MONTANA LAWYER

State Bar of Montana

Aug. 2013 | Vol. 38, No. 9

Annual Meeting 2013

HELENA

Sept. 18-20 | Red Lion Colonial Hotel

- Hot-topics -10.5 CLE/2 ethics
- Supreme Court oral arguments
- Reception at Holter Museum of Art
- Keynote speaker Bill Neukom
- Awards banquet and luncheon
- And more ...

Also in this edition:

MONTANA LAWYER

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E-mail: mailbox@montanabar.org

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

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August 2013

Feature Stories

Regular Features

Montana Defense Trial Lawyers

Annual CLE Seminar

October 4, 2013 ■ 6 CLE hours *(Includes 1 Hour Ethics)*

Doubletree by Hilton Missoula-Edgewater, Missoula, Montana

A limited block of rooms have been reserved for MDTL program participants. Call **406.542.4611** and ask for the MDTL room block.
For full schedule and additional information, visit www.mdtl.net.

Advocacy for the Ages

Cicero Speaks to the Next Generations

Dominic Gianna, Esq.
Middleberg, Riddle & Gianna
Dallas, New Orleans, Baton Rouge

- Explore the intricacies of navigating today's landscape of Gen X, Gen Y and soon Gen *i* jurors.
- Live demonstrations, video and film expose the new science of persuasion and show you how to capitalize on the concepts of confirmational bias, selective attention, mind schemata and pre-decisional bias.
- Reveals how to use your "gender strengths" to win, to find your emotional I.Q. and to understand the Holy Grail of Winning.
- Learn the "next generation psychology of litigation" and understand how to use the Magic of the Three C's to create winning stories and themes.
- Cicero delivers his actual closing arguments at the Forum from his most notorious trials and imparts his Six Maxims of Persuasion, which bring his trials (and yours) to life.
- Learn how to "text message" your case, to try a case "in a hurry," to craft directed directs and constructive crosses, to use the three S's, the ethical limits of persuasion and why "Show, Not Tell," is the goal.

Lisa Marcy, Esq.
Marcy Law Firm, PLLC
Salt Lake City

Seminar Schedule

7:30-8:00 am	**Registration**
8:00 am - 12:30 pm	**Advocacy for the Ages** Dominic Gianna, Esq. & Lisa Marcy, Esq.
12:30-2:00 pm	**MDTL Annual Membership Meeting Luncheon** Lunch on own if not attending
2:00-4:00 pm	**Advocacy for the Ages** Dominic Gianna, Esq. & Lisa Marcy, Esq.

Fees

	On or Before Sept. 16	After Sept. 16
❑ MDTL Member	$260	$325
❑ Nonmember	$345	$410
❑ Paralegal	$175	$215
❑ Claims Personnel	$140	$160
❑ Law School Students	$25	$25
❑ Members of the Judiciary	*Complimentary*	*Complimentary*

Payment must accompany registration **Total Enclosed $**_____

Payment Information:
❑ Visa ❑ MasterCard ❑ Check (made payable to MDTL)

Cardholder's Name (please print) _____

Account # _____ Exp. Date _____

Validation Code _____ Auth. Signature_____

Cardholder's Address _____

City/State/Zip _____

Registration Policies: The registration fee includes all sessions and course material. Payment must accompany registration form to receive early registration discount. ***Cancellations received in writing by September 16 will be subject to a $25 service charge. No refunds will be made after September 16.*** Course materials will be mailed to pre-paid registrants who were not able to attend the conference. Registration substitutions may be made at any time without incurring a service charge.

Two Ways to Register:

1. Easy online registration at www.mdtl.net

or

2. Registration Form

Name _____

Nickname for badge _____

Firm _____

Address _____

City/State/Zip _____

Email _____

Telephone _____

Cell Phone _____

Send registration form to:
MONTANA DEFENSE TRIAL LAWYERS
36 South Last Chance Gulch, Suite A ● Helena, MT 59601
Phone 406.443.1160 ● **Fax** 406.443.4614
sweingartner@rmsmanagement.com ● www.mdtl.net

State Bar Nonprofit Law Section seeks attorneys for emerging referral service

A loosely organized group of local artists wants to explore the possibility of creating a nonprofit to support arts in the community and wants advice on the pros and cons of incorporating as a nonprofit. The chair of a small nonprofit's board wants to formalize their financial oversight policies and wants to know both what the law requires and what are "best practices." Another board has just recognized the need to terminate an underperforming employee and wants advice on the correct steps to honor the employee's rights and protect the nonprofit from the risk of a lawsuit. The Nonprofit Law Section fields queries like this on a regular basis, but until now has had no organized referral process to connect Montana attorneys with these potential clients.

Over the last year, together with the Montana Nonprofit Association, the section has been exploring ways to provide referrals for lawyers with expertise in the many areas of law that affect nonprofits, from nonprofit formation to human resources, tax, and many other areas. Some of the nonprofits are larger entities seeking specialist advice on a for-fee basis. Other nonprofits or would-be nonprofits have tiny budgets – in the thousands or tens of thousands annually – and seek discounted or pro bono advice.

To be sensitive to attorneys' specialties and capacities, the emerging plan is to provide a very individualized referral service that will match the right attorney to a nonprofit. There is no charge to attorneys or nonprofits to participate. Attorneys may be as specific as they like about the kind of referrals they will consider. The section will only provide attorney contact information at the attorney's direction. If the client engagement is pro bono, Montana Legal Services will do the client intake and provide malpractice coverage.

The referral service is a wonderful opportunity to match attorneys with community organizations doing great work across the state, in a way that's sensitive to the attorney's capacity and expertise. If you would be willing to participate, or simply want to know more, please contact Nonprofit Law Section chair Carrie La Seur at 406-969-1014 or carrie@baumstarkbraaten.com.

HEALTH CARE LAW SECTION

Meeting Notice: The Health Care Law Section cordially invites all Section members and any other interested persons to our annual meeting, held in conjunction with the State Bar Annual meeting in Helena at the Red Lion Colonial Hotel on Thursday, September 19, 2013, 10:00 a.m. – 12:00 a.m. We will be discussing revisions to the Section Bylaws and electing new Officers.

CLE Notice: Join the Health Care Law Section members at the State Bar Annual meeting in Helena during the Hot Topics CLE on Thursday, September 19, 2013, 1:00 p.m. – 2:15 p.m. We will assist you with advising your clients about issues that are relevant to the highly-regulated health care industry, including compelling health care information, HIPAA, Anti-Kickback and Stark, and Health Care Reform.

Stay Tuned: Watch for Health Care Law Section articles in the Montana Lawyer over the coming months! The articles will address current health care law topics discussed during the Hot Topics CLE. If you're interested in joining the Health Care Law Section, want an advance copy of the proposed Section Bylaw revisions, or have suggestions for additional health care law related topics that you want to see in the Montana Lawyer, please contact Erin MacLean at emaclean@fandmpc.com

August 15 deadline for Uniform Law Commission applications; new member selected Aug. 22

The Legislative Council is seeking applicants interested in serving on the National Conference of Commissioners on Uniform State Laws or Uniform Law Commission (ULC) following the resignation of Justice Michael Wheat. The Legislative Council regretfully accepts his resignation and sincerely thanks Justice Wheat for his service on the Commission.

The Uniform Law Commission members research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

The Legislative Council is responsible for appointing a new member and is accepting applications. In order to apply, one must be a member of the State Bar. ULC members serve 4-years terms and receive reimbursement for expenses incurred attending ULC annual meetings. The Legislative Council will select the new member at their August 22, 2013, meeting. If you are interested in applying, please send a letter of interest and resume by August 15, 2013, to the Legislative Council, c/o Susan B. Fox, PO Box 201706, Helena, MT 59620. For more information, contact Susan Fox at (406) 444-3066 or sfox@mt.gov.

Weamer is new partner at Tarlow Stonecipher & Steele

The law firm of Tarlow Stonecipher & Steele, PLLC, is pleased to announce that Margaret C. Weamer has become a partner in the firm. Maggie is originally from Billings and completed her undergraduate studies at Montana State University-Billings, with honors, in 2002. Maggie graduated from the University of Montana School of Law in 2006. During law school, Maggie was a member of the National Moot Court Team and a teaching assistant for the legal research and writing program. Before joining the firm in 2007, she clerked for Justices Brian Morris, Patricia Cotter, and John Warner of the Montana Supreme Court. Maggie is admitted to practice in Montana and the U.S. District Court for the District of Montana. Her practice areas focus on commercial litigation, construction law, labor and employment, tort defense, and personal injury.

