MONTANA LAWYER

State Bar of Montana

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Top eight challenges facing the State Bar

The State Bar is at a pivotal time in its 40 year history. The Board of Trustees met in June to discuss developing a strategic plan to guide the State Bar over the next 3-5 years. As President-Elect, I was tasked with developing the challenges we need to address in that plan. To assist in this task, I invited all local bar presidents, new lawyer leadership, law school leaders, law school administrators, leaders of the Montana Trial Lawyers and Montana Defense attorneys, Montana's ABA delegation, management from Montana Legal Services, State Bar staff, and, section and committee chairs.

I knew that facilitation of this gathering would be vital to its success. I was fortunate to obtain the assistance of Professor Martin Burke. There was lively discussion, and, while everyone had different perspectives and diverse interests, there was a sincere interest and concern on everyone's part about the future of our profession. As part of the meeting, the leaders were asked to identify the top challenges we face. The top eight challenges were as follows:

1. Prioritizing Bar Services and Programs

The State Bar reserve funds are dwindling. How can we continue to provide valuable services to our membership and maintain financial solvency? We want to continue to meet the needs of our members and the public. Our members have often become resistant to bar programs because of the cost and questionable relevancy. Many members already complain that their dues are too high. A balanced budget is essential.

2. Pro Se Litigants

There continues to be a growing number of self-represented parties appearing before the courts. Some of these individuals are indigent, others are not. The growing number of pro se litigants does not reflect well on the State Bar and is burdening the courts who are already struggling with delays.

3. The Speed (or Lack Thereof) of Civil Litigation

There is a growing concern regarding delays in district courts. It is becoming more difficult to have a hearing or other proceedings scheduled in a timely manner. In many cases, it is taking the judge a year or more to make a ruling or even set a hearing. There is an inconsistency amongst the different districts with this issue. As the saying goes: justice delayed is justice denied. Delays create a negative public perception of the courts and the profession. There is a negative impact on the economy. The ability to have timely resolutions of legal issues is integral to maintain the rule of law.

4. Civics Education

There is a public ignorance of the legal system and legal procedures, which results in lack of respect for our profession. Communication is the strategy to deal with this issue. We need to utilize the State Bar's web site, local media, the Montana Library Association, the schools, legislative counsel, etc., to provide information and education regarding the legal system.

5. Aging Demographics

Fifty percent of the attorneys in our state are over fifty years of age. We have a moral obligation to take care of our own. Older attorneys expect and deserve support services from the bar. In smaller communities with few attorneys, who will provide legal services when these individuals retire? With fewer attorneys, there will be a decline in bar dues and revenue.

6. End of Practice

In addition to fifty percent of our membership being over fifty years of age, a high percentage of Montana lawyers are sole practitioners. Not only do we need to protect and support the aging attorney, we also have an obligation to protect clients and the perception of the bar. Before emergent situations arise, sole practitioners must have a plan in place.

7. The Great Technology Divide

There is a resistance in our profession to technology changes, particularly with our aging demographics. Technology presents competency issues. Confidentiality is a major concern. There is a lack of technological competency of some of our judicial members. Communication has become impersonal and can cause a decline in professionalism. These problems are not going away. If anything, they will increase.

8. Making the State Bar Relevant

My friend, Bobbi Anner-Hughes, President of the Montana Trial Lawyers, attended the Strategic Planning Meeting. When I asked Bobbi what she found to be beneficial, she summed it up in one sentence, "The most important thing I am taking away from this meeting is that it is critical that we are self-regulated." Bingo! If we do not regulate ourselves though an organized bar, the legislature will do it for us. Addressing the challenges that the profession faces requires a coordinated effort that can only be mounted by an organized bar. We need to continue to meet the concerns and needs of our membership, from the time they are admitted to the time they retire.

Conclusion

We welcome your input as we move forward in developing the new strategic plan. Please contact a member of the Board of Trustees or Executive Committee with your thoughts and suggestions. Better yet – consider becoming involved in our bar association and be a part of the solution

Nygren accepts new position; firm announces name change

Chris Nygren, a shareholder with the Missoula firm of Milodragovich, Dale, Steinbrenner, and Nygren, P.C., has accepted a position as the Assistant General Counsel for Barnard Construction Companies headquartered in Bozeman. The new firm name will be Milodragovich, Dale, Steinbrenner, P.C.

Cossitt a contributing editor for consumer bankruptcy book

The King Bankruptcy Practice Series of the Morgan King Company recently published "Cracking the Means Test in Consumer Bankruptcy Cases" by Catherine E. Vance and Morgan D. King. James H. Cossitt, a bankruptcy specialist in Kalispell, Montana, is one of the contributing editors of the book.

A graduate of Iowa State University, Mr. Cossitt received his law degree from the University of Iowa College of Law in 1986. He became Board Certified in Consumer Bankruptcy in 1995 and Business Bankruptcy in 2005, by the American Board of Certification. After practicing law and serving as a bankruptcy trustee in central Iowa, he established a private practice in Kalispell, Montana, in 1999. He specializes in bankruptcy, debtor / creditor and commercial law.

Silverman leaves Revenue, opens law office

Helena attorney Joel E. Silverman recently left the Montana Department of Revenue, after five and a half years of practicing liquor and tax litigation, and has opened his own law office. Mr. Silverman specializes in estate planning, tax, transactions, business, and liquor law. He may be contacted at P.O. Box 4423, Helena, MT 59604, (406) 449-4TAX (829), joel@mttaxlaw.com, www.mttaxlaw.com.

Olney joins Helena firm


Olney

Kelton Olney has recently joined the law firm of Luxan & Murfitt, PLLP in Helena. A native of Vermont, Kelton has lived in Montana since 1999. He is a graduate of the University of Vermont and the University of Montana School of Law. He has been practicing law in Missoula and Helena since 2002. At Luxan & Murfitt, PLLP, Kelton's practice will focus on health care law, banking law, general business law, and civil litigation.

Keiser joins Bozeman firm

Kasting, Kauffman & Mersen, P.C. Attorneys At Law, are pleased to announce that Kathryn E. Keiser, Esq. has joined the firm as an associate attorney. Ms. Keiser received her bachelor's degree

MEMBER NEWS, Page 6

Legislative committee to solicit testimony on substitution of District Court judges

On September 6, 2012, the Law and Justice Interim Committee, a statutory interim committee of the Montana Legislature, will hold a hearing on the Montana Supreme Court rule governing substitution of District Court judges. The rule appears in the Montana Code Annotated as section 3-1-804, MCA.

Pursuant to Article VII, section 2(3), of the Montana Constitution, the Legislature may disapprove a rule of procedure adopted by the Montana Supreme Court in either of the two legislative sessions following adoption of the rule.

The purpose of the September hearing is to solicit testimony on whether or not the rule governing substitution of District Court judges should be disapproved.

The hearing will begin at 10:15 a.m. in room 102 of the State Capitol in Helena. The hearing has been requested by representatives of the Montana Judges Association.

Interested persons may contact the Committee staff, Dave Bohyer, at (406) 444-3064, with any questions."

Member News

from page 5

from Montana State University - Bozeman with highest honors and her law degree from the University of Montana School of Law. Prior to joining Kasting, Kauffman & Mersen, P.C., Ms. Keiser was the Law Clerk to the Honorable Russell Fagg, District Court Judge in Yellowstone County. She will be assisting the firm in all aspects of its practice.

Six attorneys from Billings firm named Super Lawyers

Bender

Six Holland & Hart Billings attorneys have been named to the 2012 list of Mountain States Super Lawyers. The attorneys and their practice areas are: Jeanne Matthews Bender in Employment & Labor, Charles Hingle in Bankruptcy & Creditor/Debtor Rights, Laurence Petersen in Mergers & Acquisitions and Robert L. Sterup, Jr. in Litigation. Shane Coleman and Jason Ritchie were listed as Rising Stars in Intellectual Property and Employment & Labor, respectively. Jeanne Matthews Bender was also recognized with the distinct honor of being listed among the Top 50 Women Mountain States Super Lawyers.

Chambers USA honors six attorneys, three practice areas of Billings firm

Six Holland & Hart attorneys and three of the firm's practice areas in the Billings office, were honored by Chambers USA for 2012: Jeanne Matthews Bender and Elizabeth Nedrow in Labor & Employment; Charles Hingle and Larry Petersen in Corporate/M&A; and Scott Mitchell in Natural Resources & Environment. Jason Ritchie was also recognized as an Associate to Watch in Labor & Employment. Holland & Hart's Billings office was also recognized for its strong practice groups in Corporate/M&A, Labor & Employment, and Natural Resources & Environment. Chambers USA ranks the leading firms and lawyers in an extensive range of practice areas throughout America.

Drummond elected president of National Association of Chapter 13 Trustees

Great Falls Attorney Bob Drummond was recently elected president of the National Association of Chapter 13 Trustees. Drummond has been the only Chapter 13 Trustee for the District of Montana since 1992. The National Association of Chapter 13 Trustees is composed of over 1000 Bankruptcy and Insolvency Professionals from around the country.

Shaffer, Stepans, Meyer announce new firm

Members Ryan Shaffer and Robert Stepans, together with Richard Meyer, are pleased to announce the formation of Meyer, Shaffer & Stepans, PLLP. The firm has offices in Jackson, WY; Missoula, MT; and Sidney, MT. Members of the firm are admitted in Arizona, Colorado, Montana, Utah and Wyoming.

The firm is available for consultation and association in matters of litigation.

Jewell accepts new position in Fresno, Calif.

Missoula attorney Monte Jewell accepted a position as Litigation and Advocacy Director for Central California Legal Services. Monte will work from the Fresno office of CCLS at 2115 Kern Street, Suite 1, Fresno, California 93721, (559) 570-1200. He invites his Montana colleagues and friends to please remain in touch!

Justice Foundation approves $185,000 in grants

The Montana Justice Foundation annually awards grants to nonprofit organizations that provide civil legal services to eligible persons; promote knowledge and awareness of the law; and/or facilitate the effective administration of justice. In May 2012, MJF approved $185,000 in operating grant awards to eleven organizations for the award year ending June 30, 2013. Since 1986, the MJF has contributed nearly five million dollars to Montana access to justice programs. More information about the grant process, application deadline and descriptions of current grantees is available at *www.mtjustice.org*.

CASA-CAN of Cascade County
$6,000 Operating
Lisa Goff, Executive Director
CASA-CAN provides highly trained volunteer guardians ad litem to speak on behalf of abused and neglected children involved in youth-in-need-of-care cases in the Eighth Judicial District Court.

CASA of Missoula, Inc.
$3,000 Operating
LaNette Diaz, Executive Director
Through independent, trained volunteers, CASA of Missoula provides consistent, long-term advocacy for children who are at risk or have experienced abuse and neglect in Missoula and Mineral counties.

Cascade County Law Clinic
$5,000 Operating
Judith Pylar
The Clinic serves low-income clients in Cascade County through the efforts of a small in-house staff and a roster of local attorneys handling cases on a pro-bono basis. The Clinic accepts family law and guardianship cases, provides limited pro se assistance, and makes referrals for services not available through the Clinic.

Community Dispute Resolution Center of Missoula County
$3,000 Operating
Mary DeNevi, Executive Director
The CDRC educates, empowers, and supports low-income Missoula County community members in creating peaceful and collaborative solutions by providing low and no-cost mediations. Services are provided through the efforts of a part-time coordinator and volunteer board and mediators.

Community Mediation Center
$5,500 Operating for Low-income Family Mediation Program
Connie Campbell, Executive Director
The Center provides quality, affordable dispute resolution services and education using trained, volunteer mediators. The CMC's Low-income Family Mediation Program serves clients in the Eighteenth and Sixth judicial district courts.

Domestic Violence Education & Services (DOVES)
$500 Operating
Jenifer Blumberg, Executive Director
DOVES provides assistance to victims of domestic abuse in Lake County and on the Flathead Indian Reservation with a variety of civil legal needs, ranging from representation at Order of Protection hearings to complex family law, housing, and immigration issues.

Eastern Montana CASA/GAL Inc.
$6,000 Operating
Cherie LeBlanc, Executive Director
Eastern Montana CASA/GAL serves twelve counties in Eastern Montana by providing the Seventh and Sixteenth judicial district courts with trained volunteers to represent the best interest of a child or children in neglect and abuse court proceedings.

