you must also introduce at least a scintilla (I call this a chinchilla) of other evidence on which a jury could find in your favor, or the favorable verdict may be reversed.

For example, imagine a debt collection case brought by an estate. The defendant's brother testifies as a witness at trial that their family has a strict policy of "neither a borrower or a lender be," so the defendant never would have borrowed any money from the decedent. On rebuttal, the plaintiff calls the brother's barber, who testifies that the brother told the barber that the brothers had borrowed money from Joe but would never have to pay it back because Joe was now dead. If this OCS is allowed in for impeachment only, the jury cannot use it to find that a loan occurred. At most, it can find that the brother lied on the stand, but this is cannot satisfy the plaintiff's burden of proof.

B. M.R.E. 801(d) magically transposes some out-of-court statements offered to prove their contents into non-hearsay, which are not affected by Rule 802, and can be admitted as substantive evidence.

Rule 801(d)(1) provides, outright, that three kinds of prior OCS by a person who testifies at trial are simply not hearsay, even if they are offered for the truth of the facts they assert. These types of statements are not exceptions to the hearsay rule; they are not hearsay at all. Therefore, they are not subject to Rule 802 and are admissible to prove the facts they assert. The exact text of the rule is:

> (d) Statements which are not hearsay. A statement is not hearsay if:
>
> 1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
>
> (A) inconsistent with the declarant's testimony, or
>
> (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive, or
>
> (C) one of identification of a person made after perceiving the person;

The Montana Evidence Commission Comment indicates that the Commission modeled 801(d) on the F.R.E. but modified two of the three federal subdivisions (which I will discuss in more detail below) for use in Montana:

> The effect of this rule is to place certain statements " ... which would otherwise literally fall within ... " the hearsay definition outside the hearsay rule.
>
> Subdivision (d)(1) deals with certain prior statements of the witness who is now testifying and subject to ideal conditions of oath, cross-examination, and presence of the trier of fact. The Commission feels that the application of the conditions at the trial or hearing is sufficient to take these statements out of the hearsay rule, for requiring their application at the time the statement was made would have the effect of excluding almost all prior statements. Therefore, **these prior statements are admitted as substantive evidence.** It should also be noted that the subdivision limits the types of prior statements placed outside the hearsay rule to three: This is a compromise between allowing "general use of prior prepared statements as substantive evidence" which could lead to an abuse of preferring prepared statements to actual testimony, and allowing no prior statements to be admitted, which is not sensible, for " ... particular circumstances call for a contrary result. The judgment is one more for experience than logic". *Advisory Committee's Note, supra 56 F.R.D. at 295.* (Emphasis added).

1. Under M.R.E. 801(d)(1)(A), **all prior inconsistent statements are now admissible** as substantive evidence to prove the facts they assert.

If the witness testifies at trial, anything else she said on the same subject before trial which contradicts her testimony is admissible not just for impeachment of her in-court testimony, but to prove the fact that she stated earlier, out of court. The Commission noted that the existing Montana law on the use of prior inconsistent statements was quite confusing (see below) and that "the apparent practice in Montana is to give a cautionary instruction that prior inconsistent statements may be used only for impeachment purposes. Therefore, **this clause has the effect of clarifying as well as changing existing Montana law.**" The Commission cited two other rationales for this new treatment of prior inconsistent statements: that juries might not follow the standard cautionary instruction, and that "this

1 This phrase does not occur in the federal version of Rule 401, either as originally written or as amended in 2011, although there are many federal cases indicating that the credibility of a witness is relevant, at least on non-collateral matters.

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statement is always made closer in time to the event, free from any influences, and therefore has an assurance of trustworthiness like many hearsay exceptions."

In an attorney disbarment proceeding decided just after the adoption of the Montana Rules of Evidence, the defending attorney objected to admission of prior inconsistent statements to prove the facts they asserted. The Montana Supreme Court agreed that at least prior to a 1941 case, State v. Jolly, 112 Mont. 352, 116 P.2d 686, "previous inconsistent statements of a witness were admissible for impeachment purposes only and did not constitute substantive evidence," and that in the period of time after Jolly but before the M.R.E. were adopted, the law of Montana on the admission of prior inconsistent statements for substantive rather than impeachment purposes was "in flux." Matter of Goldman, 179 Mont. 526, 549, 588 P.2d 964, 977 (1978). The Court went on to observe that:

> With this background, the Commission on Rules of Evidence in proposing the new Rules of Evidence for this Court felt prior inconsistent statements were admissible as substantive evidence, and suggested for adoption, Rule 801(d)(1) (A), accordingly. This Court had approved those rules prior to the hearing hereunder, even though the effective date would not begin until July 1, 1977.
>
> The foregoing cases would indicate the law in Montana on this point was in flux, but the Court was moving toward a change in the rule of Wise v. Stagg, supra. The matter is now settled with the adoption of the Montana Rules of Evidence. **Such testimony is now clearly admissible for substantive purposes.** (Emphasis added)

Matter of Goldman, 179 Mont. at 550, 588 P.2d at 977 (1978).

The Montana prior inconsistent statement rule is much more inclusive than the federal version of 801(d)(1)(A). The federal rules allow use of only those prior statements which are inconsistent with the declarant/witness's trial testimony AND which were made "given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition." In Montana, **any prior inconsistent statement, made anywhere, anytime, is usable**. This means that a Montanan who spills her guts at the Stockmen's (Stockpersons'?) Bar and later tells a Montana state jury something quite different can expect to see the bartender take (I originally wrote "mount" but the visual was bad) the stand. If the same case were tried in the U.S. District Court for the District of Montana, her drunken rambling would be inadmissible except for its impeachment value. The Montana Commission explained its decision to broaden the prior inconsistent statement rule: "The clause deletes the oath requirement as unnecessary and harmful to the usefulness of the rule. The Commission believes that prior inconsistent statements should be admissible as substantive evidence."

The only requirement to admit a prior inconsistent statement is that the declarant must have testified at trial, and the prior statement is inconsistent with that testimony. If the witness testifies that the light was green, and somewhere else told someone that the light was red, there is a clear inconsistency and the earlier statement is admissible. Further, the Montana Supreme Court has held that even a minor inconsistency suffices under Rule 801(d)(1)(A). In State v. Herman, the defendant was accused of stabbing a man with whom the defendant and his father had had a bar fight. The night of the stabbing, the police interviewed the defendant's father on video (which the police lost, held to be harmless) and the father also wrote out a half page statement. "¶ 37 In his testimony at trial, Herman's father said he chatted with the bartender for a minute or two before going outside. In his written statement, he said he followed Herman outside. Thus, **there is inconsistency between his testimony and his statement, even though it is minor.** The District Court's admission of the statement into evidence was in accordance with M.R. Evid. 801(d)(1), which provides a prior oral or written statement inconsistent with the testimony of a trial witness is admissible." State v. Herman, 350 Mont. 109, 117, 204 P.3d 1254, 1260 (2009). (Again, this case earlier describes the use of the prior inconsistent statement as for "impeachment" but this restriction is unnecessary because the rule defines the prior inconsistent statement as non-hearsay, thus usable for substantive purposes).