The firm also recently welcomed Anna M. Bidegaray to its practice. Anna graduated with honors from the University of Montana School of Law in 1994. She received a Bachelor of Arts Degree in Political Science and German Area Studies from the University of Washington in 1991. During law school, Anna was a member of the National Moot Court Team. After law school, she served one year as a law clerk at the Workers' Compensation Court. From 1995-2000, Anna was in private practice in Sidney, Montana, where she had a general law practice. Since 2000, she has practiced in Bozeman focusing on plaintiffs' cases of various types. Anna is admitted to practice in Montana and U.S. District Court for the District of Montana, as well as Fort Peck Tribal Court. She will be engaged generally in the firm's practice, with an emphasis on litigation.

Both Maggie and Anna can be reached at (406) 586-9714. Their email addresses are mweamer@lawmt.com and abidegaray@lawmt.com, respectively.

Burns joins Drake Law Firm

Amy K. Burns joined the Drake Law Firm in 2013. After graduating at the top of her class from Stanford Law School, she served as a law clerk to the Honorable Lucy H. Koh of the Northern District of California. Amy has participated in the litigation of several cases before the United States Supreme Court. Before becoming an attorney, she worked in a neuroscience research lab, where she designed and ran studies using cutting-edge brain scanning technology, and served as an AmeriCorps VISTA volunteer, specializing in disaster planning and recovery. When she's not working, Amy enjoys running, yoga, reading classic novels, and spending time with her husband and two dogs. http://www.drakemt.com. 406-495-8080.

Silverman admitted to North Dakota Bar

Silverman Law Office, PLLC is pleased to announce that Joel E. Silverman has been admitted to practice law in the state of North Dakota. He will focus his practice on tax, business, transactions, and real property law. Joel can be contacted at Silverman Law Office, PLLC, P.O. Box 4423, Helena, MT 59604. Phone (406) 449-4829; Fax (406) 968-4608. Email: joel@mttaxlaw.com.

Milodragovich, Dale & Steinbrenner welcomes Shoquist to firm

Liesel Shoquist's practice focuses on civil litigation in a wide variety of areas. She has assisted individual clients, corporations and government entities in cases involving personal injury, real property disputes, employment rights, insurance law, medical negligence, toxic torts and commercial transactions. Liesel has tried several cases to verdict, representing both plaintiffs and defendants, and has negotiated resolutions in the best interests of her clients in multiple cases.

Liesel was born and raised in Great Falls, Montana. After graduating from college, she spent a year as an Americorps National Conservation Corps volunteer and lived and worked in communities in Colorado, New Mexico, Texas and Minnesota. Her work included teaching algebra, digging trail, refurbishing a historical building, organizing community events, and grade school literacy outreach. After her Americorps stint, Liesel lived in Portland, Oregon and worked for a major insurance company. Ultimately, Liesel could not ignore being overwhelmingly homesick and returned to her beloved Montana to attend law school.

When Liesel is not practicing law, she can be found on Montana's rivers and lakes, ski hills, golfing or attending local sporting events and concerts. Liesel is also the President of the Western Montana Bar Association and an active member of Leadership Missoula through the Missoula Chamber of Commerce. (406) 728-1455. lshoquist@bigskylawyers.com

Ries partners with Rubin in new law office

Brandi Ries, formerly staff attorney with DOVES (Domestic Violence Education & Services) Legal Assistance for Victims (LAV) Program in Polson, has partnered with Amy Rubin to

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Gould, Lancaster, Glovan, and Olney join Payne as partners at Luxan & Murfitt

Luxan & Murfitt, PLLP, currently celebrating its 51st year of providing excellent service to its clients, is pleased to announce that Gregory G. Gould, Mark I. Lancaster, Jeffrey R. Glovan and Kelton D. Olney are joining with the firm's senior partner Candace C. Payne as partners in the firm. Luxan & Murfitt is confident that this revitalized partnership will enable Luxan & Murfitt to continue its strong tradition of providing the highest quality legal services to its clients across Montana. The firm looks forward to serving its clients for the next fifty years and beyond in the areas of business transactions, estate planning, health care, employment, family law, administrative, insurance, real property, taxation, nonprofit organizations, government relations and other areas of general civil litigation.

In addition, Luxan & Murfitt is pleased to announce that Dale E. Reagor is transitioning from his role as senior managing partner of the firm to of-counsel status. Dale has spent his legal career at Luxan & Murfitt and has played an integral part in ensuring the firm's commitment to excellent service. Dale, and his many years of expertise, will continue to serve the firm and its clients in his of-counsel role.

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form Rubin and Ries Law Offices, PLLC. At DOVES, Ries provided legal representation to victims of domestic violence, sexual assault, and stalking in Lake County and on the Flathead Indian Reservation in a variety of cases, including, but not limited to, family law (divorce and parenting plan cases), orders of protection, victims' rights advocacy, housing, employment, and immigration. In addition to directly representing victims as staff attorney, Ries also served as DOVES LAV Program Supervising Attorney and has also served as Guardian ad Litem in parenting cases in Missoula and Lake counties. Ries has represented clients before Montana state courts, the Montana Supreme Court, and the Confederated and Salish Kootenai Tribal (CSKT) Court. Ries is currently licensed to practice in Montana and CSKT Courts. The law practice of Rubin and Ries Law Offices, PLLC will primarily focus on family law. Rubin and Ries Law Offices, PLLC can be contacted at (406) 541-4141 or email at office@rubinrieslaw.com.

Holland & Hart achieves top certification from Women in Law Empowerment Forum

Holland & Hart LLP is proud to announce that it has achieved Gold Standard Certification from the Women in Law Empowerment Forum (WILEF) for the third year in a row.

The certification recognizes firms that have integrated women in top leadership positions and compensated them fairly. Only 42 firms in the country met this year's qualifying criteria. Holland & Hart is one of only six firms that met all six of the qualifying criteria.

"Attaining WILEF Gold Standard Certification is a testament to the fact that Holland & Hart takes this initiative very seriously and has met all six of the criteria--quite an achievement!" says WILEF chair Elizabeth Anne "Betiayn" Tursi.

"We are honored to once again receive the Gold Standard Certification," said Wendy Pifher, Holland & Hart partner and management committee member. "Holland & Hart is proud to foster a culture of diversity and inclusion, with a longstanding dedication to empowerment that attracts and retains women and diverse attorneys in leadership positions across the firm."

To qualify for 2013 WILEF Certification, law firms with 200 or more practicing lawyers in the U.S. had to satisfy four or more of the following criteria:

- Women account for at least 20% of equity partners or alternatively, 25% or more of the attorneys becoming equity partners during the past twelve months.
- Women represent at least 10% of firm chairs and office managing partners.
- Women make up at least 20% of the firm's primary governance committee.
- Woman represent 20% or more of the firm's compensation committee.
- Women make up at least 25% of practice group leaders or department heads.
- Women represent at least 10% of the top half of the most highly compensated partners.

Minto steps down at ALPS; Bell takes reins as CEO

In May of this year, after 25 years at the helm, ALPS Chief Executive Officer Robert W. Minto, Jr., stepped down from his role as CEO and now serves as executive chairman of the board. David Bell, then president and chief operating officer, has assumed the role of president and CEO of ALPS Corporation.

Bell came to ALPS in May of 2012 from Allied World Assurance Company (AWAC), a global insurance company founded in the wake of 9/11 by AIF, Chubb and Goldman Sachs. Bell served as the company's senior vice president and global professional lines manager before becoming chief operating officer, a role in which he served for the past four years in AWAC's Bermuda offices.

Bell brings extensive knowledge and experience in the insurance industry to ALPS. He began his professional career with The Chubb Corporation as Underwriting Manager-Executive Protection/Assistant Vice President specializing in a number of product lines including public and private directors and officers (D&O) insurance and employment practices liability insurance (EPL). Bell moved on within Chubb to serve as the Florida Legislative Liaison for the company.

Concurrently Bell emerged as a resource for the ever-changing D&O industry. He penned several articles on industry trends including "The Ups & Downs (Mostly Downs) of the D&O Rate Cycle," in The Professional Liability Underwriting Society Journal, and "Probing The D&O Market," Price Waterhouse Coopers Bermuda Insurance Quarterly.

For Bell, the move to ALPS is really more of a homecoming. He graduated from the University of Montana in 1996 with a degree in finance. While Bell and his family have lived in Florida and Bermuda for the past 16 years, Bell has maintained strong ties with his Montana roots. Bell serves on the board of directors for The Maureen & Mike Mansfield Center, an organization dedicated to promoting a better understanding of U.S. and Asia relations. The center was founded in the spirit of Montana Senator and former U.S. Ambassador to Japan, Mike Mansfield (1903-2001).

Bell also founded and serves on the board of Grateful Nation, a Montana-based organization founded in 2007 that provides college education for the children of Montana soldiers killed in active duty in Iraq and Afghanistan. Montana has the highest number of soldiers killed in action per capita and the state has been the blueprint for the Grateful Nation program with a vision to expand into more states throughout the country.