HAVEN
$3,000 Operating for Legal Advocacy Program
Kristy McFetridge, Executive Director
Through its Legal Advocacy Program, HAVEN assists victims of domestic or sexual violence in seeking Orders of Protection and provides information, education, and referrals for other civil law matters.

Montana Innocence Project
$1,000 Operating for Innocence Clinic
Jessie McQuillan, Executive Director
MTIP provides legal assistance to indigent Montanans who claim to be wrongfully convicted. Legal assistance is provided through the Innocence Clinic, affiliated with the University of Montana Schools of Law and Journalism. Client services for post-conviction, civil legal matters are provided through a small staff assisted by pro-bono attorneys and student interns.

Montana Legal Services Association
$148,000 Operating
Alison Paul, Executive Director
MLSA provides statewide free legal services to low-income Montanans in the areas of family, housing, and consumer law and public benefits. In addition to direct representation, MLSA provides community legal education, coordination and support of pro bono resources, and legal advice and referrals.

Yellowstone CASA, Inc.
$4,000 Operating
Angela Campbell, Executive Director
Yellowstone CASA trains volunteers to provide a voice for abused and neglected children in the Yellowstone County court system. CASA volunteers promote children's best interests and advocate for safe, permanent homes.

Funding cuts severely affecting legal aid services

The House of Representatives recently voted to cut funding to the Legal Services Corporation (LSC) by $20 million and even threatened to eliminate funding completely.

The decisions made by Congress regarding the LSC have a direct impact on low-income Montanans. The LSC provides grants to 135 legal aid organizations nationwide, including a grant that accounts for more 40% of the Montana Legal Services Association's (MLSA) total budget. In recent years, MLSA has had to lay off fourteen employees from its already small staff as well as eliminate or reduce vital self-help and Helpline programs.

Moreover, in January of 2012 the Federal Reserve announced it would be extending its benchmark interest rate of zero to .25% through the end of 2014. The drastically depressed rates have had a devastating impact on funding for civil legal aid in Montana and throughout the nation. The Montana Interest on Lawyers Trust Accounts (IOLTA) Program provides for a significant portion of legal aid funding. Consequently, the Montana Justice Foundation (MJF), which administers the IOLTA program, has been forced to dramatically reduce grants to local providers over the past five years.

Federal funding cuts for legal aid paired with continued rock bottom interest rates on IOLTAs will have a severe impact on dozens of Montana law clinics, legal aid organizations, pro bono programs, self-help law programs, CASAs, community mediation centers, and domestic violence education and service provider programs. The number of Montanans in need of legal services increases as the economy remains depressed. It is now more important than ever to preserve LSC and MJF supported legal aid programs.

Heather Rogers of Remapping Debate wrote an article in June that illustrates the history of LSC funding cuts and discusses how much money is really needed in order to make access to justice a reality for all Americans. It's titled "The relentless push to bleed Legal Services dry." You can read it at this URL: *http://bit.ly/NSR5Kp*

— Montana Justice Foundation

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

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Bolded names are those being remembered or honored.

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The Montana Justice Foundation works to achieve equal access to justice for all Montanans through effective funding and leadership.

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Court approves Uniform Bar Examination, revision to Rules or Admission, and Rules for Character and Fitness

Summarized from July 3 order AF 11-0244)

IN RE PETITION TO ADOPT UNIFORM BAR EXAMINATION and IN RE THE PETITION AND MEMORANDUM IN SUPPORT OF REVISION OF THE 2005 RULES FOR ADMISSION AND RULES OF PROCEDURE OF THE COMMISSION ON CHARACTER AND FITNESS OF THE SUPREME COURT OF MONTANA

The Montana Supreme Court approved adoption of the Uniform Bar Examination. The Court also approved revision of the 2005 rules for admission and rules of procedure of the Commission on Character and Fitness.

IT IS ORDERED that, beginning with the February 2013 bar examination, the NCBE online character and fitness investigation service will be used in Montana. The fees for that investigation (presently set by the NCBE at $200 for students, $275 for recent law school graduates, and $350 for attorneys) will be paid directly to the NCBE. (This provision was adopted unanimously.)

IT IS FURTHER ORDERED that, beginning with the July 2013 Montana bar examination, Montana will use the Uniform Bar Examination (UBE), consisting of the Multistate Bar Examination (MBE), the Multistate Performance Test (MPT), and the Multistate Essay Exam (MEE). The Board of Bar Examiners is directed to administer the examination and to transfer and accept UBE scores in accordance with the policies governing the UBE. (This provision was adopted unanimously.)

In addition, before being admitted to the Montana bar, all applicants will be required to personally participate in a Montana law seminar component to be developed by the Board of Bar Examiners, the CLE Commission, and the CLE Institute, and approved by the Court.(This provision was adopted 5-2, with Chief Justice McGrath and Justice Morris dissenting.)

The requirement of successful passage of the Multistate Professional Responsibility Examination (MPRE) shall remain in effect.

IT IS FURTHER ORDERED that, beginning with the July 2013 Montana bar examination, a Montana bar applicant's score on the UBE earned in another jurisdiction may be accepted and considered valid for a period of three years from when the score was earned. To be accepted in Montana, UBE scores must be certified by the National Conference of Bar Examiners to the Montana Bar Admissions Administrator. (This provision was adopted 5-2, with Justices Wheat and Morris dissenting.)

IT IS FURTHER ORDERED that, beginning with the July 2013 Montana bar examination, the minimum passing combined scaled score on the Montana bar examination is set at 270 on a 400-point scale. (This provision was adopted 5-2, with Chief Justice McGrath and Justice Morris dissenting.)

IT IS FURTHER ORDERED that, beginning with the July 2013 examination, bar examination applicants shall pay fees to the State Bar of Montana to cover the expenses of NCBE testing, as well as State Bar of Montana expenses for administration and character and fitness review.

IT IS FURTHER ORDERED that, on or before October 31, 2012, the Board of Bar Examiners, with assistance of the CLE Institute and the CLE Commission, shall file with the Clerk of this Court, for Court approval, a written proposal outlining a Montana law seminar component to be completed by every Montana bar applicant before admission to the bar.

As soon as practicable, the following rules shall be amended to conform with this Order: the Board of Bar Examiners' Rules (to be amended with the assistance of the Board of Bar Examiners); the Rules of Admission to the Bar of the State of Montana (to be amended with the assistance of the Board of Bar Examiners); and the Rules of Procedure of the Commission on Character and Fitness of the State Bar of Montana (to be amended with the assistance of the Commission on Character and Fitness).

Court clarifies M. R. App. P. 4(5)(b)

Summarized from July 24 order AF 07-0016

IN THE MATTER OF THE RULES OF APPELLATE PROCEDURE

The Court seeks to address apparent confusion on the part of some retained criminal defense counsel as to their continuing responsibility for appellate representation of the defendant. For that purpose, on February 28, 2012, we began accepting public comments to proposed amendments to M. R. App. P. 4(5)(b). No comments were filed. IT IS NOW ORDERED that M. R. App. P. 4(5)(b) is amended as follows. Because the amendments clarify, and do not alter, counsel's responsibilities, they shall take effect immediately. Language added to the rule is highlighted and language deleted is stricken.

(b) Appeals in criminal cases.

(i) ~~In criminal cases, a~~ An appeal from a judgment entered pursuant to section 46-18-116 must be taken within 60 days after entry of the judgment from which appeal is taken. A notice of appeal filed after the oral pronouncement of a decision or sentence but before entry of the written judgment or sentence is treated as filed on the date of such the written entry. The district court is not deprived of jurisdiction to enter the written judgment or order by the premature filing of a notice of appeal.

(ii) After filing a notice of appeal, retained criminal defense counsel will remain as counsel of record on appeal until and unless counsel either obtains and files with the clerk of the supreme court the client's written consent to counsel's withdrawal, or obtains a supreme court order allowing counsel to withdraw.

(iii) ~~In criminal cases, a~~ An appeal from a judgment or order made appealable by section 46-20-103 must be taken within 20 days of the entry of the written judgment or order from which appeal is taken.

Comments accepted until Oct. 15 on revisions to Rules for Lawyer Disciplinary Enforcement

Summarized from June 19 order (AF 06-0090)

The Office of Disciplinary Counsel has asked the Court to amend Rule 33 of the Rules for Lawyer Disciplinary Enforcement regarding the appointment of a trustee in situations in which there is a need to protect the clients of a Montana lawyer who has disappeared, died or abandoned their practice.

IT IS ORDERED that comments will be accepted on the attached proposed revisions to Rule 33 of the Rules for Lawyer Disciplinary Enforcement until October 15, 2012. Comments should be filed in writing with the Clerk of the Court.

Following election, Court appoints member to four-year term on Commission on Practice

Summarized from June 19 order (AF 06-0090)

Pursuant to Rule 2(A) of the Rules for Lawyer Disciplinary Enforcement, an order was issued April 3, 2012, requiring the Honorable Thomas M. McKittrick, District Judge, to conduct an election among the resident members of the State Bar of Montana in Area C, comprised of Cascade, Glacier, Toole, Pondera and Teton Counties (Eighth and Ninth Judicial Districts) and to certify to this Court the results of the election. Such election was held and Judge McKittrick has certified to this Court the results. The Court has appointed Jean Faure to the Commission on Practice of the Supreme Court of the State of Montana for a four-year term commencing the date of this order.

Oral arguments in two cases scheduled before the Court at State Bar annual meeting

Summarized from June 28 order referencing DA 11-0681 and DA 11-0559

State of Montana V. Fitzpatrick

and

Kluver, et al. V. PPL, Montana et al.

IT IS ORDERED that pursuant to the Internal Operating Rules of this Court, these causes are classified for oral argument before the Court sitting en banc and are hereby set for argument on Friday, September 21, 2012, at the Crowne Plaza Hotel, 27 North 27th Street, Billings, Montana, with an introduction to the oral arguments beginning at 8:00 a.m.

IT IS FURTHER ORDERED that argument in DA 11-0681, Kluver, et al. v. PPL, Montana, et al., shall begin at 9:30 a.m. with oral argument times to be thirty (30) minutes for the Appellants and twenty-five (25) minutes for the Appellees.

IT IS FURTHER ORDERED that oral argument in cause number DA 11-0559, State v. Fitzpatrick, shall begin at 10:30 a.m. with oral argument times to be thirty (30) minutes for the Appellant and twenty-five (25) minutes for the Appellee.

Issues for oral arguments in Kluver:

Summarized from July 5 order (DA 11-0691)

By order dated June 28, 2012, the Court set this case for oral argument on Friday, September 21, 2012, with argument times limited to thirty (30) minutes for the Appellants and twenty-five (25) minutes for the Appellees. Upon further review of the briefing, the Court determines it appropriate to narrow the issues for argument. Accordingly,

IT IS ORDERED that oral argument shall be limited to the following issues:

1. Did the memorandum of understanding satisfy the statute of frauds?

2. Did the District Court properly admit evidence outside the four corners of the MOU to determine whether the parties reached a binding settlement agreement during the mediation?

Court approves fee increase for pro hac vice admission to equal that of member dues

Summarized from July 31 order (No. AF 11-0244)

The State Bar of Montana has asked the Court to increase the fee for pro hac vice admission to the bar of Montana. The 2009 Rules for Admission to the Bar of Montana provide for a one-time fee of $345 for pro hac vice admission. The State Bar has requested that this fee be increased to annual payments of the bar dues amount for active members of the State Bar (currently $385), for the term of the Montana litigation.

In March of 2012, the Court invited written comments on this proposal. Two written comments were filed during the comment period. At a July 24, 2012, public meeting, the Court discussed this matter, accepted further comments, and reached its decision on the request.

IT IS NOW ORDERED that, effective as to pro hac vice admissions granted on or after October 1, 2012, the fee for pro hac vice admission to practice law in Montana shall be the amount paid annually by active members of the Montana bar (currently $385), to be paid each year for the term of the Montana litigation. However, for a lawyer who is appearing pro bono as defined under Rule 6.1 of the Rules of Professional Conduct, the pro hac vice fee shall be a one-time-only fee equal to the amount paid annually by active members of the Montana bar. The Rules for Admission to the Bar of the State of Montana shall be amended accordingly, and concurrently with other amendments to those rules as required by our recent order adopting the Uniform Bar Examination and the NCBE online character and fitness application process.