Rule 801(d)(1)(A) also applies where the witness said something on the subject outside of court and now testifies that she does not remember anything about that subject, and/or that she does not remember giving an earlier statement.

Montana law used to be a mess, to say the least, on the issue of whether memory lapse is a form of "inconsistency" so as to invoke 801(d)(1)(A). When the Commission forwarded its version of the M.R.E. to the Supreme Court, its Comment to 801(d)(1)(A) included this language: "It is the intent of the Commission that a witness' failure to recollect at a trial or hearing is an inconsistency under **801(d)(1)(A)** when a witness has made a prior statement on the matter under inquiry." Despite this clear language in the Comment, after the M.R.E. were adopted, two different lines of decisions developed, one holding that a failure of memory is an inconsistent statement, and the other the opposite. The Court acknowledged and resolved this discrepancy in State v. Lawrence, 285 Mont. 140, 159, 948 P. 2nd 186, 198 (1997):

> "Given the weight of authority, we believe Devlin is the better reasoned opinion, and hold that a claimed lapse of memory is an inconsistency within the meaning of *Rule 801(d)(1)(A)*. To the extent that our prior decision in Goodwin is inconsistent with this holding, it is overruled." (Emphasis supplied).

In the Lawrence case, the witness Mary was diagnosed with dementia, possibly Alzheimer's. Prior to trial, she had given 5 statements to the police. At trial, she frequently said she couldn't remember certain facts, and also that she couldn't remember having given prior statements about them. The Court held that this testimony was inconsistent with her prior statements, and affirmed the judge's admission of them under M.R.E. 801(d)(1)

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(A). (This case is also very useful for reviewing HOW to admit prior inconsistent statements).

In State v. Howard, 362 Mont. 196, 204, 265 P.3d 606, 613 (2011), the Court reaffirmed its holding in Lawrence: "In that case, we also stated a claimed lapse of memory constitutes an inconsistent statement for the purposes of *M.R. Evid. 801(d)(1)(A). Lawrence, 285 Mont. at 159, 948 P.2d at 198.* We did not, however, hold claimed memory lapse was the only ground for application of Rule 80 1(d)(1)(A)." In Howard, the child victim/witness on the stand in a sexual abuse case recanted several previous statements and said she didn't remember others; the court allowed a DVD of the child's pretrial interviews into evidence. Both trial court decisions were affirmed on appeal.

Thus, prior inconsistent statements are clearly admissible in Montana state court trials. Once the witness has testified on the stand, anything else she has said on the same subject, anywhere, any time, to anyone, which outright contradicts her trial testimony, or serves to fill a memory lapse on the stand, is admissible, not just for impeachment but also to prove the fact she earlier asserted.

Coming next month: Part II, Prior Consistent Statements in Montana

Cynthia Ford *is a professor at the University of Montana School of Law where she teaches Civil Procedure, Evidence, Family Law, and Remedies.*

Editor's note and correction: *The February edition of this series, "A refresher: Montana evidence law sources and research," containted an incorrect reference referring to the "parol evidence rule" on page 41. The correct reference is as follows:*

28-2-905. When extrinsic evidence concerning a written agreement may be considered. (1) Whenever the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms. Therefore, there can be between the parties and their representatives or successors in interest no evidence of the terms of the agreement other than the contents of the writing except in the following cases:

(a) when a mistake or imperfection of the writing is put in issue by the pleadings;

(b) when the validity of the agreement is the fact in dispute.

(2) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as described in 1-4-102, or other evidence to explain an extrinsic ambiguity or to establish illegality or fraud.

(3) The term "agreement", for the purposes of this section, includes deeds and wills as well as contracts between parties.

Update: Who is an Indian?

And who is Mr. Dooley?

By Daniel Donovan and John Rhodes

Last year, we published an article in the Montana Law Review reviewing who is an Indian for federal criminal jurisdiction purposes in Indian Country cases.[1] This "Indian" jurisprudence has centered in the Ninth Circuit. Case after case arose off of Montana's Indian reservations. From the High-Line reservations the cases worked their way to federal district court in Great Falls and then on to the Ninth Circuit. That court's recent decision in *United States v. Zepeda*[2] demonstrates that the Montana-inspired jurisprudence is spreading to reservation cases throughout the West, the importance of jury instructions, the prosecution's burden of proof, and the sanctity of the jury's fact-finding. And in this day of codification and regulation, it also shows the common law lives on.

So does the wisdom of Mr. Dooley.

In *Zepeda*, an Arizona case, the government charged assault and firearm charges in a nine-count indictment. Eight of the counts alleged Zepeda was an Indian and thus charged a violation of 18 U.S.C. § 1153, the Major Crimes Act, providing federal jurisdiction for specified crimes by Indians in Indian Country.[3] Under a Ninth Circuit decision in *United States v. Bruce*, which started on the Fort Peck Indian Reservation, a two-part test determines who is an Indian: 1) Indian descendent status from a federally recognized tribe; and 2) tribal or federal recognition as an Indian. The Ninth Circuit details the *Bruce* test in a model jury instruction.[4]

The Ninth Circuit quoted Mr. Dooley in Zepeda: *". . . As Mr. Dooley once said: 'Nuth'n walks itself into evidence.' "* [5]

Zepeda considered the first *Bruce* test and required the Ninth Circuit "to decide whether a Certificate of Enrollment in an Indian tribe, entered into evidence through the parties' stipulation, is sufficient evidence for a rational juror to find beyond a reasonable doubt that the defendant is an Indian for the purposes of § 1153 where the government offers no evidence that the defendant's bloodline is derived from a federally recognized tribe."[6]

Who Is Mr. Dooley?

The stipulated evidence, a document entitled "Gila River Enrollment/Census Office Certified Degree of Indian Blood," provided Zepeda was an enrolled member of the "Gila River Indian Community," with a "Blood Degree" of "1/4 Pima and 1/4 Tohono O'Odham."[7] It was presented to the jury through the testimony of a detective, who said the document confirmed Zepeda's enrollment in the tribe and that he met the blood quantum.[8]

Mr. Dooley is a fictional character created by Finley Peter Dunne (1987-1936), an American humorist and writer from Chicago. Mr. Dooley appeared in Dunne's nationally syndicated newspaper columns. As owner/bartender of a fictional South Side Irish pub,

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1 Daniel Donovan and John Rhodes, "To Be or Not To Be: Who is an 'Indian Person'?" Montana Law Review, Winter 2012. We thank Editors-in-Chief Lee Baxter and John Sullivan for challenging us to improve the article from submission to publication.

2 705 F. F.3d 1052 (9th Cir. 2012)

3 18 U.S.C. § 1153 provides:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

4 9th Cir. Crim. Jury Instr. 8.113 (2011) ("Determination Of Indian Status For Offenses Committed Within Indian Country (18 U.S.C. § 1153)").