— Compiled from www.alpsnet.com

Attorney, ultra marathon swimmer to take on Canyon Ferry Reservoir, record for fundraiser

What: Swimming for Carter's Cause: 4 Paws. Ultra marathon swimmer Emily von Jentzen will attempt a 70-mile swim in Canyon Ferry Lake. Emily will swim without a wetsuit, which qualifies the swim as a record for the longest lake swim according to the International Marathon Swimming Hall of Fame (current record is 60 miles set in 1963). The swim will take around 48 hours to complete.

Where: Emily will swim in Canyon Ferry Reservoir, near Helena, MT and plans to swim along the lake's shoreline to meet the 70-mile goal.

Why: This swim is a fundraiser for 3-year old Carter Hasselbach of Helena. This fundraiser will assist in paying the costs for Carter's dog, Minnie.

When: Emily plans to begin swimming early on August 18, 2013, weather permitting.

Who: Emily von Jentzen has made a name for herself in open water ultra marathon charity swims. In 2010, Emily became the first woman and third person ever to swim the 30-mile length of Flathead Lake and in doing so raised $9,500 for a 3 year old battling Leukemia. In 2011, Emily became the first person to complete a 50-mile swim of Lake Chelan in WA, and in doing so raised $8,500 for a 5 year old battling Nueroblastoma. Emily is not a professional athlete; she is an Assistant Attorney General for the State of Montana's Child Protection Unit.

For more information about Emily and the Enduring Waves Foundation visit www.enduringwaves.com .

Incoming president lays out path for term at State Bar

By Randy Snyder

Every lawyer should question the relevance of the bar association. Didn't we all start that way?

In June, 1980 about 71 of us graduated from UM School of Law. Most knew little of any bar association (State or ABA). There wasn't even mandatory CLE then. I didn't join ABA and had it not been mandatory, would not have joined the Montana Bar. Why pay dues to something that does little or nothing, right? Some clique of lawyers meet in Helena and discuss lofty issues I don't know and don't care about. I read the "bar news" and who's looking for work once a month. My attitude held good for about 20 years, even after mandatory CLE. Good excuse to get out of the office, see some friends, and darn if I didn't learn a thing or two. The CLE's were fun enough I thought I'd try one or two. Bad mistake. I woke up one Monday, involuntarily appointed to the CLE Institute in order to organize, not just speak at a CLE. I dialed the phone to the State Bar to yell at someone. But the deliberative voice (thanks Betsy) calmly said, try it for a year and if you don't like it, you're off the hook. I wasn't off the hook; I got hooked. Being on the cutting edge of legal education? Plan and market education to our members? Now that could make a difference in a lawyer's life and practice. Ouch. My first swallow of my refrain that the Bar had no relevance.

Bar work became fun. I met a lot of people and (many swallows later) I kept stumbling up the ladder. Now I regret I missed out the first 20 years. My friends ask, so what do you do? The short answer: where else can an average lawyer from a one-horse town get to meet the finest of our profession all over Montana (and the country) and talk about our practice and life? They ask about the Bar. I ask about antelope hunting. So what the heck good is the Bar for, other than to take your money? I could write you what I think, but I'd rather do it in person. You might be surprised. So give me a call. Drop me a note, or invite me over. It'll cost you nothing. I'll learn something about what you think, and if you give me five minutes — more if you're willing, I'll tell you what we do. You can decide later if that's worth your dues or not – I just want you to know what's up with us.

The editor gives me this little white space for a year. His mistake. T'aint much good at great thoughts, so we'll talk about our practice that's changing so fast we can't near keep up. I'll share a couple ideas on how to make nice with owley folk (clients, courts and –cough – that other lawyer) and the next scary rule change that'll haunt us. We don't need more suits. We need more lawyers who'll forget the agenda and go to lunch. Call me. I'll buy lunch, breakfast, or lemonade at the fair. No agenda. Tell me what's on your mind, or tell me nothing. I'll knock on your door either way.

Nine questions with Randy Snyder

Q: Tell us a little about your background.

A: Linda and I just returned from my 40th year high school class reunion. It was great – couldn't believe people looked better now than high school. But then the 70's dress code was jeans and t-shirts.

Q: Where was that?

A: CMR in Great Falls. I grew up there, living next to Herman's Flowers (Herman was my grandfather – great guy). Hay fever kept me out of the Air Force Academy, so I enrolled at Missoula and went on to law school there. Today, I have twin daughters working in Washington DC, a son looking to be an electrician in the Flathead. Linda still teaches and trains dressage (that fancy Olympic riding – I can barely stay on a horse) and we've been in Bigfork thirty years now. I finally painted my 35 year old sailboat and it still plies the north end of Flathead whenever I can get out.

Q: How did you decide to seek the presidency?

A: I think I missed a meeting and was appointed. Seriously, I wasn't interested. If Bar membership weren't mandatory, I'd have declined to join. I thought it was a meaningless organization that promoted itself and offered nothing to

Every lawyer has a need, a good idea or would like to tell the Bar what to do with itself. We in turn can explain what Bar services are available, different sections or committees which can help, or where we're at with sponsored legal research, technology, or electronic filing.

me. Unfortunately, after giving a couple CLE's at Fairmont, I was drafted without notice to the CLE Institute. I stayed on and kept stumbling upstairs. About 7 years ago I was asked in a men's room to takeover a retiring Trustee's term. I intended to step down after a couple terms and give someone else a term. But another officer asked if I'd run for Board Chair. I first said "no" but then thought it could be fun, so I ran for chair and did that two years. Again, I didn't intend to keep stumbling upstairs, but prior officers kept encouraging me so I finally put my name in.

Q: How does your role in the Bar affect your role as an attorney?

A: It's changed my practice. Unfortunately, most of us rank and file folk have little idea what any Bar Association does. I had to become involved to find out. Since then, I've benefitted from its programs and I've met and exchanged with new friends and colleagues state-wide. Even day to day practice is different when you have a professional organization that supports you.

Q: Looking back, what has changed the most during your time as a Bar representative?

A: Aside from technology, very little. We (the Bar) strived for relevance to our members seven years ago. It's worse today. Both the practice of law and bar association's (all of them) struggle to keep current is harder than ever. Bar work and legal practice are a rapidly moving target. With the aging of our members (30-40% will die or retire in the next ten years) and technology, we barely become accustomed to what's new. In a couple months, it's different again.

Q: What has changed about you as an attorney?

A: Learning how little I matter. And the realization that I've been shaped by my choices more than I would like to admit. Small town practice is unbelievably rewarding. I love it, but I've learned that it doesn't always work in larger circles. When I joined the Board of Trustees, I spoke and voted against most everything, just because I didn't want to do things the same way they'd always been done without a good reason (I think they label such people troublemakers). I vote differently today.

Q: Looking forward, do you have a program, issue or agenda?

A: Not really. I was hoping to consolidate our programs and achieve some fresh, long range planning, but it didn't sell. Remember, the Bar President doesn't make policy; our members and the Trustees do. Better then that the Bar continues doing what it does well. We have outstanding CLE. We have dynamic committees and sections that do great work. The Bar staff answer phone calls from lawyers or the public and gives them live, timely answers to nearly every question posed. Our relationship with the Supreme Court, Montana Legal Services, Montana Trial Lawyers (to name a few) is outstanding. We need to keep up the great work we're already doing, but let more attorneys know that.

Next year (2014) we'll celebrate our "Fabulous 40th" as a unified Bar. Not every lawyer applauds that, so I want a chance to tell them what we do. We've just fired up the group to plan next year's annual convention at Big Sky. I hope we can whistle stop most every town to promote the convention and offer incentives to attend.

Q: If you have one goal for the next year, what is it?

A: I'd like to meet and talk to most every lawyer in Montana. That's a bit of a trip in the saddle, but I'm excited to try – especially eastern Montana and small towns. Every lawyer has a need, a good idea or would like to tell the Bar what to do with itself. We in turn can explain what Bar services are available, different sections or committees which can help, or where we're at with sponsored legal research, technology, or electronic filing. Pam Bailey started a program to meet with local bar associations. We're now working on scheduling our executive committee meetings to be in various towns when the local bar has its meeting. I'm not sure the Bar will become more relevant to members, but we'll at least know a little more about one another.

ORAL ARGUMENTS

Summarized from a June 12 order — DA 12-0139

IT IS HEREBY ORDERED that pursuant to the Internal Operating Rules of this Court, *State of Montana v. Jill Marie Lotter*, DA 12-0139, and *Allianz Global Risks US Insurance Company v. Lincoln County Port Authority*, DA 12-0519, are classified for oral argument before the Court sitting en banc and are hereby set for argument on Friday, September 20, 2013, at the Red Lion Colonial Hotel, 2301 Colonial Drive, Helena, Montana, beginning at 9:30 a.m.