Disciplinary Actions

Summarized from July 24 order (PR 11-0600)

IN THE MATTER OF THOMAS R. ANACKER, an Attorney at Law.

On October 13, 2011, a formal disciplinary complaint was filed against Montana attorney Thomas R. Anacker. The formal disciplinary complaint relates to Anacker's failure to respond to an earlier, informal disciplinary complaint filed against him by clients. Anacker is presently administratively suspended from the practice of law in Montana for nonpayment of dues, and did not file a response to the formal complaint.

The Commission on Practice held a hearing on the formal complaint on April 19, 2012. Anacker did not appear for the hearing either in person or through counsel. On June 4, 2012, the Commission submitted its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Anacker did not file any objections within the time allowed.

The Commission has noted that, because of Anacker's failure to answer the allegations of the formal complaint within the time prescribed by Rule 12 of the Rules for Lawyer Disciplinary Enforcement (RLDE), the allegations of the complaint are deemed admitted. The Commission concluded that Anacker violated Rule 8.1 (b) of the Montana Rules of Professional Conduct by failing to respond to lawful requests for information from the Office of Disciplinary Counsel and by failing to appear before the Commission at the hearing.

The Commission recommends that, as a result of his violations of the Montana Rules of Professional Conduct, Anacker be disciplined by suspension from the practice of law in Montana for an indefinite period of not less than seven months. At the hearing before the Commission, disciplinary counsel pointed out that this duration of suspension will require Anacker to petition for reinstatement and to prove he is fit and able to practice law before he is reinstated. The Commission also recommends that Anacker be ordered to pay the costs of these proceedings.

The Court accepted and adopted Commission's Findings of Fact, Conclusions of Law.

Summarized from June 12 order (PR 11-0091)

IN THE MATTER OF MICHAEL TRAMELLI, An Attorney at Law.

The Court publically censured Michael Tramelli for violating Rules 1.5 and 1.18 of the Montana Rules of Professional Conduct.

Specifically, Tramelli failed to communicate to a client, in writing, the scope of his representation of that client and the basis or rate of the fee and expenses for which the client would be responsible.

The Court also concluded that Tramelli failed to deposit $2,000 paid to him by his client into a trust account or a separate interest-bearing account, and that he neither completed the work the client hired him to do nor communicated sufficiently with the client.

Summarized from June 12 order (PR 11-0617)

IN THE MATTER OF GREGORY W. DUNCAN, An Attorney at Law.

The Court publically censured Gregory W. Duncan for failure to adequately represent a client in relation to her termination from employment and other employment-related matters, resulting in multiple violations of the Montana Rules of Professional Conduct. The proceedings were founded upon his tendered admission, which the Court approved upon the recommendation of the Commission on Practice.

Summarized from May 29 order (PR 12-0196)

IN THE MATTER OF ANN C. GERMAN, an Attorney at Law.

Ann C. German was indefinitely suspended from the practice of law in Montana for not less than six months beginning on May 1, 2011, in this Court's Cause No. PR 10-0428. She has not petitioned for reinstatement from the period of suspension

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Discipline

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imposed under that cause number.

On March 27, 2012, the present formal disciplinary complaint was filed against Ann C. German. The six-count complaint is based on acts and omissions alleged to have occurred before German was suspended in Cause No. PR 10-0428. Briefly stated, the complaint alleges German failed to competently represent, expedite litigation on behalf of, and consult with a client in violation of Rules 1.1, 1.3, 1.4, and 3.2 of the Montana Rules of Professional Conduct (MRPC); that she failed to comply with a hearing examiner's scheduling order, to appear for a status conference before the hearing examiner, or to provide a written explanation for those failures, in violation of Rule 3.4, MRPC; and that she failed to withdraw from the representation of the client when her physical or mental condition materially impaired her ability to represent that client, in violation of Rule 1.16, MRPC.

German has tendered to the Commission on Practice a Conditional Admission and Affidavit of Consent made pursuant to Rule 26 of the Montana Rules of Lawyer Disciplinary Enforcement. On April 20, 2012, the Commission held a private hearing on this matter, at which German appeared and addressed the Commission. The Commission has now filed with this Court its recommendation that the Court approve German's tendered admission and the discipline to which she has consented in her tendered admission.

The discipline to which German has consented, and that the Commission recommends we impose, is as follows: German shall be indefinitely suspended from the practice of law for a period of not less than six months, which suspension shall run consecutively to the suspension imposed in Cause No. 10-0428; German shall continue to undergo regular addiction counseling with a licensed therapist, counselor, psychologist, or psychiatrist, with whose treatment recommendations she shall comply; German shall provide the Commission with HIPAA-compliant releases for all records generated by her addiction counselor; and German shall be assessed with the costs of these proceedings.

The Court accepted the Commission's recommendation to approve German's conditional admission.

Summarized from June 26 order (PR 11-0205)

IN THE MATTER OF R. ALLEN BECK, An Attorney at Law.

On April 13, 2011, a formal disciplinary complaint was filed against Montana attorney R. Allen Beck. The Commission on Practice held a hearing on the complaint on January 20, 2012, at which hearing Beck represented himself and testified on his own behalf.

On April 25, 2012, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Beck filed objections to the Commission's findings, conclusions, and recommendation, and the Office of Disciplinary Counsel (ODC) has filed a response.

The Commission has concluded, based on the allegations of the complaint and the evidence produced at the hearing, that R. Allen Beck has violated multiple provisions of the Montana Rules of Professional Conduct (MRPC) during his representation of a client and five corporations controlled by that client, in six Chapter 11 bankruptcy proceedings. The Commission concluded Beck violated Rule 1.5(a), MRPC, in that he charged an unreasonable fee for his services. The Commission concluded, and Beck admitted, that he violated Rule 1.5(b), MRPC, in that he did not communicate in writing the basis for his fee or the scope of his representation; nor were the fee and the scope of representation approved by the bankruptcy court. The Commission concluded Beck violated Rule 1.15 and 1. 18, MRPC, in that he did not deposit his client's funds into a trust account, did not segregate his property from his client's, and failed to maintain any record or account of his client's funds. The Commission further concluded Beck violated Rule 1.4, MRPC, in that he failed to keep his client reasonably informed. The Commission concluded Beck violated Rule 1. 1, MRPC, in that he did not provide competent representation in the bankruptcy proceedings. The Commission concluded Beck violated Rule 1.7, MRPC, by representing both his clients and his client's corporate entities in spite of a conflict of interest in that several of the corporations owed the client money. Finally, the Commission concluded Beck violated Rule 5.3, MRPC, in that he failed to adequately supervise his employee, who prepared faulty bankruptcy schedules for Beck's client.

The Commission recommends that, as a result of these violations of the Montana Rules of Professional Conduct and his past disciplinary history, Beck be disciplined by suspension from the practice of law in Montana for an indefinite period of not less than seven months. The Commission also recommends that Beck be ordered to pay the costs of these proceedings.

Beck's objections to the Commission's findings, conclusions, and recommendation begin with a lengthy recitation of "key events . . . . to place the Responses and Objections into a meaningful context." He then goes on to admit several of the allegations of the complaint, but denies that he spent any of his client's money before earning it, that he failed to adequately supervise an employee, or that he represented clients with conflicts of interest or failed to provide competent representation. In its response, ODC maintains that clear and convincing evidence supports the Commission's findings, and that its conclusions are correct. We agree.

The Court accepted and adopted The Commission's Findings of Fact, Conclusions of Law, and Recommendation.

Introducing: The Appellate Pro Bono Program

Want to know more?

For further information, contact the Pro Bono Coordinator, Patty Fain at pfain@mt.gov , (406)794-7824, or the Pro Se Law Clerk, Sally Johnson at sjohnson2@mt.gov, (406)444-1412, or consult the State Bar website and follow the link to the Appellate Pro Bono Program.

By Order dated May 22, 2012, the Montana Supreme Court established an Appellate Pro Bono Program (APBP or Program), which became effective July 1, 2012. The APBP is coordinated by the Montana Supreme Court's Pro Bono Coordinator (Coordinator) and the Court's Pro Se Law Clerk (PSLC). This article outlines the process for attorneys and law students to offer pro bono services through the APBP.

Case Qualification

A case qualifies for the APBP when: (1) after initial briefing, the Court determines there are one or more issues in which the Court could benefit from additional briefing and possibly oral argument; and (2) the self-represented litigant is financially eligible.Financial eligibility occurs when the Montana Legal Services Association (MLSA) , confirms that the self-represented party would qualify, or be eligible, for use of MLSA's services. A "qualified litigant" is a self-represented litigant who meets the above criteria.

Recruiting Volunteer Attorneys

The Coordinator will continue recruitment efforts to enlist pro bono appellate lawyers who are willing to accept the cases that have been selected for participation in the APBP. Attorneys and law students who offer their services through the APBP may do so as a mentor, a lead attorney, a law student, or attorney with a mentor. When an attorney accepts a case through the Program, the attorney becomes eligible to receive, through MLSA, primary or secondary malpractice insurance for the duration and scope of the pro bono appellate representation.

Litigant Qualification

Once the Court requests supplemental briefing, the parties to the appeal will be notified of the Court's request. Members of the Court have no involvement in the selection of pro bono counsel. Nor shall the self-represented litigant participate in the attorney selection process.

If there are multiple parties to the appeal who are qualified litigants, each will be offered an opportunity to participate in the Program and the assignment of pro bono counsel. Except for court fees waived in accordance with existing rules, transcripts and other costs associated with the appeal will continue to be the responsibility of the parties.

Once the Court has identified a case for participation in the Program, the Court will direct the PSLC to notify the self-represented party or parties in writing with the application packet. The self-represented litigant may decline to participate in the APBP by indicating so on the Application and returning the completed Request to Decide the Appeal form to the PSLC.

If the self-represented litigant chooses to participate in the Program, the litigant must complete and return the APBP litigant application and the MLSA Application for Assistance within fourteen (14) days of the date of the letter.

To apply for financial qualification, the self-represented litigant must complete the MLSA Application for Assistance. This form may be completed and submitted electronically. Alternatively, the self-represented litigant may complete the hard copy of the form included in the information packet from the PSLC and return it to MLSA by mail. After the MLSA determines financial eligibility, MLSA will notify the PSLC who will notify the self-represented litigant and the Coordinator. If the litigant meets the financial qualification requirements, the Coordinator will begin selection of counsel.

Appointing Pro Bono Counsel

Attorneys and law students who are interested in participating in this program must complete a brief online or hard copy form. The Coordinator will select volunteer counsel (or student and mentor) from this pool of volunteer applicants. To facilitate efficient case and client control, a mentor shall not be included in any formal appointment papers. When volunteer counsel has been selected, the Coordinator will confirm the lack of conflicts and notify counsel in writing.

After the selected attorney has had the opportunity to meet with the litigant and/or file a notice of appearance in the case, counsel shall return an "Attorney Confirmation of Acceptance" of APBP case. After consulting with the client and obtaining necessary documentation relating to the representation, volunteer counsel shall file a Notice of Appearance.

If an objection is made to the selection of a volunteer counsel, financial eligibility cannot be confirmed, or if a volunteer match cannot be made for any reason, the Coordinator will

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notify the PSLC, who will in turn notify the Court. The PSLC will also notify the self-represented litigant by letter that appointment of counsel was unsuccessful. This will allow the case to be decided based upon the briefs filed with the Court.

Substitution of Pro Bono Counsel

Although it is anticipated that an APBP-appointed attorney will handle the pro bono appeal through completion, it is recognized there are times when an attorney who accepts representation must withdraw due to circumstances beyond the attorney's control. Withdrawal of counsel may be permitted in accordance with the rules governing withdrawal in other cases. If the Court permits withdrawal, the Coordinator will attempt to place the client with another volunteer attorney.

Post-Appointment Procedures

To expedite access to the District Court record, and avoid costs associated with printing and postage, the Coordinator will facilitate volunteer attorney access to the record directly from the District Court.