5 2013 U.S. App. LEXIS 1306, *35.

6 Id. at *3.

7 Id. at *4.

8 Id. at *5.

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Mr. Dooley expounded upon the political and social issues of his time. The columns were written as Mr. Dooley would have spoken: in the thick verbiage and accent of an Irish immigrant from County Roscommon. Recognizing Dunne's sly humor and political acumen as well as the Mr. Dooley's popularity, President Teddy Roosevelt considered the columns to be a litmus test of public opinion and had them read each week at White House cabinet meetings.

The only other evidence regarding Zepeda's Indian status came from his brother. He testified Zepeda was half "Native American," from the "Pima and Tiho" tribes, that Indian heritage came from their father, and their mother was "Mexican."[9]

What does Mr. Dooley know about criminal justice?

At the close of the government case, Zepeda moved for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure.[10] The district court rejected the motion; he renewed it at the close of evidence; the district court again denied it.[11]

Surprisingly, he knows a lot, particularly from the viewpoint of the typical layperson who sits on a jury. Here is a sampling of Mr. Dooley's wisdom:

> *"Justice, says ye? I tell ye Hogan's r-right whin he says: 'Justice is blind.' Blind she is, an' deef an' dumb an' has a wooden leg! Niver again will they dhraw me to a coort. I'll take th' rude justice iv a piece iv lead pipe without cousts or th' r-right iv appeal."*[12]

> *"Thank th' Lord, whin th' case is all over, the jury'll pitch th' [expert] tistimony out iv th' window, an' consider three questions" 'Did [the defendant] look a though he'd kill his wife? Did his wife look as though she ought to be kilt? Isn't it time we wint to supper?*[13]

> *"'Ye ra-aly do think dhrink is a nicissry evil?', said Mr. Hennessy. 'Well,' said Mr. Dooley, 'if its an evil to a man, it's not nicissry, an if it's nicissry, it's an evil.'"*[14]

On appeal, the Ninth Circuit overviewed the Major Crimes Act and General Crimes Act. Indian status is a jurisdictional element that must be plead in the indictment and proved to the jury.[15] Given the jury's fact-finding on the issue, the court reviewed for sufficiency of the evidence.[16]

Why would the Ninth Circuit quote Mr. Dooley in the Zepeda opinion?

Implementing the *Bruce* test, the court emphasized the "threshold requirement of affiliation with a federally recognized tribe stem[s] from judicial and legislative acknowledgment that federal criminal jurisdiction over Indians is not dependent on a racial classification, but upon the federal government's relationship with the Indian nations as separate sovereigns."[17] The court repeated: "the first prong of the *Bruce* test requires 'that the bloodline be derived from a federally recognized tribe.'"[18]

To illustrate the following point: "judicially noticed facts are insufficient to meet the government's burden of proof beyond a reasonable doubt . . . until they are accepted by the jury as conclusive."[19] *Although "the jury found that Zepeda was an Indian pursuant to § 1153[,] in the absence of any proof that Zepeda's bloodline derived from a federally recognized tribe[,] [w]e are not at liberty to displace the role of the jury and to make this factual determination on its behalf."*[20]

The court turned to the facts. The government offered no evidence that either of the tribes listed on the Tribal Enrollment

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9 Id. at *5-6.

10 Id. at *6.

11 Id.

12 Dunne, Finley Peter, Mr. Dooley's Opinions, R.H. Russell Publisher, 1901, Cross-Examinations.

13 Dunne, Finley Peter, Mr. Dooley in Peace and in War, Small, Mynard & Company, 1899, On Expert Testimony.

14 Dunne, Finley Peter, Dissertations by Mr. Dooley, Harper & Brothers Publishers, 1906, The Bar.

15 Zepeda, at *9.

16 Id. at *10-11.

17 Id at *19-20 (citing United States v. Maggi, 598 F.3d 1073, 1078-79 (9th Cir. 2010) (discussing LaPier v. McCormick, 986 F.2d 303, 305 (9th Cir. 1993) ("Federal legislation treating Indians distinctively is rooted in the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a guardian-ward status, to legislate on behalf of federally recognized tribes.")' United States v. Antelope, 430 U.S. 641, 646 (1977) ("[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions. . . . [I]t is not to be viewed as legislation of a 'racial group consisting of 'Indians' . . . .") (quoting Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974), and Means v. Navajo Nation, 432 F.3d 924. 930 (9th Cir. 2005)).

18 Id. at *20 (citing Maggi, 598 F.3d at 1080). Maggi was a Blackfeet Indian Reservation case.

19 Id. at *34.

20 Id. at *37 (citing United States v. James, 987 F.2d 648, 651 (9th Cir. 1993).

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Certificate – the Pima and the Tohono O'Oldham – are federally recognized.[21] The government argued federal recognition is a question of law to be determined by the court, and requested judicial notice that both the "Gila River Indian Community of the Gila River Indian Reservation, Arizona," and the "Tohono O'Odham Nation of Arizona" are federally recognized Indian tribes.[22]

How did the Zepeda court know about Mr. Dooley and his enduring wisdom?

The court responded: "*Bruce* and its progeny make clear that Indian status is an element of any § 1153 offense, and as such, that it must be alleged in the indictment and proven beyond a reasonable doubt."[23] The court acknowledged "[f]ederal recognition is a legal status afforded to" tribes.[24]

For over 30 years, the Ninth Circuit had forgotten about Mr. Dooley. The court resurrected him from United States v. Dior, 671 F.2d 351, 358 n. 11 (9th Cir. 1982).

In reaching its holding, the Ninth Circuit cautioned that evidence is not self-executing:

> It does not follow, however, that federal recognition is selfevidencing. To the contrary, the question of whether a given tribe is indeed listed among the tribes recognized by the federal government remains quintessentially factual in nature. Our case law is clear that federal recognition, like all elements of Indian status, must be proved to the jury beyond a reasonable doubt. The government is not relieved of its evidentiary burden in a prosecution under § 1153 simply because federal recognition by the Bureau of Indian Affairs, at the end of the administrative process, is a legal designation.[25]

The Court thus held because the government offered no evidence that Zepeda's Indian blood derived from a federally recognized tribe, the jury could not convict him of being an Indian, a requisite element for eight of the counts of conviction.[26] The ninth conviction for conspiracy, a crime of nationwide applicability, was not displaced.[27] A dissent maintained "the jurisdictional status of the defendant's tribe should be determined by the court rather than by the jury."[28]

The Dior court used this same quote from Mr. Dooley to illustrate the following point: "just because a fact may be generally known does not mean that the need to introduce evidence of that fact, or to request that it be judicially noticed, is dispensed with automatically."[29]

The court acknowledged that it could take judicial notice of the tribes' federal recognition, even on appeal.[30] Invoking F.R.E. 201(f), which provides "[i]n a criminal case, the court must instruct the jury that it may or may not accept the noticed facts as conclusive," the court ruled appellate judicial notice of en elemental fact would deprive a defendant of the right to trial by jury.[31] The court quoted Mr. Dooley: "Nut'n walks itself into evidence."[32]