Counsel in *State v. Lotter*, DA 12-0139, shall give oral argument first, with argument by counsel in Allianz v. Port Authority, DA 12-0519, to immediately follow. The following issues are designated for argument in DA 12-0519:

1. Did the District Court err by holding that the Port Authority is an insured under the Allianz policy and is entitled to independently file a claim directly with Allianz?

2. Did the District Court err by dismissing Allianz' counterclaim for reformation of the Allianz policy to reflect the mutual intent of the parties?

The oral arguments in these cases will be preceded by an introduction to the arguments provided by the University of Montana School of Law.

IT IS FURTHER ORDERED, pursuant to M.R.App.P. 17(3), that oral argument times for *State v. Lotter*, DA 12-0139, shall be twenty-five (25) minutes for Appellant and twenty (20) minutes for Appellee, and for *Allianz v. Port Authority*, DA 12-0519, shall be thirty (30) minutes for Appellant and twenty-five (25) minutes for Appellee.

COMMISSION ON CHARACTER AND FITNESS

Summarized from a June 27 order — AF 13-0276

A member of the Montana Supreme Court's Commission on Character and Fitness, Scott H. Moore, has resigned from the Commission. We take this opportunity to extend the thanks of a grateful Court, on behalf of the people of Montana, for Mr. Moore's valuable contributions to the Commission on Character and Fitness and to the legal profession.

With the consent of the appointee,

IT IS ORDERED that Sarah C. Scott ofHelena, Montana, is hereby appointed to the Commission on Character and Fitness, effective the date of this Order.

IIN THE MATTER OF THE APPOINTMENT OF A MEMBER TO THE JUDICIAL STANDARDS COMMISSION

Summarized from a June 27 order — AF 07-0385

Pursuant to the provisions of§ 3-1-1101, MCA, this Court is to appoint one attorney as a member of the Judicial Standards Commission for a term of four years.

This Court does hereby reappoint VICTOR F. VALGENTI of Missoula, Montana, as the attorney member of the Judicial Standards Commission for a term commencing July 1, 2013, and ending June 30,2017.

IN THE MATTER OF APPOINTMENT TO THE DISTRICT COURT COUNCIL

Summarized from a June 27 order — AF 06-0536

The term of District Court Council member, the Honorable Robert L. Deschamps, III (District Court Judge, Position 1 member) expires on June 30, 2013.

Pursuant to § 3-1-1602, MCA, the Montana Judges Association has nominated Judge Deschamps for reappointment as the District Court Judge, Position 1 member of the District Court Council.

THEREFORE,• IT IS ORDERED that the Honorable Robert L. Deschamps, III, is hereby reappointed to the District Court Council, as the District Court Judge Position 1 member, to a 3-year term which will begin July 1, 2013, and will conclude June 30, 2016.

The term of District Court Council nonvoting member Glen Welch (current Montana Juvenile Probation Officers Association representative) will expire on June 30, 2013. Pursuant to § 3-1-1602, MCA, the Montana Juvenile Probation Officers Association has nominated Mr. Welch for reappointment.

THEREFORE, with the consent of Glen Welch,

IT IS ORDERED that Glen Welch is hereby reappointed to the District Court Council as the Montana Juvenile Probation Officers Association representative. Glen Welch's 3-year term will begin July 1, 2013, and will conclude June 30, 2016.

N THE MATTER OF THE APPOINTMENT OF MEMBERS TO THE COMMISSION ON PRACTICE

Summarized from a June 28 order — AF 06-0090

The Court now appoints to the Commission on Practice of the Supreme Court of the State of Montana the following members for a four-year term to expire on April 1, 2017:

Area B: Brad Belke, Butte, Montana

Area D: Stephen R. Brown, Havre, Montana

Area F: James A. Hubble, Stanford, Montana

Area H: Robert J. Savage, Sidney, Montana

Discipline

Summarized from a June 5 order — PR 11-0617

On October 17, 2011, a formal disciplinary complaint was filed against Montana attorney Gregory W. Duncan. The complaint, which may be reviewed by any interested persons in the office of the Clerk of this Court, alleges that Duncan: failed to act with reasonable diligence and promptness in representing a client; failed to keep his client reasonably informed about the status of her legal matter or to comply with her reasonable requests for information; attempted to limit the scope of his representation unreasonably and without his client's consent; failed to communicate to the client in writing the scope of his representation and the basis or rate of his fees and expenses; and failed to have a written contingent fee agreement with the client. Finally, the complaint alleges that Duncan failed to

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IN RE ADDING TO THE RULES OF APPELLATE PROCEDURE A RULE ON JUDICIAL ORDER WAIVER APPEALS

Summarized from a June 27 order — AF 07-0016

Chapter 307, 2013 Laws of Montana, generally requires parental consent prior to an abortion for a minor, and provides for an expedited confidential appeal to this Court by a petitioner if a youth court denies a petition for waiver of the parental consent requirement. Chapter 307, which has an effective date of July 1, 2013, includes a provision allowing this Court to adopt rules providing for such expedited confidential appeals. Based in part on a proposed rule submitted to the Court by the Office of Appellate Defender, the Court has crafted the attached rule regarding those expedited confidential appeals. On May 8, 2013, we published the rule as a proposed rule and allowed 30 days for public comment. No comments were filed within the time allowed. Therefore, IT IS ORDERED that the attached rule is adopted. It shall be added to the Montana Rules of Appellate Procedure as Rule 30.

Rule 30. Judicial waiver appeals.

(1) Scope. This rule applies to an appeal from an order denying or dismissing a petition filed by a minor under age 16 to waive parental consent to an abortion, pursuant to Title 50, Chapter 20. In such appeals, this rule supersedes the other appellate rules to the extent they may be inconsistent with this rule.

(2) Notice of appeal.

(a) A minor may appeal an order denying or dismissing a petition to waive parental consent by filing a notice of appeal with the clerk of the supreme court. The notice of appeal may be filed in person, by mail, or by fax. If a transcript or written order is available, it should be attached to the notice of appeal, but such notice shall not be defective if it does not include such transcript or order.

(b) If a notice of appeal is incorrectly filed in a youth or district court, the clerk thereof shall immediately notify the clerk of the supreme court of such filing, and shall transmit a copy of the notice of appeal by fax or e-mail for filing with the supreme court.

(c) The notice of appeal must indicate that the appeal is being filed pursuant to this rule, but the court will apply this rule to cases within its scope whether they are so identified or not.

(d) Blank notice of appeal forms and copies of these rules will be available at all court locations and will be mailed, emailed, or faxed to a minor upon request.

(e) No filing fees or fee for any service may be required of a minor who files an appeal under this provision.

(3) Record on appeal; standard of review. A youth court that conducts proceedings for judicial waiver of consent shall issue written and specific findings of fact and conclusions of law supporting its decision and shall order that a confidential record of the evidence, findings, and conclusions be maintained. The record on appeal consists of the confidential record of the youth court, including all papers and exhibits filed in the youth court, the written findings and conclusions of the youth court, and, if available, a recording or transcript of the proceedings before the youth court. If the appellant has counsel, counsel shall serve the clerk of the youth court with a copy of the notice of appeal, request the record from the clerk of the youth court, and arrange for expedited preparation of the transcript immediately upon filing the notice of appeal. If the appellant does not have counsel, the clerk of the supreme court shall request the record immediately upon receiving notice that a self-represented minor has filed a notice of appeal, and the clerk of the youth court shall arrange for expedited preparation of any transcript directly with the court reporter. Upon receiving a request for the record from counsel for the appellant or from the clerk of the supreme court, the clerk of the youth court shall forthwith transmit the record to the supreme court by fax, e-mail, overnight mail or in another manner that will cause it to arrive within 48 hours, including weekends and holidays, after the youth court's receipt of the request for the record.

(4) Brief. A brief is not required. However, the minor may file a memorandum in support of the appeal within 48 hours, including weekends and holidays, after filing the notice of appeal.

(5) Disposition. The supreme court may designate a panel of five or more of its members to consider the appeal. The supreme court shall review the decision of the youth court de novo. The supreme court shall enter an order stating its decision within 72 hours, not including weekends and holidays, after the record referred to in (3) is filed. The supreme court shall issue an opinion explaining the decision as soon as practicable following entry of the order.

(6) Confidentiality.

(a) Documents, proceedings, and audio or video recordings in an appeal under this rule are sealed. All persons are strictly prohibited from notifying the minor's parents, guardian, or custodian that the minor is pregnant or wants to have an abortion, and from disclosing this information to any person. The court shall not release the name of, or any other identifying information concerning, a minor who files a judicial waiver appeal.