The Court will issue a Scheduling Order setting forth the dates when supplemental briefs are due. Any requests for extension of time must be submitted to the Clerk of the Supreme Court via motion in substantial compliance with the Montana Rules of Appellate Procedure.

There is no guarantee that any participating case will selected for oral argument to the Court; however, should volunteer counsel request oral argument, the Court will consider the preferences of counsel as well as the nature of the case to determine whether oral argument is appropriate. If the Court classifies the case for oral argument, an order will issue scheduling the date and time for argument and specifying the amount of time allowed to each party in accordance with the Court's Internal Operating Rules.

Continuing Role of Coordinator and Pro Se Law Clerk

The Coordinator will maintain contact with the volunteer attorneys for administrative purposes. The Coordinator will assist in directing the volunteer attorney to practice resources and information to facilitate a positive pro bono experience and serve as the point of contact between the volunteer attorney and the Court.

The PSLC will serve as the contact for the litigant should an issue arise with volunteer counsel. The PSLC will monitor the case progress.The PSLC and Coordinator will confer as necessary.

BIG SKY rendezvous

STATE BAR OF MONTANA
ANNUAL MEETING 2012 | BILLINGS

This year's annual meeting, "Big Sky Rendezvous," is in the Magic City, Sept. 20-21, with opening activities starting on Sept. 19.

Events kick off Thursday with the local bar reception at **Zoo Montana**, which features live music by South Bound and zoo visits starting at 4 p.m.

Official meeting activities begin Thursday morning with the Board of Trustees meeting (bar members are encouraged to attend). A half day's worth of CLE begins at 1 p.m. Tours of the **James F. Battin Courthouse** will be available before the president's reception. Afterward, Justice **Sandra Day O'Connor** gives the keynote address at the annual banquet. J. Martin Burke, winner of the Jameson award will be honored, as well as the bar's 50-year members.

Friday carries a full day of CLE and begins with a UM School of Law breakfast and Supreme Court candidates forum. An appellate practice panel will round out the early morning activities. Following a brief introduction, the **Montana Supreme Court** will hear two oral arguments: *Kluver, et al. v. PPL, Montana, et al.,* and *State v. Fitzpatrick.*

The awards luncheon begins at noon on Friday, where the winners will be announced for the Karla Gray Equal Justice Award, Neil Haight Pro Bono Award, and Haswell Writing Award (which features three winners this year). After the luncheon, hot topics CLE begins. Attend the whole event and earn 11 CLE (2 ethics/1 SAMI)

Register at *www.montanabar.org,* or watch for the flier in the mail.

Ranch life ex

Commentary by Mark Parker

I write to encourage all of you to mark your calendar so you can attend the Montana State Bar Annual Meeting in September. Our keynote speaker will be Sandra Day O'Connor, retired Associate Justice of the United States Supreme Court.

Yes, I understand, this is where I am supposed to say she was the first woman to be appointed to the high court. This is all true, and important, but a tinny refrain when compared to what Justice O'Connor really brought to the high court. She was a ranch girl. The "girl" business is important, no doubt. I will leave it to others to speak on that score. After reading "Lazy B," my personal prejudice is that the *ranch* part was as important as the *girl* part.

"Lazy B" is a careful and straightforward autobiography of Justice O'Connor. Except for a few species of flora and fauna not indigenous to Montana, it otherwise could have been set in Montana. She had a life of cattle, cattle hands, hard work, outdoors, regulatory intrusion, market vagaries, joy and sorrow. All familiar components of a Montana ranch.

The ambitious reader should stop here, log on to Amazon.com, order a copy of "Lazy B," and draw their own conclusions. It is a quick read. Not because it lacks depth or importance. It reflects the ethic that words are of limited importance, deeds matter. It reflect a trust in the reader that moralizing is disrespectful. When Justice O'Connor reflects on the hired hands drunken forays into town to party for a few days and engage in the services of the

Schedule at a glance*

Wednesday

> **10:00 - Noon:** Access to Justice Committee meeting

> **Noon - 3:00:** Lunch and joint meeting of the Equal Justice Task Force, Access to Justice Committee and Commission on Self-Represented Litigants

> **5:00 - 7:00 :** Local Bar reception at Zoo Montana. Zoo visits begin at 4 p.m.

xemplifies O'Connor's time on the Court

Bio: Sandra Day O'Connor was born in El Paso, Texas, March 26, 1930. She married John Jay O'Connor III in 1952 and has three sons: Scott, Brian, and Jay. She received her B.A. and LL.B. from Stanford. She served as deputy county attorney of San Mateo County, Calif., from 1952–1953 and as a civilian attorney for Quartermaster Market Center, Frankfurt, Germany, from 1954–1957. From 1958–1960, she practiced law in Maryvale, Ariz., and served as assistant attorney general of Arizona from 1965–1969. She was appointed to the Arizona Senate in 1969 and was subsequently re-elected to two terms. In 1975 she was elected judge of the Maricopa County Superior Court and served until 1979, when she was appointed to the Arizona Court of Appeals. President Reagan nominated her as an associate justice of the Supreme Court, and she took her seat Sept. 25, 1981. Justice O'Connor retired from the Court on Jan. 31, 2006.

— Info from http://www.supremecourt.gov

local prostitutes, the narrative ends at that. No moralizing that "well, it was a different time" or "of course, we looked down on this victimization of the women involved." Not a pedantic whisper.

When a cowboy quit because his skills were questioned in a very minor way, her dad asked him back and promised it would never happen again. There was no rummy handwringing over who had the legal right as employer and who was the employee. We learned what happened. We could draw our own conclusions.

She was not pampered or babied. She was not told she was special. If she wanted to be special, she better get to work and do something special.

This *ranch* girl, we know, made it to the Supreme Court and the commentators tried to untangle her politics, scholarship and judicial temperament.

These commentators would say something like this, which I found on the internet:

"Known for her dispassionate and meticulously researched opinions, she proved to be a moderate and pragmatic conservative who sometimes sided with the court's liberal minority on social issues (e.g., abortion rights). O'Connor retired from the court in 2006." *Read more: http://www.answers.com/topic/sandra-day-o-connor#ixzz1xoMcUutd*

Let's look at three things first. Dispassionate, meticulous and pragmatic. You cannot survive on a ranch without all three. Justice O'Connor describes how her father took her to a struggling calf that had to be shot because it had been wounded by predators. She describes how they killed rabbits because six rabbits could eat as much as a single cow. But, care must be used when using the adjective dispassionate. On a ranch you learn to ration your passions for things to be passionate about. You cannot survive on a ranch, or in law, without having a rich passion for the task. You cannot afford cheap displays of useless passion.

Meticulousness. Well, when you ranch, you have no choice. A frayed cinch, a sloppy brake job, or a moment of inattention while moving cattle can yield quick horror. In the law, it is the mother's milk of an ordered system of rules.

Pragmatic. No one needs me to explain why you have to be pragmatic to run a ranch. We sometimes have to be reminded, but always get there eventually, that the law must similarly be pragmatic.

But, what of this "siding with the liberal minority on social issues." This is what they say. I understand that some suggest that this is the result of her being the first woman on the high court. Let me advance my view, based wholly on wild speculation. I advance the unproven and unprovable proposition that even this so called "liberal" streak is merely the *ranch* coming out in Justice O'Connor. Ranchers, generally, mind their own business, and expect you to do the same. They may hold dear all sorts of prejudices and judgements about their neighbors, but they are very slow to letting these personal views translate into a government taking action, or license to treat their neighbors with disrespect. Not a liberal streak, but a libertarian streak if you will.

In any event, come down and see Justice O'Connor. I am not sure she agrees, but I am prepared to say she is the first Montanan on the Supreme Court.

Thursday

> **8:30 - Noon:** Board of Trustees meeting. (Bar members are invited to attend.)
> **10:00 :** Registration desk opens
> **11:00 - 5:00:** Montana Justice Foundation meeting
> **Noon - 1:00:** New Lawyers Section Luncheon meeting
> **1:00 - 5:00:** Hot Topics CLE (3.5 CLE/1 Ethics)
> **4:30:** Resolutions Committee meeting
> **4:30:** Tour of James F. Battin Courthouse
> **5:00:** President's Reception (At the James F. Battin Courthouse.)
> **6:30:** Banquet | Keynote Address (At the Crowne Plaza)

Friday

> **7:00 - 8:00 :** UM Law School breakfast
> **7:30 - 8:00:** Supreme Court candidates forum
> **7:30:** Registration desk opens
> **8:00 - 9:00:** Appellate Practice Panel
> **9:00 - 9:30:** Introduction of Supreme Court oral arguments
> **9:30 :** Arguments in civil case: DA 11-0681, Kluver, et al. v. PPL,Montana, et al.
> **10:30:** Arguments in criminal case: DA 11-0559, State v. Fitzpatrick
> **Noon - 1:30:** Awards luncheon/Business meeting
> **1:30 - 5:10:** Hot Topics CLE (3.5 CLE/1 Ethics)
> **5:10:** Annual meeting adjourns
> **5:30:** Paralegal Section dinner

**Times may change slightly before date of event*

State Bar seeks volunteers for committees

Member participation in the organization and management of the State Bar of Montana is essential to its success as a professional association. The most effective way lawyers and legal assistants can participate is through volunteer service on the many committees that compose the Bar.

Committees meet two to six times per year, usually in Helena, although many meetings are via conference call. Expenses associated with attending meetings are reimbursed by the State Bar.

Every effort is made to assign volunteers according to their choices.

We are looking for volunteers to serve on the following committees:

- Access to Justice (Bar Committee)
- Lawyer Referral & Information Service
- CLE Institute
- Elderly Assistance
- Lawyers Helping Lawyers
- Fee Arbitration
- Judicial Relations
- Technology
- Law-Related Education

Some committees' members do not have any expiration dates this year or the committee currently has an adequate number of members at present time. Openings occur when a term expires and the member does not wish to renew, a member resigns before their term is up or there is a need to add additional members. If you would like to be added to a waiting list for Dispute Resolution, Ethics, Lawyers' Fund for Client Protection, Professionalism, or Resolutions, please let Jill Diveley know.

If you are interested in serving on a committee, please email Jill Diveley at *jdiveley@montanabar.org* by August 24. You can also mail in your request to State Bar of Montana, C/O Jill Diveley, P.O. Box 577, Helena, MT 59624.

Montana Law Review sets schedule for 2012 Honorable James R. Browning Symposium

"The State of the Republican Form of Government in the States"

> **WHEN:** Thursday, Sept. 27, 6 – 7 p.m.; Friday, Sept. 28, 8:45 a.m. – 5:45 pm
> **WHERE:** University Center Ballroom, The University of Montana, Missoula, Montana

About the symposium: This biennial symposium will focus on the distinct place of state law and politics in the changing landscape of election law.

Montana is a focal point of debate over these issues this year as it hosts its independent redistricting commission, supreme court justice elections, a closely fought U.S. Senate race, and litigation of its campaign contribution and disclosure laws, all in the aftermath of the Supreme Court's invalidation of Montana's century-old Corrupt Practices Act. In short, there is no more opportune time or place to consider the changing landscape of election law in the States than Montana in 2012.

Harvard Law School Professor Lawrence Lessig will provide the keynote address on Thursday evening. There will be four panels on Friday. Each panel corresponds to general issues of legislation (what state campaign laws are preferable or permissible), enforcement (how states should administer campaign laws), and adjudication (in particular, what special issues arise in judicial campaigns), as well as an additional panel focused on the Montana experience.

The Montana Law Review will publish a symposium issue of the Law Review next winter.

CLE credits: This course provides CLE credits.

Attendance: The program is free. No registration is required.

For more information, please contact the Montana Law Review staff at *montanalawreview@gmail.com.*

U.S. Supreme Court

Constitutional case summaries

The U.S. Supreme Court decided many important constitutional cases this spring, including the following:[1]

In *National Federation of Independent Business v. Sibelius*, 132 S.Ct. 2566 (June 28, 2012)(5-4), the Court upheld the challenged provisions of the Patient Protection and Affordable Care Act. The opinion's unexpected author, Chief Justice Roberts, held that the Act's provision that requires virtually all Americans to either purchase health insurance or pay a penalty was a constitutional exercise of congressional power under the Taxing Clause. The Court reasoned that individuals who choose not to purchase health insurance are required to pay a "shared responsibility payment" as part of their federal income taxes.