Mr. Dooley is again a knowledgeable and distinguished legal source worthy of quoting in a published federal judicial opinion. If you desire his wisdom for your trial and appellate briefs, you may easily find the work of Peter Finley Dunne on the Internet.[33]

And the recent Montana Indian jurisprudence continues its reach beyond our border: on March 14, 2013, in an Arizona case the Ninth Circuit held a tribal Certificate of Indian Blood is a not self-authenticating document, and thus vacated a conviction premised on the defendant's Indian status. *United States v. Alvirez, 2013 U.S. App. 5097 (9th Cir. 2013).*

21 Id. at *21
22 Id.
23 Id at *22 (citing Bruce, 394 F.3d at 1229; Maggi, 598 F.3d at 1077; United States v. Cruz, 554 F.3d 840, 845 (9th Cir. 2009). Cruz was a Blackfeet Indian Reservation case.
24 Id. at *24-25.
25 Id. at *25-26 (footnote omitted noting the relative ease of meeting this evidentiary burden) (citing Maggi, 598 F.3d at 1077; Cruz, 554 F.3d at 845; Bruce, 394 F.3d at 1229; see also Ninth Cir. Model Jury Instr. No. 8.113 ("In order for the defendant to be found to be an Indian, the government must prove the following, beyond a reasonable doubt: First, the defendant has descendant status as an Indian, such as being a blood relative to a parent, grandparent, or greatgrandparent who is clearly identified as an Indian from a federally recognized tribe . . . .") (emphasis added); id. cmt. ("The question of Indian status operates as a jurisdictional element under 18 U.S.C. § 1153. 'Some blood' evidence must be from a federally recognized tribe.") (citations omitted)).
26 Id. at *39.
27 Id. at 40 (citing United States v. Begay, 42 F.3d 486, 499 (9th Cir. 1994) ("Section 371 is a federal criminal statute of nationwide applicability, and therefore applies equally to everyone everywhere within the United States, including Indians in Indian country.").
28 Id. at 40 (Watford, J., dissenting).
29 Dior, 671 F.2d at 358 n. 11 (citation omitted): "For a court...to take judicial notice of an adjudicative fact after a jury's discharge in a criminal case would cast the court in the role of a fact-finder and violate defendant's Sixth Amendment right to trial by jury. Under F.R.Evid. 201(g) the jury in a criminal case may, but is not required to, accept as conclusive any fact judicially noticed. Indeed, for a trial court (in a post-verdict motion) or an appellate court to take judicial notice of an adjudicative fact in a criminal case would frustrate Congress sought to achieve in providing in F.R.Evid. 201(g) that a jury is not required to accept as conclusive a judicially noticed fact. These policies are to preserve the jury's traditional prerogative, in a criminal case, to ignore even uncontroverted facts in reaching a verdict and to prevent the trial court from violating the spirit of the Sixth Amendment right to counsel by directing a partial verdict as to facts."
30 Zepeda, at *33.
31 Id. at *34-35.
32 Id at *35 and n.16 (citing and discussing in a footnote Dior, 671 F.2d at 358 n.11 (9th Cir. 1982)).
33 For example, go to http://www.theodoreroosevelt.com/trdooley.html or http://www.amazon.com (Kindle Store "Finley Peter Dunne").

What's it to ya? EPLI coverage for small and mid-size law firms

Wendy Inge, Esq. | ALPS Risk Manager

Employment practices liability insurance (EPLI) has long been considered a line of coverage that only large corporations and certain industries require. However, federal and state laws designed to protect the rights of employees have increased the potential liability of employers who "get it wrong," either through bad behavior or poor practices. And no organization is immune from employment practices liability litigation, least of all law firms. Small business employers, looking to their existing commercial general liability or other policies like directors and officers liability or professional liability policies for relief from defense costs and judgments, may be surprised to find that these claims are typically excluded from coverage. The insurance industry responded with the creation of employment practices liability insurance to specifically address some of these claims, but in the past, these products were often only available to large companies. With the continued increase of EPLI claims affecting businesses of all sizes, the market is finally creating products that are suitable and affordable for small and mid-size businesses.

The Risk is Real

Equal Employment Opportunity Commission (EEOC) charges for 2010 showed increases in employment practices liability claims across the board. In particular, 2010 marked a record year for the number of discrimination charges. Additionally, 2010 was the first time in which retaliation charges surpassed racial discrimination as the most filed charge. Looking at all charges filed in 2010, the EEOC collected more than $404 million from employers on behalf of employees – the highest annual total ever! And 2011 data continued to show increases in many of the reported categories with just under 100,000 charges filed. According to industry experts, the chance of a business facing an employment claim is much greater than the chance of a business facing a general liability claim. The number of employers that have faced an employee lawsuit within the past 5 years is 6 out of 10. Also, these claims can be costly. The average out-of-court settlement for an employment practices case is about $40,000. If the case goes to court, the average award is $218,000, and nearly 10% of these cases can result in an award of more than $1 million. Legal fees are also quite expensive in these cases. The average cost of defending a wrongful termination or employment case is about $51,975.

Additionally, labor and employment disputes increasingly comprise a large percentage of new class action filings in federal and state courts. It's important to remember that these claims will take valuable time and money to defend. Employers can spend thousands of dollars on legal fees alone, defending the position that there was no negligence in the alleged incident. Even without solid evidence of negligence, some employers end up settling in order to save their public image, avoid having to drag out negotiations, or have the suit bought to litigation.

Law Firms Aren't Immune

Let's look at some of the verdicts involving law firms:

- A California law firm was recently ordered to pay more than $7,000,000 in punitive damages to a secretary who was sexually harassed by her boss, a partner in the firm. The jury found that the firm had not taken appropriate steps to eliminate the harassment.
- A law firm's partners elected a new management committee. At the committee's first meeting, it was decided that a partner, 60 years old, should be demoted to of-counsel status. When the partner asked a committee member why, he was told he was too slow and that his productivity had declined. The former partner sued for $10 million, alleging age discrimination. Case settled for approximately $1.5 million. The law firm paid more than $200,000 in defense expenses.
- Male counsel sued for gender discrimination and retaliation. Matter settled for $1,000,000.
- A minority associate, who was laterally hired by the firm, was assured there would be ample work and opportunity for him in his specialty area. Two years later, the chief rain maker left the firm taking many of the clients with him, and forcing the firm to downsize. The firm offered the associate a transfer to another office. The associate declined and soon after he and the firm ended the employment relationship. Shortly thereafter, the associate filed suit alleging he was constructively discharged, discriminated against in salary and assignments, and that he was not considered for partnership, all due to race discrimination. The suit went to trial and the jury found in favor of the plaintiff on all counts. Although the associate had been employed with the firm for less than two years, the jury awarded him $1 million in compensatory damages and $1.5 million in punitive damages. After the case was reversed and remanded, it was settled for an undisclosed amount prior to a second trial.