(b) All statistical and general information that the court system may have concerning judicial waiver appeals is confidential, except the number of appeals filed, granted, and denied statewide each year is public information.

(7) Attorney. If the minor is not represented by an attorney, the clerk of the supreme court shall appoint the office of the state public defender to represent the minor in the appeal. If counsel was assigned to represent the minor in the youth court, the appointment continues through the appeal. All counsel shall immediately be served with copies of the Court's order by fax or e-mail. In the event a minor waives the right to have counsel appointed on appeal, then notice of the court's order will be served upon her at the address or location she has provided to the clerk of the supreme court . The minor or her counsel shall be provided a certified copy of the order upon request.

(8) Filing defined. For purposes of this rule only, an appeal is deemed filed at the time and on the date it is received by the clerk of the supreme court.

(9) Special rule for interpreting time requirements. If the end of a time limit set out in this rule falls upon a weekend or holiday, then the time limit is extended to noon on the next business day.

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comply with applicable law requiring notice or permission of a tribunal when he terminated representation of his client. The complaint alleges that, by these acts and omissions, Duncan violated Rules 1.2, 1.3, 1.4, 1.5(b) and (c), and 1.16(c) of the Montana Rules of Professional Conduct applicable to all attorneys licensed to practice law in Montana.

Duncan 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 19, 2012, the Commission held a private hearing on this matter, at which Duncan appeared and addressed the Commission. The Commission has now filed with this Court its recommendation that the Court approve Duncan's tendered admission and the discipline to which he has consented.

The discipline to which Duncan has consented, and that the Commission recommends we impose, is that this Court administer a public censure and that Duncan be assessed with the costs of these proceedings.

We have reviewed the complete record in this matter. Based upon the foregoing, IT IS HEREBY ORDERED:

The Commission's Recommendation that we approve Gregory W. Duncan's conditional admission is ACCEPTED and ADOPTED.

Summarized from a June 11 order — PR 12-0665

On November 5, 2012, a formal disciplinary complaint was filed against Montana attorney Philip O'Connell. The disciplinary complaint may be reviewed by any interested person in the office of the Clerk of this Court.

O'Connell subsequently tendered to the Commission on Practice a conditional admission and affidavit of consent, pursuant to Rule 26 of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). The Commission held a hearing on the conditional admission and affidavit of consent on April 18, 2013, at which hearing O'Connell and his counsel were present. On June 4, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation that O'Connell's conditional admission be accepted.

We approve the findings, conclusions, and recommendation of the Commission on Practice. In his conditional admission, O'Connell has admitted that, with respect to two separate clients in different proceedings, he failed to provide competent representation and failed to act with reasonable diligence and promptness in representing them, in violation of Rules 1.1 and 1.3 of the Montana Rules of Professional Conduct (MRPC). O'Connell admits that, with respect to client Cara Fradkin, he violated Rule 1.5, MRPC, by failing to communicate in writing the scope of representation and the basis or rate of the fee and expenses for which she would be responsible. In violation of Rules 1.15 and 1.18, MRPC, O'Connell also admits that he did not deposit a $1,000 retainer fee in a trust account and that he took the fee before it was earned. At the time he agreed to represent both of the clients in question, O'Connell admits to having suffered from a condition that materially impaired his ability to represent them and either accepted the representation or failed to withdraw from representing them, in violation of Rule 1.16(a)(2), MRPC. O'Connell further admits to having failed to promptly respond to inquiries from the Office of Disciplinary Counsel in violation of Rule 8.1(b), MRPC. O'Connell's admission was tendered in exchange for the following discipline: a public censure by this Court, a three-year term of probation with terms and conditions, and payment of costs.

Based upon the foregoing,

IT IS HEREBY ORDERED: The Commission's Recommendation that we accept O'Connell's Rule 26 tendered admission is ACCEPTED and ADOPTED.

Summarized from a June 23 order — PR 13-0025.

In response to a petition filed by the Office of Disciplinary Counsel (ODC), we entered an order on January 23, 2013, determining that Christopher J. Lindsey has been convicted of a criminal offense that affected his ability to practice law, and ordering ODC to file a formal complaint against Lindsey predicated upon his conviction. Lindsey had entered a guilty plea in the United States District Court for the District of Montana to Conspiracy to Maintain Drug-Involved Premises in violation of 21 U.S.C. § 846. The Federal District Court sentenced Lindsey to three months home confinement and five years of probation upon terms and conditions. A civil forfeiture judgment in the amount of $288,000 was also imposed on Lindsey.

ODC filed a formal disciplinary complaint and a hearing was conducted by the Commission on Practice on April 18, 2013. Respondent Lindsey appeared with his counsel, Colin Stephens, and testified. On June 4, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. The Commission adopted a disciplinary recommendation that was jointly recommended to the Commission by ODC and Lindsey. For Lindsey's "ethical misconduct," the Commission recommends that he be suspended from the practice of law for six months, commencing January 23, 2013; that he thereafter practice law under probation for a period coextensive with his federal probationary sentence, with a violation of the terms and conditions of his federal probation constituting a violation of the disciplinary order; and that Lindsay be assessed with the cost of these proceedings.

Based upon the foregoing and our review of this matter, IT IS HEREBY ORDERED: The Commission's Findings of Fact, Conclusions of Law, and Recommendation are ACCEPTED and ADOPTED.

Summarized from a June 27 order — PR 12-0656

On October 3 1, 2012, a formal disciplinary complaint was filed against Montana attorney Darrel Moss. The disciplinary complaint may be reviewed by any interested persons in the office of the Clerk ofthis Court.

In December of 2012, Moss moved this Court to dismiss

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the complaint against him on grounds that the Commission on Practice (Commission) no longer had jurisdiction to discipline him because he had resigned from the State Bar of Montana and surrendered his license to practice law in Montana. The Office of Disciplinary Counsel opposed the motion for failure to raise the issue before the Commission on Practice, before whom the matter was then pending. We agreed with the argument of the Office of Disciplinary Counsel and denied Moss's motion to dismiss, without prejudice to his raising of the jurisdictional issue before the Commission.

However, Moss did not pursue his jurisdictional issue before the Commission. He failed to appear either in person or through counsel at the Commission's hearing on the formal complaint on April 19, 2013. On May 13, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Moss did not file any objections within the time allowed.

The Commission found that Moss was admitted to the bar of the state of Montana in 2002, and was indefinitely suspended from the practice of law in a prior disciplinary proceeding in 2012. On April 23, 2012, Moss resigned his membership in the State Bar of Montana.

As to the present disciplinary complaint, and based on the allegations of the complaint, which were deemed admitted, the Commission concluded clear and convincing evidence established that Darrel Moss violated Rules 1.1 and 1.3 of the Montana Rules of Professional Conduct (MRPC) by failing to provide a client with competent representation or to act with reasonable diligence and promptness in representing another client in district court and this Court. The Commission concluded clear and convincing evidence established that Moss violated Rule 1.4, MRPC, in that he failed to keep a client reasonably informed about the status of his case and failed to respond to his client's inquiries about the status of the case. The Commission concluded Moss violated Rule 1.16, MRPC, by failing to provide his client with a copy of the client's file, and violated Rules 8.l(b), MRPC, and 8A(6) of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE) by knowingly failing to respond to lawful demands for information from the Office of Disciplinary Counsel and the Commission, and by failing to justify his refusal or his nonresponse.

The Commission recommends that, as a result of these violations of the Montana Rules of Professional Conduct, Moss be disciplined by disbarment from the practice of law in Montana. The Commission also recommends that Moss be ordered to pay the costs of these proceedings.

Based upon the foregoing,

IT IS HEREBY ORDERED:

The Commission's Findings ofFact, Conclusions of Law, and Recommendation are ACCEPTED and ADOPTED.

State Bar of Montana election results

President-elect, secretary-treasurer, and trustee positions in areas E, F and H were up for election this year. President-elect (Mark Parker) and Area E (Kent Sipe) were uncontested. Here are the winners for each contested race:

Secretary-Treasurer: *Bruce Spencer*

Area F Trustees: *Tom Keegan, Luke Berger, Kate McGrath Ellis*

Area H Trustees: *Juli Pierce, Monique Stafford, Ross McLinden*

Continuing Legal Education

For more information about upcoming State Bar CLE, please call *Gino Dunfee at* ***(406) 447-2206.*** You can also find more info and **register at *www.montanabar.org*,** just click the CLE link in the Member Tools box on the upper-right side of the home page. We do mail out fliers for all multi-credit CLE sessions, but not for 1-hour phone CLE or webinars. The best way to register for all CLE is online**.**

August

Aug. 15 - Limited Scope Representation, Pt. 1 Webinar - Noon to 1 p.m. 1 CLE credit. P. Mars Scott, Esq., Missoula, presenter.