Interestingly, Justice Roberts joined with the four dissenters in rejecting the government's principal defense of the individual mandate under the Commerce Clause. The Court interpreted the second challenged provision of the Act, which required states to substantially expand their Medicaid coverage or else forfeit all their federal Medicaid funding, to mean that states that did not agree to expand their Medicaid coverage would only lose the additional federal funds allocated for that expansion.

In *American Tradition Partnership, Inc. v. Bullock*, 132 S.Ct. 2490 (June 25, 2012)(5-4), the Court summarily reversed a decision by the Montana Supreme Court upholding Mont. Code Ann. §13-35-227 (1) (2001), the Montana state law barring corporations from using their general treasury funds to support or oppose a candidate for office. The Court's *per curiam* opinion was only two paragraphs long and concluded with this observation: "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."

In *Miller v. Alabama*, 132 S.Ct. 2455 (June 25, 2012)(5-4), the Court held that juveniles convicted of murder cannot be subject to a mandatory sentence of life imprisonment without the possibility of parole. The Court held the sentencing judge cannot be barred from taking the defendant's youthful age, and other relevant circumstances, into consideration when imposing punishment. The majority also made the following observation: "[G]iven all we have said . . . about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."

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1 These summaries are excerpted from the ACLU 2011 Supreme Court Term Civil Liberties Summary, which discusses many more important civil liberties opinions, and can be found at http://www.aclu.org/files/assets/final_summ-11_mem_2.pdf.

Montana Supreme Court

In Brief (June - July)

Blodgett v. Justice Court, Missoula County, 2012 MT 134 (filed June 26, 2012) (5-0)

Issue: Did retired district court judge have authority to act as substitute justice of the peace (JP) and preside over a criminal jury trial?
Short Answer: No.

Facts: Missoula County JP asked retired district court judge to preside over criminal jury trial while she was presiding over another trial. Defendant's objection overruled; jury found her guilty.

Procedural Posture & Holding: Writ of supervisory control granted. Jury trial void ab initio; remanded.

Reasoning: JP agreed supervisory control was appropriate. Court concludes Justice Court "proceeding under a mistake of law and causing a gross injustice." ¶10. Authority to act as substitute JP arises only from strict compliance with MCA ¶ 3-10-231. Threshold requirement is that elected JP must be disqualified, sick, disabled, or absent; not met here. ¶ 16. Moreover, procedural requirements not met. Acting JP must be selected from list provided by elected JP; elected JP must obtain waiver of JP training for potential substitutes if they have not received JP training; each person on list must subscribe to oath of office after receiving waiver of training; all of these were then to be filed. Elected JP must attempt to call in another elected JP or city judge before going to substitute list; here, did not ask city judge.

Although retired judge was qualified by training and experience to act as substitute JP, he lacked jurisdiction in this instance because procedures not followed.

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In *Arizona v. U.S.*, 132 S.Ct. 2492 (June 25, 2012)(5-3), the Court struck down three of the four provisions of Arizona's immigration law, S.B. 1070, which had been challenged on federal preemption grounds. One invalidated provision made it a state law crime for aliens to seek or hold a job without authorization; a second made it a crime for aliens to fail to comply with federal registration requirements; the third empowered police in Arizona to make warrantless arrests based on probable cause to believe a person has committed a "public offense" that makes him or her removable from the United States. The Court held that the most controversial portion of the law, the so-called "show-me-your-papers" provision, was not unconstitutional on its face. That provision directs police in Arizona to demand immigration papers from anyone who they have lawfully stopped if there is reason to believe that the person stopped is in the country illegally. The Court noted that this provision may be applied unconstitutionally if it leads to racial profiling or leads to unreasonably prolonged detention.

In *United States v. Alvarez*, 132 S.Ct. 2537 (June 28, 2012)(6-3), the Court struck down the Stolen Valor Act, a federal statute that makes it a crime to lie about receiving a military honor. The Court rejected the government's contention that false statements of fact are categorically unprotected by the First Amendment.

Montana

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Davis v. Hall, 2012 MT 125 (filed June 12, 2012) (5-0, with special concurrence by Justice Morris)

Issue: (1) Whether easement was created from two documents read together, one of which references the other; and (2) whether express easement may be appurtenant to dominant tenement that is not contiguous to servient tenement.
Short Answer: (1) Yes, and (2) yes.

Facts: Plaintiffs own land separated from Defendants' land by parcel owned by state of Montana. Originally all land owned by same owner, who recorded Declaration of Easements, which refers to certificate of survey creating road. Road crosses Defendants' property and then state property before reaching Plaintiffs' property. Defendants placed locked gate across road, blocking Plaintiffs' access.

Procedural Posture & Holding: Summary judgment granted to Plaintiffs; affirmed.

Reasoning: (1st issue) COS alone did not create easement, but did in conjunction with Declaration of Easements. Both documents recorded; therefore, constructive notice to all. Identities of dominant and servient tenements ascertainable with reasonable certainty from both documents. Use and necessity of easement also ascertainable with reasonable certainty from documents. Therefore, adequately described. Distinguishes and explains Blazer v. Wall, 2008

MT 145. (2nd issue) Defendants argue that Plaintiffs do not have the right to cross the state property that separates the dominant and servient estates. When an easement is implied, dominant and servient estates must be single tract of land or contiguous tracts of land at time of severance. ¶ 29 (citing several cases). But where party has an express easement, contiguity not required. ¶ 30 (discussing N.W. Improvement Co. v. Lowry, 104 Mont. 289, 302, 66 P.2d 792, 795 (1937)). Court adopts rule that "an easement may be appurtenant to noncontiguous property if both tenements are clearly defined and it was the parties' intent that it be appurtenant." ¶ 32 (quoting Verzeano v. Carpenter, 815 P.2d 1275, 1278 (Or. App. 1991)).

Plaintiffs must separately establish their right to cross state property, but whether they have a right to cross state property does not affect the validity of their easement over Defendants' property.

Kaufman Bros. v. Home Value Stores, Inc., 2012 MT 121 (filed June 5, 2012) (5-0)

Issue: Did contract governing parties' relationship limit remedies to either suing for damages or terminating agreement and keeping payments made to date as liquidated damages?
Short Answer: Yes.

Facts: Plaintiff partnership owned commercial building in Billings. Defendant entered into contract for deed with Plaintiff. Defendant stopped making monthly payments and failed to pay property taxes. Plaintiff issued notice of default, giving Defendant 30 days to cure. When Defendant failed to cure, Plaintiff accelerated balance due under contract. When not paid within 30 days, Plaintiff obtained Defendant's quit claim deed from escrow, recorded it and retook possession of the property, and sold it. Then Plaintiff filed suit for damages from Defendant's breach of contract. Defendant argued that when Plaintiff elected to accelerate amount due and terminate contract, and retain payments already made as liquidated damages, it lost the right to sue for breach of contract.

Procedural Posture & Holding: Summary judgment granted to Defendants; affirmed. Reasoning: Plain

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language of the contract said seller could do one or the other. "Or" means one or the other, not both. Plaintiff argued cumulative remedies were allowed. Court applied three- part test to determine if election of remedies doctrine bars additional relief: (1) two or more remedies are available; (2) they are inconsistent with each other; and (3) the party chooses one of them. ¶ 15. Election occurs when party pursues a remedy to a "final conclusion." ¶ 16. Plaintiff pursued its election to a final conclusion, i.e., repossession and resale of the property. Sellers have option of affirming contract and suing for balance of purchase price, or terminating contract, keeping money already paid, and repossessing the property. These remedies are inconsistent. ¶ 17. Plaintiff argued it was entitled to seek damages for waste to the property, but contract stated that liquidated damages would compensate seller "for breach of this agreement."

¶ 19. Thus, Plaintiff has been fully compensated, and is barred from seeking damages for breach of contract.

Mountain West Bank v. Glacier Kitchens, Inc., 2012 MT 132 (filed June 26, 2012) (4-1; Justice Rice dissenting)

Issue: Does court obtain personal jurisdiction over defendants when they are not served in accordance with Rule 4, but have actual notice of the lawsuit?
Short Answer: No. Court had no personal jurisdiction over Defendant; default judgment void ab initio.

Facts: Individual filed suit against bank; bank filed answer and counterclaim for judicial foreclosure. Banks' claims were brought against the individual as well as a trust, a corporation, and an estate. Bank served individual's daughter, who has no relationship with other defendants. Individual answered counterclaim; other three Defendants did not appear. On bank's motion, court entered default judgments against three non-appearing Defendants. Individual Defendant moved to set aside defaults; bank objected to lack of evidence that daughter did not have authority to accept service, and to individual Defendant acting as attorney. Court did not rule. Five months later, individual Defendant moved again, citing M.R. Civ. P. 4D (2009). Bank objected because motion duplicative, and individual Defendant not an attorney. Court did not rule. Seven months later, through counsel, Defendants moved to set aside default judgments under M.R. Civ. P. 60(b) (2009). Bank objected because motion duplicative. Deemed denied after 60 days. Appeal followed.

Procedural Posture & Holding: Denial of Defendant's motion to set aside default judgment reversed and remanded.

Reasoning: Default judgments are disfavored. Bank's argument that the Rule 60(b) motion was not timely is presented for the first time on appeal; Court therefore declines to address it. Bank then argues motion to set aside default judgment was res judicata because it was the subject of three motions. But res judicata requires final judgment on the merits, and the judgment must be valid. Because the default judgments are void ab initio, the doctrine of res judicata does not apply. Judgments are void because service not properly made. Rule 4 requirements must be strictly followed; actual notice is not a substitute for valid service. Rule has specific requirements for service on corporations, trusts, and estates, which were not followed. Daughter was not an officer, director, manager, etc. of the corporation, so it was not properly served. Daughter was not a trustee of the trust, so it was not properly served. Daughter was not a personal representative of the estate, so it was not properly served. No service results in no personal jurisdiction, which means default judgments were void and should have been set aside.

Sheila Callahan & Friends, Inc. v. State of Montana Dept. of Labor & Industry, 2012 MT 133 (filed June 26, 2012) (5-0, with concurring opinion by Justice Baker)

Issue: Is employer liable for pro rata share of unemployment benefits paid to former employee when employee voluntarily terminated her employment with that employer?
Short Answer: No.

Facts: Employee entered into one-year contract with employer SC&F. Employer offered new one- year contract prior to expiration of first term, with slightly different terms. Employee declined, saying she wanted to help her mother through some health problems. Stated on exit interview form that she "quit." Was then hired by a different employer, and laid off shortly thereafter. Filed for unemployment benefits. Department determined that SC&F's account as chargeable for pro rata portion of benefits paid to employee. SC&F asked for redetermination, stating employee had left voluntarily. Administrative hearing officer affirmed Department's decision. SC&F appealed to Board of Labor Appeals, which conducted a hearing and affirmed Department's decision. SC&F sought judicial review from district court, which reversed board's decision. Department appealed.

Procedural Posture & Holding: Appeal of judicial review of administrative decision; affirmed reversal of board decision.

Reasoning: According to Montana statute, unemployment benefits are paid to claimants on a pro rata share of their "base period," which is "first 4 of the last 5 completed calendar quarters immediately preceding the first day of the individual's benefit year." MCA § 39-51-1214(1); MCA § 39-51-201(2)(a). SC&F agrees it is a base period employer. If SC&F failed to offer employee opportunity to continue the same work, then she is considered laid off, and SC&F must pay for part of her unemployment benefits. But where employee refused to even consider a new contract, regardless of the terms, she voluntarily terminated.

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BNSF Railway Co. v. Cringle, 2012 MT 143 (July 6, 2012) (7-0 in judgment; 2 concurring opinions)

Issue: Whether BNSF counsel's misplacement of the mailed notice of a Human Rights Commission hearing officer's decision was "good cause" sufficient to excuse its failure to file an appeal within 14 days.
Short Answer: No.

Facts: Cringle sued BNSF for discrimination. Hearing officer entered summary judgment for claimant, and mailed notice of decision to parties. Notice misplaced at BNSF counsel's office, and not found until 19 days had passed. BNSF then filed appeal and sought to be excused for failure to timely appeal to Commission.