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April

April 11 — OCR Audits: An Inside Look. Noon-hour webinar sponsored by the Health Care Law Section. Must register by April 8. 1 credit.

April 12 — New Lawyers Section Annual CLE. UM School of Law, Missoula. For lawyers within first 10 years of practice. To register, please email Erica Grinde, NLS President, at erica@bkbh.com. She will provide payment information upon receipt of your email. 4.5/1 SAMI/0.5 Ethics

April 19 — Annual Bench-Bar Conference. Holiday Inn, Bozeman. Sponsored by the Judicial Relations Committee and CLE Institute. 7.50/.50 CLE/Ethics credits

April 23 — Child Abuse & Neglect Issues. Sponsored by Family Law Section. 1 credit/hour noon teleconference.

April 26 — Bankruptcy 101. Hampton Inn, Great Falls. Sponsored by the CLE Institute. 7 CLE/1 Ethics.

May

May 3 — Family Law: Sometimes the Numbers Matter. Holiday Inn, Missoula. Sponsored by the Family Law Section and CLE Institute. 6 CLE/1.5 Ethics.

May 10 — Cybersleuth's Guide to the Internet. Back by popular demand, nationally recognized authors and speakers on internet legal research, Carole Levitt and Mark Rosch, return to Montana. This CLE, with updates, includes Strategies for Discovery, Trial Preparation and how to Successfully Complete Transactions, including Investigative Research Strategies for the Legal Professional. 6.00 CLE credits.

June

June 14 — New Lawyers' Workshop and Road Show. In Billings. Sponsored by the Professionalism Committee. Workshop free to new admitees. Approximately 3 ethics.

July

July 25-26 — Annual Bankruptcy Section CLE. Fairmont Hot Springs Resort. Sponsored by the State Bar's Bankruptcy Section, approximately 10 CLE credits.

September

Sept. 19-20 — State Bar's Annual Meeting. Colonial Red Lion Hotel, Helena. Sponsored by the State Bar's Professionalism Committee. Approximately 10 CLE credits.

October

Oct. 4 — Women's Law Section CLE. Chico Hot Springs Spa & Resort. Credits pending.
Oct. 11 — Arbitration. Sponsored by the Dispute Resolution Committee. Credits pending.

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Ethics/SAMI
- SAMI - Dependency Warning Signs | Jan. 2012
- SAMI - Is It Time to Retire? | Jan. 2012
- SAMI Smorgasbord | April 2012
- SAMI - Ethical Duties and the Problem of Attorney Impairment | April 2012
- Ethics and Elder Law | Jan. 2013
- SAMI - Understanding Behavioral Addictions in the Legal Professional | Feb. 2013
- SAMI - The Aging Lawyer | March 2013
- All Ethics, Nothing But Ethics | March 2013 (pending)

Family Law
- Drafting Family Law Briefs to the Montana Supreme Court | Oct. 2011
- How NOT to Mess Up Children During a Divorce Proceeding | Jan. 2012
- Settlement Conference Dos and Don'ts | Feb. 2012
- Facilitating Co-Parent Communication with OurfamilyWizard.com | June 2012
- Social Networking | Nov. 2012
- Income, Estate, & Gift Tax Consequences Of Divorce | Jan. 2013
- Hendershott v. Westphal, 2011 MT 73 | Feb. 2013 (pending)
- Point of Transformation: Divorce | March 2013 (pending)

Government
- Recurring Issues in the Defense of Cities and Counties | March 2012

Probate and Estate Planning
- Probate Update | Dec. 2011

Law Office Practice and Management
- Online Resources for Lawyers | Feb. 2012
- "Microsoft Office 365" - Tips and Tricks | Feb. 2013 (pending)

Civil
- Electronically Stored Information - Montana Rules of Civil Procedure | March 2012

Labor and Employment
- Contested Case Procedures Before the Department of Labor and Industry | March 2012

Rules and Policy
- Rules Update - Bankruptcy Court Local Rules | Feb. 2011
- Rules Update - Federal Rules of Civil Procedure | Feb. 2011
- Rules Update - Montana Rules of Civil Procedure Revisions | Feb. 2011
- Rules Update - New Federal Pleading Standard | Feb. 2011
- Rules Update - Practicing Under Revised Montana Rules of Civil Procedure | Feb. 2011
- Rules Update - Revisions to Rules for lawyer Disciplinary Enforcement | Feb. 2011
- Rules Update -Water Law Adjudication Update | Feb. 2011
- Rules Update -Workers' Comp Court | Feb. 2011

Appellate Practice and Procedure
- Appellate Practice Tips: Ground Zero | Feb. 2012
- Appellate Practice Tips: Brief Writing and Oral Argument | March 2012

State Bar Legal Publications

To order and pay by credit card, please visit the bookstore at *www.montanabar.org*.

2012 Annual Meeting Hot Topics
326 pages, limited number of spiral bound notebooks. $35. Updates on current legal hot topics: employment law, criminal law prosecution & defense, consumer law, SAMI, patent law and patent troll litigation, federal tax law, tribal law, *Citizens United,* technology issues, civil procedure and electronically stored information, appellate practice tips, immigration law, elder law and Medicaid for the nursing home, legal issues in and around the Bakken, MT Supreme Court summary, family law.

Montana Real Estate Transactions
- 2010, 360 pages, book plus 2011 supplement CD $205.
- 2011 Supplement, 82 pages, $25 for CD.

Montana Civil Pleading & Practice Formbook.
2012, 489 pages, book plus all forms in editable format on CD, $225

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

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

Criminal Jury Instructions
2010 edition
650 pages, on editable CD $130

Public Discipline Under MT Rules of Professional Conduct
2010, 192 pages annotated
CD $35

EPLI, from previous page

The Question

Could your firm survive an employee claim? The first line of defense is education of all employees (whether lawyer or non-lawyer) regarding proper interaction in the work-place. The firm should have education at least annually on these practices and procedures. Additionally, the firm must be vigilant in having policies and procedures to address these issues and should engage employment counsel to help keep the policies and the management current on employment law issues. Beyond these important steps, if a claim does arise, the final line of defense is EPLI coverage. The questions to ask yourself are, "What are our risks from an employment perspective?" and "Could our firm financially survive an employment claim, even if it were just the defense costs alone?" As employment claims continue to increase, so does the likelihood that many small and mid-size firms will have to defend themselves from such a claim. An EPLI policy will help give you the peace of mind that your firm could survive a claim.

General Coverage Information

EPLI provides protection for an employer against claims made by employees, former employees, or potential employees. It covers discrimination (age, sex, race, disability, etc.), wrongful termination of employment, sexual harassment, retaliation, wage and hour disputes and other employment-related allegations such as defamation, negligent hiring, supervision, promotion, etc. EPLI policies generally operate on a claims made basis. This means that a claim is covered under an EPLI policy only if the incident related to the claim happens during the policy's period of coverage, and only if the claim is made during the period. The limits of an EPLI policy are typically eroded by any defense costs.