September

Sept. 19-20 — State Bar's Annual Meeting. At the Red Lion in Helena. 10.5/2 ethics CLE credits. Keynote speaker is Bill Neukom, former ABA president, chief legal officer for Microsoft, and the founder of the World Justice Project. CLE Topics include modern discovery, health care law, Indian law jurisdiction issues, tax update, Supreme Court arguments, a special segment for government attorneys, and more. .

October

Oct. 4 — Women's Law Section CLE. Chico Hot Springs Spa & Resort. Credits pending.

Oct. 11 — Issues, Ethics and Opportunities in Dispute Resolution. Sponsor: Dispute Resolution Committee. Bozeman. 6.75 CLE/2.0 ethics.

Oct. 18 — Annual Construction Law Institute. Bozeman. Sponsored by the Construction Law Section. Credits pending.

November

Nov. 8 — New MT Uniform Trust Code. Billings. Sponsored by the Business, Estates, Trusts, Tax & Real Property (BETTR) Law Section. 1/2 day on new Trust Code, other half to be determined.

Lawyer Referral & Information Service

When your clients are looking for **you** ... They call **us**

Why do people call the LRIS? Most people don't know who to call and the State Bar is recognized as a trusted source for referrals. Your participation assures the public that they will receive a referral to a capable, experienced Montana attorney and rewards you professionally at the same time.

The LRIS is not a pro bono or reduced fee program! Potential clients are advised that we do not provide pro bono or reduced fee services and that participating attorneys independently set their own fees. We do the advertising - you charge a fee for your work. The benefits from participating in the LRIS are almost identical to those some attorneys pay thousands for!

How does the LRIS work? The LRIS is staffed by an experienced paralegal and other trained staff. Calls coming into the LRIS represent every segment of society with every type of legal issue imaginable. Many of the calls we receive are from out of State or even out of the country, looking for a Montana attorney. When a call comes into the LRIS line, the caller is asked about the nature of the problem or issue. Many callers "just have a question" or "don't have any money to pay an attorney". As often as possible, we try to help people find the answers to their questions or direct them to another resource for assistance. If an attorney is needed, they are provided with the name and phone number of an attorney based on location and area of practice. It is then up to the caller to contact the attorney referred to schedule an initial consultation.

It can increase your business: The Lawyer Referral and Information Service (LRIS) is a national program of the ABA that exists in some form in every State in the nation. The Montana LRIS fields thousands of calls per year and makes thousands of referrals to participating attorneys in their practicing fields of law throughout the State. It's a great way to increase your client base and an efficient way to market your services!

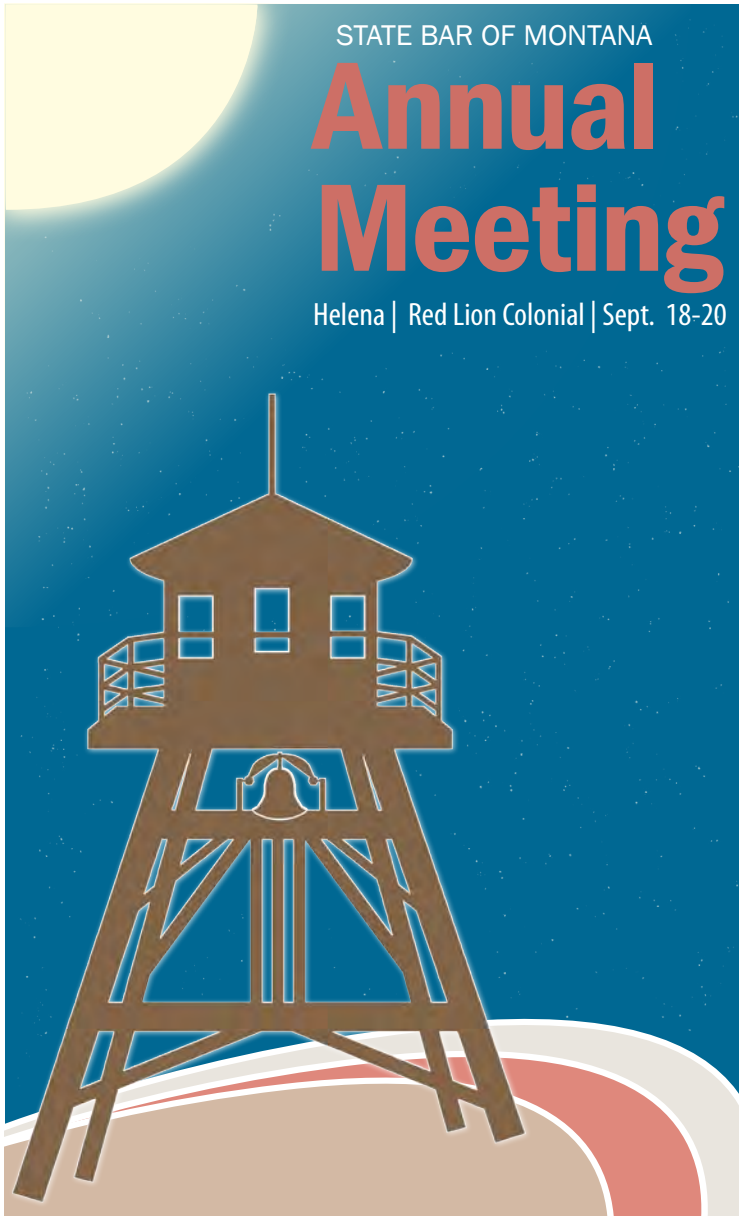
Lawyer Referral & Information Service
(406) 449-6577

It's inexpensive: The yearly cost to join the LRIS is minimal: free to attorneys their first year in practice, $125 for attorneys in practice for less than five years, and $200 for those in practice longer than five years. Best of all, unlike most referral programs, Montana LRIS doesn't require that you share a percentage of your fees generated from the referrals!

You don't have to take the case: If you are unable, or not interested in taking a case, just let the prospective client know. The LRIS can refer the client to another attorney.

You pick your areas of law: The LRIS will only refer prospective clients in the areas of law that you register for. No cold calls from prospective clients seeking help in areas that you do not handle.

It's easy to join: Membership of the LRIS is open to any active member of the State Bar of Montana in good standing who maintains a lawyers' professional liability insurance policy. To join the service simply fill out the Membership Application at www.montanbar.org -> For Our Memebers -> Lawyer Referral Service (http://bit.ly/yXI6SB) and forward to the State Bar office. You pay the registration fee and the LRIS will handle the rest. **If you have questions or would like more information, call Kathie Lynch at (406) 447-2210 or email klynch@montanabar.org.** Kathie is happy to better explain the program and answer any questions you may have. We'd also be happy to come speak to your office staff, local Bar or organization about LRIS or the Modest Means Program.



The Queen City is host to this year's Annual Meeting. 10.5 hours of CLE are on tap, including 2 ethics credits.

Highlights/activities

Mingle with local Bar members and take in contemporary works at the Holter Museum of Art (12 E. Lawrence Street) in Downtown Helena on Sept. 18. If you have free time, check out Helena's myriad outdoor activities, such as Mount Helena City Park, stroll the grounds of the Archie Bray, or head up to Firetower Park to see the Guardian of the Gulch. More ideas at the annual meeting registration desk, or www.visitmt.com/helena. The main event of the Annual Meeting is the Thursday-night awards banquet. The William J. Jameson Award recipient will be named and 50-year members of the State Bar will receive their pins. To highlight the evening, attorney Bill Neukom, founder, president and CEO of the World Justice Project, will speak on the rule of law from the perspective of a practicing attorney. (Full bio below.)

Award winners

Please congratulate your peers who will be honored at the Thursday banquet and Friday lunch:

- **William J. Jameson Award**
  Klaus Sitte
- **George L. Bousliman Award:**
  Keith Maristuen & Cindy Thiel
- **Karla M. Gray Equal Justice Award**
  Hon. Beth Baker
- **Neil Haight Pro Bono Award**
  Tom Lynaugh
- **Frank Haswell Writing Award**
  Mark Parker
- **Distinguished Service Awards**
  Jim Lewis, Vicki Dunaway, Monica Tranel, Shane Vannatta, Jim Johnson, Scott Moore, Beth McLaughlin, Tara Veazey, Deb Anspach.
- **50-year Members:** Richard Andriolo, Gary Beiswanger, Calvin Christian, Stephen Foster, Keith McCurdy, M. Gene McLatchy, H. James Oleson, Thomas Olson, Richard Renn, Edmund Sedivy, Victor Valgenti.