Procedural Posture & Holding: In previous appeal, Court held that 14-day filling deadline is not jurisdictional, opening the door to excuse for good cause. BNSF v. Cringle, 2010 MT 290, ¶¶ 18, 20 (interpreting MCA § 49-2-505). On remand, District Court found BNSF had shown good cause and remanded to Commission. Cringle appealed. Supreme Court reversed and ordered judgment entered for claimant. "[B]ecause § 49-2-505(3)(c), MCA, is a statutory time prescription that provides an inflexible rule of finality, 'good cause' for excusing noncompliance with the statute requires a showing of circumstances beyond the party's reasonable control that prevented the party from timely filing its notice of appeal." 2012 MT 143, ¶ 15.

Reasoning: District Court found good cause because (1) 14 days very short, thereby implicating due process rights; (2) claimant will be awarded attorneys' fees if ultimately successful; and (3) no evidence of bad faith on BNSF's part. Alternatively, district court found excusable neglect.

Applying de novo review, Supreme Court found that 14-day appeal deadline evidences legislative intent to expedite discrimination claims. ¶ 22. Therefore declines to decide whether equitable tolling doctrine should apply, holding instead that counsel's failure to find the notice "did not constitute sufficient cause for relief from its untimely notice of appeal." ¶ 23. All seven justices concurred in the judgment; Justices Morris and Nelson wrote separate concurring opinions.

Redding v. Montana First Jud. Dist., 2012 MT 144A (July 6, 2012) (5-0)

Issue: (1) Whether writ of supervisory control was warranted to reverse district court decision that Plaintiff's investment in a Ponzi scheme was not a security under Montana securities law, and if so, (2) whether investment was a Montana security.
Short Answer: Supervisory control was warranted, and investment was a Montana security.

Facts: 76-year-old widow with high school education sold ranch for $3 million in 2004. Accountant advised using 1031 exchanges and investing in commercial real estate to avoid tax liability and receive income. Investment, a Ponzi scheme, went bankrupt in 2008. Plaintiff sued accountant, accounting firm, and others alleging tort and contract claims.

Procedural Posture & Holding: District court held investments were not securities under Montana law. Supervisory control granted; reversed.

Reasoning: (1st issue – supervisory control) Supervisory control appropriate because lower court holding would cause significant injustice for which appeal is inadequate remedy.

(2nd issue – whether security was covered by Montana Securities Act) Four statutory criteria determine whether investment is security; here, issue is whether this was common venture, and whether it was "derived through the entrepreneurial or managerial efforts of others." ¶ 25. First holds that common venture can be established through horizontal, broad vertical, or narrow vertical commonality; finds common venture here under all three. Test for second prong is whether investor is able to exercise meaningful control over investment, regardless of written agreement. Plaintiff depended on defendant's efforts to generate profit; therefore second prong met.

Medical Marijuana Growers Assoc. v. Corrigan, 2012 MT 146 (July 6, 2012) (5-0 in judgment, with concurrence by Justice Nelson)

Issues: Whether 2009 Medical Marijuana Act (MMA) authorizes caregivers to exchange marijuana in order to supply qualified patients, or to cultivate marijuana for other caregivers to provide their patients.
Short Answer: No.

Facts: MMA authorizes one "caregiver" for each qualified patient. Caregiver must register with DPHHS and sign a statement agreeing to provide marijuana only to patients who have named that person as their caregiver. Statute restricts cultivation and use of marijuana by caregivers; those who comply are protected against arrest and prosecution. MCA § 50-46-201.

Plaintiffs sought declaratory judgment that MMA allows caregivers to transport or deliver marijuana to other caregivers, and to cultivate marijuana as agent or contractor for another caregiver.

Procedural Posture & Holding: Summary judgment granted for defendant; Supreme Court affirmed.

Reasoning: Court first found that appeal was not moot, even though 2011 statute expressly prohibits transactions between caregivers, as charges may be filed under 2009 law for up to five years. Then held that plain language of statute is clear and unambiguous, and authorizes caregivers to provide marijuana to patients only. Declines to read additional provisions into statute.

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BNSF Railway Co. v. Feit, 2012 MT 147 (July 6, 2012) (4-1)

Issue: Certified question from U.S. District Court: Is obesity that is not a symptom of a physiological condition a physical or mental impairment under the Montana Human Rights Act (MHRA)?
Short Answer: Yes.

Facts: Respondent Feit sued BNSF for discrimination when BNSF refused to hire him as a conductor because of his obesity.

Procedural Posture & Holding: Department entered judgment for Feit and Human Rights Commission affirmed. BNSF sought judicial review from federal court, which certified question to Supreme Court. Four justices in majority; Justice Morris dissented.

Reasoning: Court has not previously construed "impairment" under MHRA. Looks to federal law, which recently changed. Holds that obesity that is not the symptom of an physiological disorder may constitute an impairment under the MHRA if the person's weight is outside the normal range and affects one more body systems.

Justice Morris dissents on grounds that federal definition of impairment requires a physiological condition be present before an impairment can be found. Obesity that does not occur secondarily to a physiological condition cannot be an impairment.

Robison v. Montana Dept. of Revenue, 2012 MT 145 (July 6, 2012) (5-0)

Issue: Whether oil rig employee's travel from residence to oil rig is deductible business travel expense.
Short Answer: No.

Facts: Robison worked 7-days-on, 7-days-off schedule at oil rig. Drove from home in Billings to company camp for the week he worked, and back to Billings at end of week. Claimed $78,812 in business travel expenses for 2005-2008.

Procedural Posture & Holding: DOR audit determined Robison's employment was indefinite, making his tax home the area of the oil rig. Expenses therefore nondeductible personal commuting expenses. Robison requested informal DOR review of initial audit, then appealed to agency. Hearing officer affirmed. Robison appealed to STAB, which reversed. DOR sought judicial review from district court, which reversed STAB and reinstated hearing examiner's decision. Affirmed.

Reasoning: Travel to a temporary job – as opposed to an indefinite one – is deductible. Employment is temporary when end is foreseeable within short period. Under federal law, employment is generally temporary when it lasts less than one year. When termination is indeterminate, employment is indefinite, and business travel expenses are not deductible. Moreover, when taxpayer works for indefinite time away from personal residence, tax home shifts to the new location, and travel expenses form personal residence to tax home not deductible.

Here, Robison's employment was indefinite, not temporary. He was never told how long it would last, and in fact it lasted more than three years. Additionally, tax home shifted to area of oil rig because employment was indefinite.

Rooney v. City of Cut Bank, 2012 MT 149 (July 10, 2012) (5-0)

Issue: Whether district court's affirmance of police commission's finding that officer's firing was supported by substantial evidence precluded claim for wrongful discharge.
Short Answer: Yes.

Facts: Plaintiff worked as city police officer for eight years. Was observed sleeping in patrol car while on duty. After investigation, was fired by mayor.

Procedural Posture & Holding: Plaintiff appealed termination to police commission, which held hearing. Although commission would have preferred incremental discipline, it found substantial evidence to support firing. Plaintiff filed wrongful discharge action and, alternatively, judicial review of commission's decision. District court affirmed commission, and denied city's motion to dismiss the wrongful discharge claim. Bench trial on wrongful discharge claim; judgment for city. Both parties appealed. Supreme Court affirms but on different grounds, holding that lower court's affirmance of commission's decision bars wrongful discharge claim under res judicata and collateral estoppel.

Reasoning: Issue and claim preclusion bar re-litigating determinative facts "actually or necessarily decided in a prior action, even if they were decided under a different legal theory." ¶ 17. Additionally, legal theories or facts that could have been raised but were not are also barred. ¶ 21. District court found that substantial evidence supported Plaintiff's termination, thereby deciding facts determinative of whether his termination was for "good cause" under the WDEA. Moreover, Plaintiff did not appeal District Court's affirmance of commission's decision.

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Summaries courtesy of Beth Brennan.

To plea or not to plea: That is the question[1]

By Daniel Donovan and John Rhodes[2]

I. INTRODUCTION

Is it "nobler in the mind to suffer" the punishment that comes with a guilty plea "or to take arms against a sea or troubles" by taking the case to trial?[3] This is the conundrum faced by every citizen accused of crime. Defense counsel advising their clients face this same dilemma. As the length of sentences increase, so does the risk of going to trial.

"Proponents of plea bargaining argue that it is good for defendants. The defendant, so the argument goes, can always choose not to plea and instead go to trial. If a defendant chooses to accept a plea bargain, then the deal must be better for the defendant than going to trial."[4] But how do the defendant and counsel know that the result of a plea agreement will be better than the result of a trial? Oftentimes it is a known fact. Sometimes it is a judgment call, more art than science.

If the accused pleads guilty, he will never know the result of the trial. A guilty plea precludes acquittal. Conversely, if the accused goes to trial and loses, he will often realize the mistake he has made when he suffers the attendant consequence of greater punishment. Defendants plead guilty for many reasons, including because plea agreements can be bargained-for exchanges, in which the defendant receives consideration in the form of sentencing concessions.[5] Other times, plea agreements do not offer much of a bargain for a defendant but the belief remains that it is better than going to trial.

Defense counsel must advise their clients whether to plead guilty or proceed to trial. Plea bargaining dominates the criminal justice system. Correspondingly, "it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forego."[6] Two recent United States Supreme Court cases recognize this guilty plea laden reality and establish that the accused can be denied his Sixth Amendmenbt right to effective assistance of counsel if such advice is unsound.

II. *MISSOURI V. FRYE* AND *LAFLER V. COOPER*

On March 21, 2012, the Supreme Court issued two decisions cementing the rule that the Sixth Amendment right to effective assistance of counsel applies to representation during the plea bargaining process.[7] If defense counsel's representation relating to the plea or trial decision is deficient, the accused may have a remedy in post-conviction proceedings.[8]

In *Missouri v, Frye*, the Court held that because defense counsel failed to inform the defendant of a plea offer, defense counsel "did not render the effective assistance the Constitution requires" where the result was a 3-year felony prison sentence without a plea agreement rather than a 90 day misdemeanor sentence had the offer been accepted.[9]

Frye was charged with driving with a revoked license.[10] Because he had been convicted of the same offense three times before, he was charged, under Missouri law, with a felony carrying a maximum 4–year prison term.[11] The prosecutor sent Frye's counsel a letter, offering two possible plea bargains, including an offer to reduce the charge to a misdemeanor and to recommend, with a guilty plea, a 9-day jail sentence.[12] The plea offers expired without defense counsel conveying the offers to Frye.[13] Frye subsequently pleaded guilty without a plea agreement and was sentenced to three years in prison.[14]

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1 Derived from William Shakespeare, Hamlet. Act III, Sc. I, Line 56 ("To be, or not to be: that is the question.").

2 Donovan has practiced law in Great Falls, Montana since 1976, including service as an Assistant Federal Defender in the District of Montana from 1993 to 2000. Donovan was named 2009 Criminal Defense Lawyer of the Year by the Montana Association of Criminal Defense Lawyers. Rhodes has served as an Assistant Federal Defender for the District of Montana since 1998. In 2002, he served in Washington D.C. as Special Counsel to the United States Sentencing Commission. Most of their clients plead guilty.

3 William Shakespeare, Hamlet. Act III, Sc. I, Line 56.

4 Orin Bar-Gill & Omni Ben-Shahar, The Prisoner's (Plea Bargain) Dilemma, Regulation, Spring 2010 at 42.

5 Mabry v. Johnson, 467 U.S. 504, 508 (1984), abrogated in part on other grounds, Puckett v. United States, 556 U.S. 129 (2009).

6 Libretti v. United States, 516 U.S. 29, 50 (1995).

7 Missouri v. Frye, __ U.S. __, 132 S.Ct. 1399 (March 21, 2012), and Lafler v. Cooper, __ U.S. __, 132 S.Ct. 1376 (March 21, 2012).

8 Id.

9 132 S.Ct. at 1408.