What's Not Covered

Most, if not all, EPLI policies have a list of exclusions specifying what the policies won't cover. These usually include risks covered by other types of policies. For example, most EPLI policies don't offer coverage for bodily injury or property damage because these claims are covered by commercial general liability policies. Other policy exclusions include bans on coverage for intentional conduct, such as assault or battery or criminal conduct. EPLI policies also frequently exclude coverage for punitive damages and fines or penalties. Also, many EPLI policies include a "hammer clause." This clause gives the insurer the right to tell the insured that it should allow the insurer to settle the case for a specified amount. If the insured refuses to settle and goes to court and loses, the insurer is off the hook for having to pay. As always, you should carefully review any policy you are considering and talk to a knowledgeable insurance professional about the product.

Disclaimer: *This risk management information is provided by ALPS as general information only; it is not intended to be used or relied on as legal advice. Also, as insurance products can vary greatly, the reader should always engage in their own research and evaluation of products and services.*

Wendy F. Inge, *Esq. has worked in the lawyer's professional malpractice industry for over 18 years. Prior to coordinating risk management services, she handled lawyers' legal malpractice claims for eight years. She regularly lectures throughout the country and writes about ethics issues, malpractice prevention, and law office management for attorneys and their paralegal staff.*

Additional Sources:

- ALPS Live Webinar, May 22, 2013, Fifty Ways to be Sued by Your Employees *alps.inreachce.com*
- EEOC Charge Statistics FY 1997 – FY 2012 *http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm*
- Business & Legal Reports, Inc. HR and Employment Law News, "EEOC Secured $404 Million in Monetary Benefits in FY 2010", January 13, 2011 *http://hr.blr.com/HR-news/HR-Administration/Employment-Laws-Regulations/EEOC-Secured-404-M-in-Monetary-Benefits-from-Emplo*
- Seventh Annual Workplace Class Action Litigation Report, Seyfarth Shaw LLP; Department of Labor *http://www.seyfarth.com/publications/Seventh-Annual-Workplace-Class-Action*
- Chubb Public Risk Survey *http://www.chubb.com/businesses/csi/chubb12192.pdf*

Obituaries

Matt Putzier

Dear Friends and Colleagues,

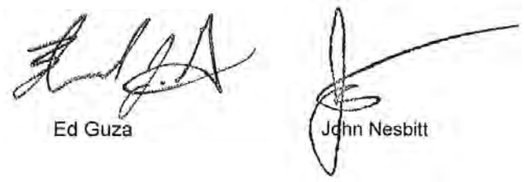
We write you all with heavy hearts. On March 10, 2013, we lost one of the great ones, Matt Putzier. Matt was a partner at Guza, Nesbitt & Putzier, PLLC, in Bozeman and a friend to so many. It was always such a source of pride to have him as a friend and law partner. If Matt was brought up in conversation, those that knew him would inevitably respond: "Matt is great!" or "Matt is so funny…nice, generous, kind, witty…" The list of positive attributes to describe our friend Matt is endless. Matt's wit and random "Mattisms" were the source of many a fit of laughter during an otherwise mundane conversation or meeting. Matt's unique perspective and clever wit will be forever missed.

Matt was a well-respected member of the legal community. Matt's clients and co-workers became Matt's friends. Matt's friends became his clients. Matt helped his friends and clients in a caring and professional manner. His absence is a loss to all that knew him and leaves the Montana Bar missing a member who exuded the attributes that we all strive for.

Matt was not defined by any one aspect of his life. Matt was a devoted father, devoted skier, devoted deadhead in addition to being devoted to his work. It is his devotion to others, his quick wit and caring soul that explains the pain shared by his partners and so many people in our community.

Matt left behind his wife Jessica and two young children, Max and Zane. In lieu of flowers, please consider sending whatever donation you can to First Security Bank, "TMZC Putzier College Fund," 208 E. Main St., Bozeman, MT 59715. More importantly, keep Matt alive in your hearts and remember him for what he was, a caring, loving person and lawyer.

Warm regards,



Ed Guza John Nesbitt

Vivian Marie (Beaudoin)

Vivian "Vee" Marie (Beaudion) died peacefully on March 7th in Butte, Montana at the age of 61.

Vivian grew up in Plainfield, Massachusetts and graduated from high school there in 1969. She married Dennis Beaudoin in 1969 and they had one daughter, Josie.

Dennis and Vivian divorced in 1974. Vivian and Josie moved to Helena, Montana, where Vivian obtained employment at Gough, Booth, Shanahan and Johnson as a legal secretary. She then moved to Missoula where she attended the University of Montana for her undergraduate and law decrees, graduating from the University of Montana School of Law in 1982.

While attending UM, she worked for Bruce Barrett at the Associated Students of the University of Montana Legal Services office starting as a legal secretary, progressing to office manager and eventually serving as a legal intern. She was a Reginald Heber Smith fellow with Montana Legal Services in Helena, she then worked in the MLSA Great Falls office. She left MLSA in 1984 and was in private practice in Missoula for several years. She returned to MLSA in 1989 working in Havre for one year before she returned to the Helena office where she was the Managing Attorney.

In 1996, she and Russ LaVigne established People's Law Center, a non profit legal entity to represent individuals seeking Social Security Disability benefits. She left PLC in 2002 to return to Plainfield, Mass and remarried Dennis Beaudoin. Dennis died in 2011 and Vivian returned to Butte, Montana where she lived with her daughter.

Vivian is survived by her daughter Josie of Butte, her sisters, Donna Devine of Butte and Joyce Morrisson of New York, her brothers James Devine of Florida and Leon Devine of Colraine, Massachusetts, and her beloved nieces and nephews.

Vivian had many interests outside the law including writing, especially poetry, and performing live music. She had a terrific intellect (she was a member of MENSA), a keen wit and an innate sense of justice. She cared for her clients and served them wisely and well. She was a great friend and colleague. She has been cremated and a memorial service will be held in the summer of 2013 in Butte. Her family is requesting that memorial contributions be made to MASPAL P.O. Box 606, Bonner, MT 59823

CLASSIFIEDS POLICY

All ads (up to 50 words) have a minimum charge of $60. Over 50 words, the ads are charged at $1.20 per word. Ads that are published at the charges above in The Montana Lawyer magazine run free of charge on this web site. Ads running only on the website will be charged at the magazine rate. The ads will run through one issue of the Montana Lawyer, unless we are notified that the ad should run for more issues. A billing address must accompany all ads. Email Pete Nowakowski at pnowakowski@montanabar.org or call him at (406) 447-2200 for more information.