Mr. William H. Neukom is the Founder and Chief Executive Officer of the World Justice Project, a 501(c)(3) organization devoted to promoting the Rule Of Law throughout the world. | ***He is in the Seattle office*** of the international law firm K&L Gates. He served as Chairman and then Chairman Emeritus of the ownership group of the San Francisco Giants major league baseball team from 2008 to 2012. | ***He is a past president*** of the American Bar Association (2007-08) and trustee emeritus of Dartmouth College (Chair 2004-07). | ***Mr. Neukom served as the lead lawyer*** for Microsoft Corporation from 1978 to 2002. As Executive Vice President of Law and Corporate Affairs, Mr. Neukom managed Microsoft's legal, government affairs, and philanthropic activities. Mr. Neukom led Microsoft's efforts to establish, distribute, and protect intellectual property rights around the world, and also led Microsoft's defense of antitrust claims brought by the United States, the European Union and several other countries. | ***Mr. Neukom serves many organizations,*** including the Dean's Council at Stanford Law School (Chair 2012 -), the Board of the Pacific Council on International Policy, the Board of the Center for Advanced Study in the Behavioral Sciences at Stanford, the Board of the Asia Foundation, the Board of Ecotrust, and the Advisory Board of the William D. Ruckleshaus Center. | ***In 1995, Mr. Neukom and his four children*** founded the Neukom Family Foundation, which supports not-for-profit organizations principally in the fields of health, human services, education, justice, and the environment. Mr. Neukom earned his LL.B. from Stanford University and his A.B. from Dartmouth College.

Annual Meeting Schedule

Wednesday | Sept. 18

> **10 a.m.** | Justice Initiatives Committee meeting
> **10 a.m.** | Access to Justice Commission meeting
> **Noon** | Executive Committee meeting
> **1 p.m.** | Joint meeting: ATJC and JIC
> **5-7 p.m.** Local Bar Reception at the Holter Museum
> **TBD** | Montana Justice Foundation meeting

Thursday | Sept. 19

> **8:30 a.m.** | Board of Trustees meeting (Bar members are invited to attend)
> **9:30 a.m.** | Registration desk opens
> **10 a.m.** | Elder Law Committee meeting
> **10 a.m.** | Health Care Law Section meeting
> **Noon** | New Lawyers Section Luncheon meeting

Hot Topics CLE 3.75 CLE/1 Ethics (e)

> 1:00-2:15 | Health Care — What Every Lawyer NEEDS to Know

- Privacy & Security Overview: HIPAA, HITECH and the 2013 Omnibus Rule — *Darci Bentson*
- Compelling Production of Information under Montana Law and HIPAA — *Erin F. MacLean*
- Business Associates and Attorneys as Business Associates — *Kevin Twidwell*
- Transactions with Providers: Anti-Kickback and Stark Considerations and Pitfalls — *W. Rick Beck*
- Health Care Reform — *Kristy Buckley*

> 2:15 | Navigating the Indian Jurisdiction Maze — *Lori Harper Suek*

> 2:45 | Advising Nonprofit Organizations and Serving on Nonprofit Boards (e) — *Nonprofit Section*

>> 3:15 BREAK <<

> 3:30 | How Attorneys Get Hacked (And What You Can Do About It) (e) — *Sherri Davidoff*

> 4:00 | Legislative Update — *Todd Everts*

> 4:30 | Public Duty Doctrine: A point/counterpoint between MTLA President Jamie Towe and MDTL President Leonard H. Smith — *Moderated by Beth Brennan*

> 5:00 | President's Reception

> 6:30 | Banquet: We will announce the winner of the Jameson Award and honor the recipients of 50-year membership pins. Keynote speaker is the Founder and Chief Executive Officer of the World Justice Project, William H. Neukom.

Friday | Sept. 20

> 8:00 a.m. | Registration desk opens

> 8:30 a.m. | Introduction to Oral Arguments (0.75 CLE) — *J. Martin Burke, Beth Brennan*

Oral Arguments Before the Supreme Court (2 CLE)

- **9:30 a.m.** | *State of Montana v. Jill Marie Lotter* — DA 12-0139
- **10:20 a.m.** | *Allianz Global Risks US Insurance Company v. Lincoln County Port Authority* — DA 12-0519

> 11:30 a.m. - 1 p.m. | Awards luncheon: Winners recognized for Karla Gray Equal Justice Award, Neil Haight Pro Bono Award, Haswell Award, and Distinguished Service Awards. Outgoing State Bar President Pam Bailey will hand the gavel to incoming President Randy Snyder. The State Bar business meeting follows lunch.

Hot Topics CLE | 4 CLE/1 Ethics (e)

> 1:15 | Tax Update — *J. Martin Burke*

> 1:45 | Family Law in a Time of Change (concurrent session) — *P. Mars Scott, Gail Haviland, Jane Mersen, moderated by Shane Vannatta*

> 1:45 | Government Attorneys: Who is the Client? (concurrent session) — *Helena City Attorney Jeff Hindoien; Dept. of Labor Lead Counsel, Judy Bovington; Solicitor General Lawrence VanDyke, Montana Dept. of Justice.*

> 2:45 | 21st Century Discovery, an Interactive CLE (e) — *State Bar Technology Committee members Cort Jensen, David Carter, Joe Sullivan and Brian Smith*

> 3:45 | Criminal Law Update — *Assistant Attorney General Tammy Hinderman*

> 4:15 | Elder Law: Long Term Care - Issues, Options, Updates — *Twyla Sketchley and Sol Lovas*

> 4:45 | Civil Procedure Update: The 3-Day Service Rule and Other Questions — *Justice Pat Cotter*

> 5:15 | Annual meeting adjourns

> 5:30 - 9 p.m. | Paralegal Section dinner/meeting

REGISTRATION INFORMATION

Register online at www.montanbar.org, or mail-in a registration. You can also call 406-447-2206 for more information. A block of discounted rooms are available at the Red Lion, call 406-443-2100 by Sept. 2 — rooms fill up quickly.

Montana Law Student Pro Bono Service Award

This award is a collaborative effort between the University of Montana Law School, private firms and attorneys, Montana Legal Services Association, and the local judiciary to recognize the outstanding volunteer work of law students. The award is given annually in October during National Pro Bono week to a 3L student who has demonstrated extraordinary commitment to public service-in particular the field of pro bono legal work. For this award, pro bono is defined as: *work taken voluntarily, without payment, and done as a public service*.

Eligibility criteria for the award are:

1) The student has demonstrated a passion for public service, his or her community and the law, especially in terms of providing legal services to under-served populations. These include, but are not limited to low-income residents, veterans, handicapped, children or Native populations.
2) The student has performed meaningful pro bono legal work which has met a need or extended services to underserved segments of the community. This work can include but is not limited to projects at major firms that benefit an underserved population, work at the public defender's office, for veterans or native organizations, CASA, legal aid/services or the Housing Authority.
3) The student has participated in other public service oriented activities or groups such as an official student group, a religious institution, or a nonprofit. Community service activities will also be considered. These activities can include but are not limited to Kiwanis, legal aid or advice clinics, tax preparation clinics, Veterans Stand Down, Project Homeless Connect, or volunteering at soup kitchen/food pantry or as shelter advocates.
4) A total of at least 50 hours of completed legal pro bono work is suggested. Hours completed for course credit or mandatory clinicals may *not* be counted.

Students can either apply for the award or be nominated by a third party. For self -applicants, please provide two references along with this application. For nominations, see below criteria.

On a separate sheet of paper, please describe the candidate's involvement in the community and identify the ways in which they have met the eligibility criteria in narrative form. Supplemental supporting documents such as volunteer logs, letters of support, news articles or the student's resume may also be included in the nomination packet.

All nominations must be received by **Tuesday, October 1st.** Send to:

Montana Law Student Pro Bono Award Committee
c/o Montana Legal Services Association
211 N. Higgins Avenue Suite 401
Missoula, MT 59802
Electronic submissions can be emailed to: eweaver@mtlsa.org

Nominee Name_____

Nominee phone_____ Nominee email_____

Your name_____ Your phone or email _____

Primer on compelling production of patient health care information

By Erin F. MacLean

Author's note: *This article is the first in a series that will be published in the Montana Lawyer over the next year by the Health Care Law Section. I am the section's chair, and a group of section members and I have been meeting this year to increase the activity of the section and determine how we can help all Montana practitioners who, at times, need health care law related information to better serve their clients. All of us at the section hope that our articles will help you in your general legal practice in dealing with health care entities and handling health care information generally*

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Compelling the production of patient health care records is one task that many attorneys must tackle or defend against, at one time or another during their careers. Not too long ago, a member of the State Bar of Montana wrote to me regarding his need to obtain medical records by compulsory process and that he was reviewing Title 50 and the HIPAA laws and finding them "somewhat confusing." He asked "[a]re there any CLE materials available for purchase that helps navigate through this?" Thus, this article on compelling the production of health care information seemed most suitable to begin the Section's series of articles.