10 Id. at 1404.

11 Id.

12 Id.

13 Id.

14 Id.

Seeking post-conviction relief in state court, he alleged his counsel's failure to inform him of the earlier plea offers denied him the effective assistance of counsel, and he testified that he would have pleaded guilty to the misdemeanor had he known of the offer.[15] The Missouri appellate court granted Frye relief.[16]

The United States Supreme Court found that the Missouri court correctly concluded that counsel's failure to inform Frye of the written plea offer before it expired fell below an objective reasonableness standard, but reversed and remanded because the Missouri court failed to require Frye to show that the plea offer would have been adhered to by the prosecution and accepted by the trial court.[17]

In Lafler v. Cooper, the Court held, although defense counsel communicated the plea offer to the defendant, because defense counsel erroneously advised the defendant to reject the offer and go to trial, defense counsel did not render effective assistance where the result was a sentence 3 1/2 "times more severe than he likely would have received by pleading guilty."[18]

Lafler was charged under Michigan law with assault with intent to murder and three other offenses.[19] The prosecution offered to dismiss two of the charges and to recommend a 51-to-85 month prison sentence on the other two, in exchange for a guilty plea.[20] In a communication with the court, Lafler admitted his guilt and expressed a willingness to accept the offer.[21] But he rejected the offer after his counsel convinced him that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist.[22] At trial, Lafler was convicted on all counts and received a mandatory minimum 185-to-360 month prison sentence.[23]

In post-conviction proceedings, the Michigan courts rejected Lafler's claim that his counsel's advice to reject the plea constituted ineffective assistance.[24] The federal courts granted Lafler relief and Michigan sought review in the United States Supreme Court.[25]

Significantly, both sides agreed that the advice to go to trial was bad: "all parties agree the performance of [defense counsel] was deficient when he advised [the defendant] to reject the plea offer on the grounds he could not be convicted at trial,"[26] and the government "conceded" that the choice to go to trial rather than accept the plea deal "was the result of ineffective assistance during the plea negotiation process."[27] The Supreme Court held "the correct remedy . . . is to order the State to reoffer the plea agreement. Presuming [Lafler] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence [Lafler] pursuant to the plea agreement, to vacate only some of the convictions and resentence [Lafler] accordingly, or to leave the convictions and sentence from trial undisturbed."[28]

In Frye and Lafler, the Court recognized the "simple reality" in the twenty-first century that plea bargaining has become "central to the administration of the criminal justice system."[29] According to resources cited by the Court, 97% of federal convictions and 94% of state convictions are the result of guilty pleas.[30] Because plea bargaining, not trials, "is the criminal justice system," defense counsel "have responsibilities in the plea bargain process . . . that must be met to render the adequate assistance of counsel that the Sixth Amendment requires."[31]

And, of course, a major reason to plead guilty is the practical benefit of a likely reduced sentence. "[O]nly an ignorant, ill-advised consumer" would pay via a guilty plea the "full" "sticker price" of "[t]he expected post-trial sentence."[32]

Common sense dictates that defense counsel will be held accountable, as in Frye, for failing to communicate a plea offer to his or her client where the result is a longer prison sentence.[33] But when will a court, as in Lafler, second guess defense counsel's advice to take the case to trial? The government conceded in Lafler that the advice was ineffective. But what happens in future cases where there is no concession and the soundness of the plea or trial advice is disputed?

III. CASELAW PRIOR TO *FRYE* AND *LAFLER*

Prior to Frye and Lafler, in several federal circuits, defense counsel had an ethical, legal, and constitutional obligation to assist a defendant in deciding whether to plead guilty or go to trial.[34] "Where the issue is whether to advise the client to plead or not 'the attorney has the duty to advise the defendant of the available options and possible consequences' and failure to do so constitutes ineffective assistance of counsel. . . . [A]n attorney's incompetent advice resulting in the defendant's rejection of a plea offer constitute[s] ineffective assistance of counsel."[35]

Similar to the Supreme Court in Lafler, the Ninth Circuit in United States v. Blaylock found that had the defendant "pleaded guilty, his sentence would certainly have been much

15 Id. at 1405.

16 Id.

17 Id. at 1410-1411.

18 132 S.Ct. at 1390-1391.

19 Id. at 1383.

20 Id.

21 Id.

22 Id.

23 Id.

24 Id.

25 Id. at 1383-1384.

26 Id. at 1384.

27 Id. at 1386.

28 Id. at 1391.

29 Lafler, 132 S.Ct. at 1388; Frye, 132 S.Ct. at 1407.

30 Id.

31 Frye, 132 S.Ct. at 1407 (emphasis by the Court).

32 Lafler, 132 S.Ct. at 1387 (quoting Stephanos Bibas, Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection, 99 Cal. L. Rev. 1117, 1138 (2011)).

33 As recognized by the Ninth Circuit, "[i]f an attorney's incompetent advice regarding a plea bargain falls below reasonable standards of professional conduct, a fortiori, failure even to inform defendant of the plea offer does as well." United States v. Blaylock, 20 F.3d 1458, 1465-1466 (9th Cir. 1994).

34 Blaylock, 20 F.3d at 1465. Prior to Blaylock, three other circuits (the First, Third and Seventh) held that failure of counsel to communicate a plea offer to the accused was ineffective assistance of counsel. Blaylock, 20 F.3d at 1465. The Fifth Circuit had held that failure of counsel to advise the accused of the possible options and consequences of a guilty plea versus trial constitutes ineffective assistance of counsel. Id. The Sixth Circuit had held that incompetence advice resulting in the defendant's rejection of a plea offer constituted ineffective assistance of counsel. Id. The Ninth Circuit reviews those decisions in Blaylock. Id.

35 Id. (citations omitted).

less severe."[36] As in Frye, Blaylock's counsel did not inform him of the government's plea offer.[37] Blaylock was convicted at trial and then sentenced to 235 months in prison.[38] Had he accepted the plea offer, Blaylock "likely would have received at least a two-point reduction for acceptance of responsibility and thus a substantially lower sentence."[39] Furthermore, if he had accepted the plea offer, Blaylock maintained the government would not have filed enhanced penalty charges.[40]

A defendant must be given "the opportunity to consider intelligently his plea [options] and to make an informed decision about it."[41] If the accused is given bad advice or no advice from his lawyer, he will be deprived "of the right to make a well-informed decision about whether to accept a favorable plea agreement offer."[42]

"[T]he remedy for counsel's ineffective assistance should put the defendant back in the position he would have been if the Sixth Amendment violation had not occurred."[43] Where a defendant was deprived of the opportunity to accept a plea offer, "[r]equiring the government to reinstate its original plea offer is constitutionally permissible."[44]

Even without a plea agreement, it may be advantageous to plead guilty via an open guilty plea. In a Third Circuit case, United States v. Booth, the defendant alleged and the court agreed that his trial counsel was ineffective where trial counsel, "aware that the evidence against Booth was overwhelming and that Booth did not want to cooperate with the Government, did not inform Booth that he could have entered an open guilty plea to both counts of the indictment, likely entitling him to a three-level reduction for acceptance of responsibility [under the United States Sentencing Guidelines]."[45]

IV. THE ABA STANDARDS

The American Bar Association Standards for Criminal Justice[46] direct, as Frye now mandates, that defense counsel "should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney."[47] Furthermore, "[t]o aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed."[48] Indeed, "[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."[49] Defense counsel has the duty to investigate regardless of the defendant's "stated desire to plead guilty."[50]

The ABA Standards make clear that the decision to plead guilty or go to trial belongs to the defendant. "Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant."[51] Defense counsel must not make the plea or trial decision for the defendant. The decision whether to plead guilty or accept a plea agreement is "ultimately for the accused" and is "to be made by the accused after full consultation with counsel."[52]

V. RECOMMEND PLEA OR TRIAL? IN FEDERAL COURT, THE ADVICE IS USUALLY THE SAME.

Harsh punishment and lengthy imprisonment hallmark the federal criminal justice system. Guilty pleas are endemic. In the most recent annual data, 96.9 % of federal cases were resolved by guilty pleas and only 3.1 % by trial.[53] In the District of Montana, a higher percentage of cases proceeded to trial – all of 5.1 %.[54]

Several reasons explain why guilty pleas rule supreme. For instance, federal drug distribution sentences contain a series of gradated mandatory minimum sentences tied to drug quantity.[55] And to trigger the drug quantity, and thus establish the mandatory minimum, the government can charge a defendant in a conspiracy, in which the defendant is held responsible for both his and other co-conspirators' acts as long as the co-conspirators' acts were "reasonably foreseeable."[56]

The government can offer a plea agreement that does not include any, or dismisses other, mandatory minimum offenses. The government can dismiss a conspiracy charge and the

36 Blaylock, 20 F.3d at 1467.

37 Blaylock, 20 F.3d at 1461.

38 Blaylock, 20 F.3d at 1462.

39 Blaylock, 20 F.3d at 1467. See U.S.S.G. § 3E1.1 (reducing United States Sentencing Guidelines offense level for acceptance of responsibility, which almost always follows a guilty plea).

40 Blaylock, 20 F.3d at 1467-1468.

41 United States v. Day, 285 F.3d 1167, 1172 (9th Cir. 2002).

42 Id.; see also Blaylock, 20 F.3d at 1468.

43 Blaylock, 20 F.3d at 1468.

44 Id. (citations omitted).

45 United States v. Booth, 432 F.3d 542, 1075 (3rd Cir. 2005).

46 See Wiggins v. Smith, 539 U.S. 510, 524 (2003) ("[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'"(quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)); Blaylock, 20 F.3d at 1466 ("[U]nder the Strickland test, a court deciding whether an attorney's performance fell below reasonable professional standards can look to the ABA standards for guidance. Strickland, 466 U.S. at 688, 104 S.Ct. at 2065).

47 ABA Standards for Criminal Justice: Pleas of Guilty, 3d ed. (1999), No. 14-3.2; see also ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed., 1991, No. 4-3.8 & 4-6.2.

48 Id.

49 ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed., 1991, No. 4-6.1.

50 Smith v. Mahoney, 611 F.3d 978, 987 (9th Cir. 2010), cert. denied, 131 S. Ct. 461 (U.S. 2010) (quoting ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)).

51 ABA Standards for Criminal Justice: Pleas of Guilty, 3d ed. (1999), No. 14-3.2. This standard has been approved and cited by the Ninth Circuit. Blaylock, 20 F.3d at 1461.

52 ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed., 1991, No. 4-5.2.

53 United States Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics.

54 Id.

55 21 U.S.C. § 841.

56 See, e.g., Pinkerton v. United States, 328 U.S. 640, 647-48 (1946).

defendant thus pleads guilty to only his acts.[57] If the defendant faces a mandatory minimum drug charge and has a prior felony drug offense, the government can choose, or not choose, to file an "851 notice."[58] That notice doubles the mandatory minimum sentence, and if it includes two prior felony drug offenses, the minimum sentence becomes life imprisonment.[59]

There is no parole in the federal system. Life means life. And mandatory minimum sentences are just that – the minimum sentence the court has to impose, with only two exceptions detailed below.

If a gun is involved with the drugs, the government is likely to add a count of "using or carrying a firearm in commission of a drug trafficking crime,"[60] which adds, at a minimum, a mandatory five–year sentence consecutive to the sentence for the drugs, and, like the statutory framework for drugs, mandates a series (beginning with five years) of gradated mandatory minimums, based on how the gun was used during the drug trafficking offense.[61]

The United States Sentencing Guidelines facilitate plea agreements. A guilty plea almost always results in an "acceptance of responsibility" credit reducing the defendant's Guidelines calculations.[62] Except for limited circumstances, that credit is unavailable for a defendant convicted at trial. Other reductions to Guidelines calculations are few and far between and swamped by hundreds of enhancements.

Although numeric-based and thus cloaked in objectivity, many subjective determinations underlie the Guidelines calculations. In drug cases, the applicable Guidelines' range is based primarily on the type and quantity of drugs.[63] The greater the quantity of drugs attributable to the defendant, the higher the Guidelines' sentencing range.[64] The drug guideline is determined not merely by reference to the offense of conviction, but by including all of your client's "relevant conduct."[65] Relevant conduct includes conduct of co-conspirators that is "reasonably foreseeable" and within the scope of the agreement, although the court must make individualized findings of foreseeability as to each conspirator.[66]

Who really knows the drug quantity involved in a conspiracy that spans time, locations, and involves multiple conspirators, who typically are drug abusers suffering memory and credibility problems. A plea agreement can include a government recommendation to calculate the Guidelines based on a specified drug quantity. Although not binding on the court, that recommendation offers some assurance not available to a defendant convicted at trial. Moreover, drug cases are built on cooperating informants, who are often co-defendants or defendants in another case, who have decided to plead guilty and cooperate with the government. If called to testify at trial, cooperating co-defendants have many incentives to assist in the conviction of the defendant, and that assistance includes detailing drug quantities.