ATTORNEY POSITIONS

STAFF ATTORNEY: Crow Tribe of Indians, Office of Legal Counsel – Crow Executive Branch. Full-time in-house attorney, Crow Agency, Montana. Three-plus years experience preferred. Minimum qualifications include: admitted to practice law in the State of Montana (or willing to take MT bar if not licensed in MT), strong research and writing skills, respect for and familiarity with Federal Indian Law and Crow Tribal Law. General and flexible practice areas may include, but are not limited to: land and environmental issues, transportation, housing, water, contract review, and litigation. Salary depends on experience. Position open until filled. Preference will be given to qualified Crow Tribal members and members of federally-recognized Indian tribes. Please submit cover letter, resume, writing sample, and references to: Office of Legal Counsel, Crow Tribe, Attn: Melissa Holds the Enemy, P.O. Box 340, Crow Agency, MT 59022. E-mail mholdsenemy@crownations.net for more information. All applications held confidential.

ASSOCIATE ATTORNEY: Established Butte, Montana firm is seeking an associate attorney to work with retiring tax, estate and transactional attorney to take over practice. Ideal candidate has at least 3 to 5 years of experience in related work or an LLM in tax or is a CPA. New graduates will be considered based on prior experience and education. Salary negotiable based on experience. Excellent benefits. Contact Marshal Mickelson at Corette Black Carlson & Mickelson at 406-782-5800, P.O. Box 509 Butte, MT 59703.

ASSOCIATE ATTORNEY: Holland & Hart 's growing Litigation group is seeking an associate to join its team in its Billings office. Holland & Hart is the largest law firm based in the Mountain West with more than 400 lawyers in 15 offices, including 16 attorneys in Billings. Successful candidates will have one to three years experience with complex litigation matters, be team oriented with strong written and oral communication skills, and have professional recommendations. An excellent academic record is required. Holland & Hart LLP is an Equal Opportunity Employer. Send resume, cover letter and transcript to Maggie Stephenson, Recruitment Coordinator, e-mail mastephenson@hollandhart.com. No unsolicited resumes from search firms, please. No phone calls, please.

ASSOCIATE ATTORNEY: AV Rated Missoula law firm is seeking an associate attorney to practice in civil litigation. Please send or email a letter of application, resume and references to: Boone Karlberg P.C. Attn: Legal Administrator, P.O. Box 9199 Missoula, MT 59807. Or email kjenkins@boonekarlberg.com. All inquiries strictly confidential.

LITIGATION ATTORNEYS: Hall & Evans, L.L.C., a prominent and well respected law firm headquartered in Denver, Colorado is seeking experienced litigation attorneys to join our busy Billings, MT practice. Candidates must have at least 3 years of litigation experience.

Qualified candidates should possess the following qualifications, skills and experience:
- Currently licensed to practice law in the State of Montana
- A strong work ethic and proven case management skills
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- Trial experience a plus

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How to Apply: Please email your cover letter, complete resume, salary history, salary requirements, personal and professional references, and a writing sample to employment@hallevans.com or by mail to: Hall & Evans, LLC, Attn: Human Resources, 1125 17th, Street, Suite 600, Denver, CO 80202-2037. We are an Equal Opportunity Employer

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EASTERN MONTANA DRUG PROSECUTION COORDINATOR: Successful candidate will provide assistance for prosecutors and law enforcement to promote enforcement, prosecution and conviction of drug offenders. Basic qualifications include a license to practice law in Montana or expect to be licensed within six months from date of hire; knowledge of sources of MT law and willingness to travel. Will research drug prosecution law; assist in the preparation of briefs and other pleadings; inform partners of latest developments in drug prosecutions with newsletters, e-mail and cloud based file sharing. Salary for this position $70,000 per year. This two year position will be funded by a grant provided by the Montana Board of Crime Control through the Office of Justice Programs, USDOJ. Candidates may apply online at jobs.mt.gov or letters of application along with current resume may be mailed or emailed to:

Kathy Granger
Attn: DPC Applications
238 2nd Avenue South
Glasgow, MT 59230

kgranger@nemont.net

Applications will be accepted through April 15, 2013

MEDIATION

AVAILABLE FOR MEDIATIONS: Brent Cromley, of counsel to Moulton Bellingham PC, Billings. 406-248-7731.

ATTORNEY SUPPORT/RESEARCH/WRITING

COMPLICATED CASE? I can help you sort through issues, design a strategy, and write excellent briefs, at either the trial or appellate level. 17+ years experience in state and federal courts, including 5 years teaching at UM Law School and 1 year clerking for Hon. D.W. Molloy. Let me help you help your clients. Beth Brennan, Brennan Law & Mediation, (406) 240-0145, babrennan@gmail.com.

CONSERVE YOUR ENERGY for your clients and opposing counsel. I draft concise, convincing trial or appellate briefs, or edit your work. Well-versed in Montana tort law; two decades of experience in bankruptcy matters; a quick study in other disciplines. UM Journalism School (honors); Boston College Law School (high honors). Negotiable hourly or flat rates. Excellent local references. www.denevilegal.com. (406) 541-0416

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PARALEGALS/LEGAL ASSISTANTS

PARALEGAL: Missoula, MT – Small firm seeks full-time, experienced criminal paralegal. Must be organized, have good communication skills, and be a team player. Salary DOE. Please submit a cover letter and resume with references by email to: lklaudt@paulryanlaw.com

PROFESSIONAL POSITIONS

The University of Montana

DIRECTOR OF EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION: The University of Montana welcomes applications for the cabinet level position Director of Equal Opportunity and Affirmative Action. The person in this role will serve as The University of Montana's senior Equal Opportunity and Affirmative Action Officer and Discrimination Grievance Officer, and will support all EO/AA activities on the Missoula and affiliated UM campuses in Butte, Dillon, and Helena. Salary starts at $68,000 but is commensurate with skills and experience. Additional information about the EO/AA Office can be found at: www.umt.edu/EO. TO APPLY: Visit http://umjobs.silkroad.com to view full job description, qualifications, and apply online for full consideration. Review of applications begins on April 8, 2013. ADA/EOE/AA/Veteran's Preference Employer

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MISSOULA OFFICE SPACE: Spend your time building your practice rather than building your office. Looking for affordable office space without large upfront costs? Private offices with natural light and mountain views available with easy access to W Broadway and Reserve in Missoula. Kitchen and conference room on premises. $500-750/mo Call 541-2860 ext 1024

SOLO LAW PRACTICE FOR SALE: Seeley Lake, MT. Includes beautiful office furnishings , computers (w/ server), high capacity copier, phones, office supplies. Please e-mail cathy@kahnlelaw.com or call (406) 677-8500 for photos and details. Office sharing or other arrangements considered.

BOZEMAN SPACE: Bozeman Law Office Space for Rent: Professional law office, recently renovated on Main Street close to downtown. Two offices available with common conference room, reception area, storage, kitchenette and off street parking. Utilities and internet included. Contact Bruce at 922-2222 or bbrown@brownlawassociates.com if interested.

MISSOULA OFFICE: One or two professional office for lease in historic building in downtown area. Share use of reception area; two conference rooms; copy and fax machines; library; secretarial space; basement storage; locker room with shower; and private yard. Call Mark Connell, Connell Law Firm at (406) 327-1517.