Cooperation is another reason to plead guilty. Cooperating with the government means providing "substantial assistance in the investigation or prosecution of another person who has committed an offense."[67] The United States Attorney's Office unilaterally determines whether the cooperation is "substantial."[68] If the cooperation is deemed substantial, the Assistant United States Attorney may file a "substantial assistance" motion under U.S.S.G. § 5K1.1 (a "5K motion"), authorizing the court to sentence below the advisory Guidelines' sentencing range, and more importantly a motion under 18 U.S.C. § 3553(e), authorizing the court to sentence below the statutorily-mandated minimum sentence at the time of sentencing. Without a § 3553(e) "substantial assistance" motion, and absent the "safety valve" exception which applies in limited circumstances only,[69] the judge cannot sentence the defendant below the mandatory minimum.[70] Consequently, defendants cooperate, which also means pleading guilty, hoping for a reduced sentence, ideally one below the mandatory minimum sentence.

In addition to these daunting penalties, federal prosecutors routinely take a state case federal. In other words, while state law enforcement and prosecutors may begin in investigation and prosecution, eventually the case "goes federal." At a practical level, the state case serves as a placeholder, including detaining the defendant. Dual sovereignty jurisdiction provides the federal executive branch the time needed to carefully select and prepare federal cases that are defense-proof. These dynamics provide the government with tremendous leverage to extract guilty pleas from defendants, who at best are hoping for a reduced prison sentence by pleading guilty, and maybe cooperation. This practice is so common that "going federal" is part of criminal practioner parlance.

VI. CONCLUSION

Statistics confirm what criminal justice players know: rather than going to trial almost every defendant pleads guilty. Particularly in the federal system, the stakes are simply too high, and the government's case too good, for a defendant to risk suffering conviction at trial and incur enhanced punishment. The Supreme Court's decisions in Frye and Lafler conform to this reality. Requiring effective assistance of counsel during the plea agreement – or even better for the defendant, during the plea bargain – process vindicates the Sixth Amendment right to counsel.

57 Under the relevant conduct section of the Guidelines, the defendant's Guidelines calculation can still include the reasonably foreseeable acts of others. See U.S.S.G. § 1B1.8.

58 21 U.S.C. § 851.

59 18 U.S.C. § 841.

60 18 U.S.C. § 924(c).

61 Id. at § 924(c)(a)(A)-(C).

62 U.S.S.G. § 3E1.1.

63 U.S.S.G. § 2D1.1(c).

64 Id.

65 U.S.S.G. § 1B1.3.

66 United States v. Navarro, 979 F.2d 786, 789 (9th Cir. 1992).

67 18 U.S.C. § 3553(e).

68 Id.

69 18 U.S.C. § 3553(f); U.S.S.G. § 5C1.2.

70 21 U.S.C. § 841.

John W. Mahan

John W. "Jack" Mahan, a retired Helena attorney, died peacefully on July 4, 2012, in his home. Independence Day was a fitting date for this former World War II Marine pilot and national veterans' leader to depart this life. He was 89.


Mahan

Jack Mahan was a proud husband, father, grandfather and great-grandfather. He contributed greatly to his nation, his state and his community over the decades.

He was born June 24, 1923, in Missoula, the son of John W. Mahan Sr., an attorney, and his wife, Iola. His father was former national commander of the Disabled American Veterans and later brigadier general and Montana's adjutant general. His mother was president of the American Legion Auxiliary in Helena.

He graduated from Helena High School in 1941, serving as student body president his senior year. Mahan also worked as a doorman at the Marlow Theatre where his sweetheart and future wife, Shirley Tuohy, also worked.

Jack enrolled at the University of Montana in 1941, where he was elected president of the freshman class and joined Sigma Alpha Epsilon.

After the attack on Pearl Harbor Dec. 7, 1941, Jack joined the Navy Air Corps in the spring of 1942 with the goal of being a Marine pilot. He began training as a Navy cadet at Carroll College before attending other preflight schools.

He was discharged by the Navy in Corpus Christi, Texas, on April 3, 1943, and commissioned next day as a lieutenant in the Marine Corps with Navy wings. On that same day he married Shirley Tuohy in Corpus Christi. She was only 17 and needed her father's permission to get married.

Jack served as a dive bomber pilot in the Pacific Theater during World War II, flying a number of missions.

After his discharge as a major in 1945, Jack returned to Helena to attend Carroll College. Taking advantage of the GI Bill, he attended law school at what's now UM. He graduated from law school and was admitted to the state bar in 1949.

Jack began practicing law in Helena and built a successful trial law practice.

He attended meetings of Veterans of Foreign Wars Post 1116 in Helena. Veterans were angry that Montana failed to provide them with a bonus as other states had done for their World War II veterans. The state hadn't done so because after World War I, the Montana Supreme Court had found these bonuses to be unconstitutional.

He and another lawyer came up with the idea of calling it an "honorarium" instead of a "bonus." Veterans groups moved for an initiative imposing a two-cent tax on cigarettes sold to raise for $22 million for the honorarium for World War II veterans. Voters approved the proposal by a landslide, and it withstood a court challenge.

After being commander for the Helena VFW post, Jack became state VFW commander, then a regional commander, before moving through the chairs at the national VFW. He became the national commander in chief of the 1.3 million-member VFW in 1958-1959.

As national VFW commander, Jack worked with Montana's congressional delegation to get a new veterans' hospital built at Fort Harrison, west of Helena. He enlisted the help of his friend, Rep. Olen "Tiger" Teague, D-Texas, who chaired the committee overseeing the

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John Terence Flynn

John Terence Flynn, 59, passed away from complications of congestive heart failure on May 28, 2012 while on a short holiday in San Francisco.

John was born to William (Bill) Warren Flynn and Lorena Hurd Flynn on July 23, 1952. He was born in Bozeman, Montana, but lived his life in Townsend. John married Deborah Ann Whitehurst on July 24, 1999 at the Dry Creek Cabin near Townsend.

John had no military affiliation or experience.

John was educated in the Townsend public school system and graduated in the BHS class of 1970. He attained a BA in History-Political Science at the University of Montana in 1974; he earned his law degree at the University of Montana in 1977.

His principle occupations were Broadwater County Attorney, Townsend City Attorney, and had a private legal practice. John's first employment as an attorney was as a legal clerk for Judge Peter Meloy in Helena.

At the age of 25, he was elected Broadwater County Attorney, the youngest county attorney in Montana state history. He held that office for almost 34 consecutive years. John maintained a private practice office in Three Forks, MT for many years and focused primarily on estate planning, real estate and water rights.

John is survived by his spouse, Deborah Whitehurst Flynn, of Townsend. He is also survived by the mother of his children, Eileen Boharski Flynn, of Bozeman. Surviving children are Meagan Flynn Mesmer (Aaron) of Shawnee, KS, and Molly Flynn of Seattle, WA. Surviving grandchildren are Asher Aaron Mesmer and one on the way!

Surviving siblings include Claudia Evans of Eureka, MT and Ted Flynn of Townsend. He is survived by his aunt, Louise Flynn, as well as numerous nieces and nephews, and many first, second and third cousins.

John was preceded in death by his parents, William (1989) and Lorena (1993) and a brother, William Flynn (1957).

Funeral services were held on Sunday, June 3, in Townsend.

Nicholas A. Rotering Jr.

Nicholas A. Rotering Jr. ("Nick") of Helena passed away February 23, 2012 at the age of 69 after a brief battle with cancer. He was born December 30, 1942 to Nick and Dorothy Rotering in Butte, where he attended Boys Central High School and Montana Tech. Nick received a JD from the University of Montana Law School in 1970. He married Carol "Chic" King and had a son, Nick , and daughter, Melena.

Nick worked as an attorney in Montana his entire life – with Montana Legal Services from 1970-1973, the Department of Corrections from 1973-1989, and the Montana Highway Department from 1989-2004. At the last two positions, he was the "point" person during the tumultuous legislative budget sessions that occurred every two years.

Nick was a member of the Moose Lodge #639 where he served as governor and administrator. He will be remembered as a warm-hearted man with a great sense of humor who loved nothing more than a championship caliber Grizzly Football season. During his college days at Montana Tech he played as a lineman for the Orediggers, but was once called upon to try his foot at field-goal kicking when the regular kicker was injured. He made the kick just as an ore train was passing in back of the practice field on its regular run to Anaconda, thus enshrining his name in practice legend as the only holder of a 23-mile field goal.

Nick was a 3rd generation Irish American with a superb sense of humor. One spring he told a fellow litigator in Helena's District Court that the purple robes worn by Judges Bennett and Meloy were "for Lent". Nick was the grandson, son, nephew, brother and brother-in-law to 5 other Montana State Bar members. He is buried in the Rotering family plot in Butte, where it was noted he can "keep voting."

Mahan

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Veterans Administration funding. After Teague came to Fort Harrison for a visit, the VA reversed its position and later announced a new 160-bed hospital would be built at Fort Harrison, with $5.4 million allocated for the first phase.

As VFW commander in chief, Mahan choose to spend more time in Washington, D.C., to get to know senators and congressman to inform them about the problems faced by veterans and work with them to find solutions.

Throughout his career, Jack got to know Presidents Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, Richard Nixon and Gerald Ford and worked with them on veterans' issues.

U.S. Sen. Mike Mansfield, D-Mont., once said, "John W. Mahan has done more for the veterans of Montana and the nation than any other man I know."

After his time as VFW national commander ended, Jack returned to Helena to practice law. At age 36, he ran for the U.S. Senate but lost in the Democratic primary election.

Later that year, he was appointed national chairman of the Veterans for Kennedy presidential campaign committee in 1960. Four years later, he headed the national Veterans for Johnson committee.

Jack turned down an appointment by President Kennedy to be an assistant secretary of the Navy. In September 1965, he accepted President Johnson's appointment to the national Subversive Activities Control Board with the goal of "helping keep America clear of Communists and subversive elements." And, The Mahan family moved to Arlington, Va.

In December 1965, Johnson appointed Jack as chairman of the board, and President Nixon later reappointed him chairman.

After the board ended in the fall of 1973, Nixon appointed Jack to some top jobs in the Veterans Administration. He eventually became undersecretary to the VA Memorial Services and director of the national cemetery system, overseeing a major expansion of the national system and the creation of state veterans' cemeteries.

When that job ended in 1978, Jack and Shirley Mahan returned to Helena where he resumed his law practice. She died on March 30, 2002.

Jack was a great host, always interested in others as he entertained family and friends with stories about his life and his views on the issues of the day.

He is survived by his daughter, Kim, and her husband, John Dunham, of Siloam Springs, AR, and their two daughters, Bartley and Kara; his daughter, Shelley, and her husband, Carter Picotte, of Helena; his daughter Bartley and her husband, Bill Aanenson, of Issaquah, WA, and their three children, Justin, Rebecca and Michelle; and his son, Dr. John and his wife, Leslie, Mahan, and their three children, Kristen, Jaren and Kylie. He also is survived by 11 great grandchildren.

Other survivors include: his sister-in-law, Jane, and her husband, Gene Thayer, of Great Falls, and four nieces and one nephew.

He was preceded in death by his wife, Shirley Mahan; his father, John W. Mahan Sr., and mother, Iola Mahan, and his sister, Lucille Foot; and brother, Tom Mahan; and their spouses.

The family offers special thanks to Brenda Thompson, his personal caregiver, for the past two and one-half years and all his special friends that visited him and encouraged him. Also, thanks to Dr. Pincomb and the wonderful nurses and staff at St. Peter's dialysis unit, Dr. Weiner and his excellent staff.

Funeral Mass was Saturday, July 7 at Saint Peter's Episcopal Cathedral; 511 Park Ave. where Jack was a long time member.

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