OFFICE/MISC.

FOR SALE IN BOZEMAN (posted 3/12): 8' conference table, 3 legal size three drawer file cabinets with Formica tops, book cases, Sharp copier, Montana Reports Vols 1-259, Montana Law Review 1-current, Moore's Manual, Weinstein's Evidence, Weinstein's Evidence Manual, RCM 21, 47, & 35. Montana Constitutional Convention and many treatises. Greg Morgan 406-587-1895

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CONSULTANTS & EXPERTS

BAD FAITH AND INSURANCE COVERAGE EXPERT WITNESS: David E. Bauer, JD (U of M 1980), CPCU. 20 + years as in-house counsel for major property and casualty insurer. 406-671-0885.

BANKING EXPERT: 34 years banking experience. Expert banking services including documentation review, workout negotiation assistance, settlement assistance, credit restructure, expert witness, preparation and/or evaluation of borrowers' and lenders' positions. Expert testimony provided for depositions and trials. Attorney references provided upon request. Michael F. Richards, Bozeman MT (406) 581-8797; mike@mrichardsconsulting.com.

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INVESTIGATIONS & IMMIGRATION CONSULTING: 37 years investigative experience with the U.S. Immigration Service, INTERPOL, and as a privvate investigator. President of the Montana P.I. Association. Criminal fraud, background, loss prevention, domestic, worker's compensation, discrimination/sexual harassment, asset location, real estate, surveillance, record searches, and immigration consulting. Donald M. Whitney, Orion International Corp., P.O. Box 9658, Helena MT 59604. (406) 458-8796 / 7.

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EVICTIONS LAWYER: We do hundreds of evictions statewide. Send your landlord clients to us. We'll respect your "ownership" of their other business. Call for prices. Hess-Homeier Law Firm, (406) 549-9611, ted@montanaevictions.com.
See website at www.montanaevictions.com.

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Would you like to boost your income while serving low- and moderate-income Montanans?

We invite you to participate in the Modest Means program {which the State Bar sponsors}.
If you aren't familiar with Modest Means, it's a reduced-fee civil representation program. When Montana Legal Services is unable to serve a client due to a conflict of interest, a lack of available assistance, or if client income is slightly above Montana Legal Services Association guidelines, they refer that person to the State Bar. We will then refer them to attorneys like you.

What are the benefits of joining Modest Means?

While you are not required to accept a particular case, there are certainly benefits!
You are covered by the Montana Legal Services malpractice insurance, will receive recognition in the Montana Lawyer and, when you spend 50 hours on Modest Means and / or Pro Bono work, you will receive a free CLE certificate entitling you to attend any State Bar sponsored CLE. State Bar Bookstore Law Manuals are available to you at a discount and attorney mentors can be provided. If you're unfamiliar with a particular type of case, Modest Means can provide you with an experienced attorney mentor to help you expand your knowledge.

Questions?

Please email: Kathie Lynch at *klynch@montanabar.org*. You can also call us at 442-7660.

Back in the saddle again

By John C. Schulte

It has been almost five years since I completed my term as President of the SBM. My last year on the Executive Committee as Immediate Past President was largely anticlimactic compared to my year as President, so I often found myself humming the Roy Rogers and Dale Evans song "Happy Trails" as I was turned out to pasture. But now I find myself humming "Back in the Saddle Again." I can hear Gene Autry singing as I contemplate my new upcoming foray into Bar service.

At the American Bar Association February 2013 Midyear Meeting in Dallas, I was formally nominated to be a member of the ABA Board of Governors. While I do not assume my duties as a Governor until the close of the ABA Annual Meeting this August in San Francisco, I begin my orientation and will attend and participate (without voting rights) in the June BOG meeting in Chicago and the August BOG meeting in San Francisco.

I will be the Governor for District 13, which comprises the Montana, Oregon, Alaska, and the territory of Puerto Rico. The Governorship for this District position rotates equally between those states and territory. The term is for 3 years, so another Governor from Montana will not serve District 13 for nine years after my term concludes in August, 2016. I am honored and humbled by the nomination and I sincerely thank all of the Montana ABA members who supported me and signed my Nomination Petition.

Montana is indeed fortunate to have tremendous representation and leadership in the governance of the ABA.

The ABA BOG has 38 members and generally meets 4 times a year. In addition to the BOG meetings, I will also be assigned liaison duties with several Committees or Section Counsels of the ABA, so it will certainly be a busy three years.

As stated on the ABA website, the BOG "…has the authority to act and speak for the ABA, consistent with previous action of the House of Delegates, when the House is not in session." Additionally, the BOG "…oversees the general operation of the ABA and develops specific plans of action." I have no doubt that my learning curve will be steep, but I am excited to have the opportunity to have an impact on the local, state, national, and international issues affecting the practice of law.

Montana is indeed fortunate to have tremendous representation and leadership in the governance of the ABA. I had the privilege in Dallas of watching our own Bob Carlson, of Butte's Corette, Black, Carlson and Mickelson, conduct the 560 member House of Delegates meeting for his first time as Chair. The only other Montana lawyer to reach such a high level of leadership in the ABA is the revered William J. Jameson, who served as President of the ABA from 1953 to 1954. Who knows what may be in store for Bob after he serves his two year term as Chair of the House of Delegates.

Montana's ABA Delegate to the House of Delegates is Damon Gannett of Billings. For the past 10 years or so, Damon served as the State Bar Delegate to the House of Delegates, so he knows his way around an ABA meeting. Damon was kind enough to take new State Bar Delegate Shane Vannatta, of Missoula's Worden Thane, and me under his wing at the Dallas Midyear Meeting. He effectively guided us to various meetings and events that would likely be the most educational and beneficial for us as rookies. I received a significant leg up on my learning curve as a result of Damon's tutelage.

At the December meeting of the SBOM Board of Trustees, Shane was selected to complete Damon's term as the State Bar Delegate. The Dallas Midyear Meeting was Shane's first House of Delegates session, but he was immediately engaged and comfortable in his new role. There can be no doubt that Shane will be an excellent and effective representative of the SBOM with the ABA.

The ABA is a voluntary professional organization, one of the largest in the world, with about 400,000 members. Montana lawyers who are ABA members understand its value to them personally, whether it is the member benefits, services, or educational and other programs provided. I am particularly drawn to the ABA's mission to improve the legal profession. The ABA's commitment to advance the rule of law, not only nationally, but worldwide, is a strong and positive force in our society. The ABA's logo has these words that to me say it all: "Defending Liberty- Pursuing Justice." So, if you are not an ABA member, then join. Become a part of this professional organization that does great things.

As I climb back in the saddle again, I am champing at the bit. That is probably a result of being out to pasture for so long. I am looking forward to my new role in service to the Bar and the legal profession.

***John Schulte** was State Bar president in 2007-2008*

MONTANA LAWYER
State Bar of Montana

State Bar of Montana
P.O. Box 577
Helena MT 59624