To begin, in order to properly compel production of health care information, one must have a basic understanding of the general application of state and federal health care information laws for private and governmental entities. The Health Insurance Portability and Accountability Act ("HIPAA") of 1996, 42 U.S.C. 1320d, et seq., is a federal statute designed to protect the confidential health information of patients. It applies to and governs the health care information created, used, maintained, and disclosed by most health care providers and all health insurers. That information is referred to under HIPAA as "Protected Health Information" ("PHI"). Health care providers and insurers subject to HIPAA are called "Covered Entities." HIPAA also governs the use and disclosure of health care information held by certain business contractors of Covered Entities, such as attorneys representing health care providers. HIPAA calls these contractors "Business Associates."

Obtaining health care records by compulsory process from Covered Entities and other entities operating in Montana is governed by Montana state law. Attorneys who compel the production of health care information from entities in Montana should understand that there are two parts of Title 50, Chapter 16 of the Montana Code Annotated ("MCA"), applicable to obtaining health care information through compulsory process:

(1) Title 50, Chapter16, Part 5, known as the "Uniform Health Care Information Act" ("UHCIA") and

(2) Title 50, Chapter 16, Part 8, "Health Care Information Privacy Requirements for Providers Subject to HIPAA."

(This is where you might want to get out your code book). As you are flipping through the code between parts 5 and 8, note that Part 6, "Government Health Care Information," generally addresses the confidentiality of health care information in the possession of state and local governments, but does not speak to compelling production of health care information from governmental entities. (See §50-16-606, MCA). The production of governmentally-held health care information should be compelled through the same general manner described in this article, and the statutory sections to be used in that compulsory process will depend on whether the governmental entity being compelled is a Covered Entity (i.e., Montana Medicaid is a considered a Covered Entity).

In both Part 5 and Part 8, there are two specific sections that set forth the law governing and method of compelling production of health care information. In order to obtain health care information from non-HIPAA Covered Entities, attorneys should use §§ 50-16-535 and 536, MCA of the UHCIA. Generally speaking, these non-Covered Entities would include most governmental entities, non-health care providing private entities who are not Business Associates, and the few health care providers that do not participate in electronic transfer of health care information nor participate in Medicare or Medicaid.

Section 50-16-505, MCA clarifies that the UHCIA only applies to health care providers that are not subject to HIPAA or the federal rules and regulations adopted in connection with HIPAA. So, Part 5, the UHCIA, should not be used to compel health care records from the vast majority of health care providers and all health insurers, who are all HIPAA Covered Entities. I've emphasized this because most subpoenas issued by attorneys to compel production of health care information are served on Covered Entities, and, in my review of numerous subpoenas issued to compel production of health care information, the biggest mistake made by attorneys in Montana is attempting to utilize Part 5 and referencing the UHCIA to compel production of PHI by HIPAA Covered Entities.

Because, since 2009, HIPAA Covered Entities now face potentially severe monetary, civil and criminal penalties for improperly disclosing protected health information (PHI), attorneys are facing much more resistance than they had in the past when making such errors in their attempts to compel production of PHI. I know my health care provider clients are very sensitive these days to mistakes made by attorneys in compelling

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production of health care information and are more likely to refuse production if subpoenas do not reference the correct statutory sections and fully comply with legal requirements.

What are those legal requirements? To properly compel production of PHI from a Covered Entity, attorneys should use the process set forth in §§ 50-16-811 and 812, MCA (note that the process is very similar to that set forth in the UHCIA sections referenced, above). Because working through these statutory sections can be somewhat confusing for attorneys looking at them for the first time, I believe it is helpful to use an example. In the example, below, the patient has not executed an authorization for the release of the patient's health care information requested. Note that, under HIPAA and all applicable state laws, health care information can be obtained by a fully executed HIPAA-compliant authorization for release of such information ("authorization"). Thus, obtaining authorization from the patient or the patient's personal representative is the most efficient mode of obtaining health care information.

In this example, a plaintiff, Joe, filed a lawsuit and placed his physical or mental condition at issue in the Complaint. The defendant's attorney, Jane, wants to obtain Joe's medical records, but believes he may not execute an authorization. Jane has obtained a list of Joe's medical providers, all of which appear to be Covered Entities. So, Jane correctly skips past the UHCIA, flips to §50-16-811, MCA and begins her review of the compulsory process. To begin, Jane must determine if the Covered Entity can disclose the information through the legal process due to the circumstances fitting an exception under subsections 1(a)-(i). In this case, subsection 1(c) applies, since it permits disclosure when "the patient is a party to the proceeding and has placed the patient's physical or mental condition in issue." (See §50-16-811(1)(c)).

Once Jane determines that disclosure can be made through compulsory process, she should use the "method of compulsory process" established by § 50-16-812, MCA. Written notification to Joe of the intent to obtain his health care information is the first step. (See §50-16-812(1)). I suggest that Jane mail the notification ("Notice") with a letter to Joe's attorney requesting that an authorization be signed and returned to Jane prior to the end of the statutory ten (10) day notification period. That way Jane can potentially obtain an authorization that would nullify the need to issue a subpoena.

I suggest the Notice be in pleading form with the appropriate case caption and be entitled "Notice of Compulsory Process to Obtain Health Care Information," or something similar. The notice should state that Jane will be seeking, "through compulsory process in the above-captioned matter the following information: [Insert a detailed description of the health care information sought]." In order to ensure that the Notice was received by the opposing party, I suggest sending it with a return receipt requested. The Notice must be sent at least ten (10) days before sending the certificate and subpoena described in §50-16-812(2) to Joe's health care providers. (See §50-16-812(1)). If Jane does not receive a fully executed authorization from Joe within the ten (10) day statutory period (I usually wait two weeks due to mail delays), she may then send a subpoena to each healthcare provider requesting the same detailed description of the health care information sought that was contained in the Notice, accompanied by the "written certification" ("Certification") described in §50-16-812(1). (See §50-16-812(2)).

In composing the Certification, I prefer to draft a separate pleading entitled "Written Certification." Jane should sign the Certification on behalf of her client, and state in it that she is "certifying" that she has "complied with the requirements of §§ 50-16-811 and 812, MCA and all other applicable state and federal laws, including, but not limited to, the Health Insurance Portability and Accountability Act (HIPAA) of 1996, in issuing the enclosed subpoena." The Certification should include a statement that clarifies the subsection from §50-16-811(1)(a)-(i), MCA, under which the discovery is being sought. Also, in a civil proceeding when §50-16-811(1)(b), (d), (e) or (h) supplied the reason that the Covered Entity is permitted to disclose the requested information pursuant to the compulsory process, the Certification must include the following statement: "The undersigned hereby certifies that the notification requirements of 50-16-812(1) have been met." In this particular example, since §50-16-811(1)(c) supplied justification for the process, the foregoing statement would not be required in the Certification, although it could be included.

When issuing the subpoenas to the health care providers, I suggest Jane attach a copy of the executed and dated Notice that was previously sent to Joe, along with each Certification and subpoena. I have also seen the Notice integrated into the Certification by reference. As a practical matter, when representing health care providers, I prefer that a copy of the Notice is sent with the Certification and subpoena, so that I can ensure that the Notice complied with applicable law. The Certification should also include the statement "the undersigned reasonably believes that the subsection of §50-16-811, MCA identified, above, in this certification provides an appropriate basis for the use of compulsory process or discovery." (See §50-16-812(2)).

Note that even if you execute this compulsory process in a manner that fully complies with the applicable statutes, unless you have a signed Authorization, a health care provider can still refuse to provide you the records. (See §50-16-812(3)). For this reason, getting a signed Authorization from the patient is the best possible scenario. If the health care provider refuses to comply with the subpoena, a Court with appropriate jurisdiction can be involved to assist in compelling the production of the health care information. (See §50-16-812(4)).

Finally, whenever Jane compels production of health care information, she should expect to pay the health care provider for the cost of reproducing the information. Jane should state in a cover letter enclosing the Certification and subpoena that she expects to pay the fee described in §50-16-812(5), or, where applicable, §50-16-450, and ask the health care provider to contact her regarding how much reproduction will cost. Taking these steps will signal to the health care provider that Jane appreciates the extra work that the request for information generates in the provider's office and that Jane knows of and has complied with all legal requirements that will allow the provider to legally disclose the information requested.

I hope the information contained in this article is helpful to you and your practice. More information related to compelling health care records by compulsory process, plus a number of other health care law related "hot topics" will be presented by our Section members at the 2013 Annual Meeting on Sept. 19. We hope to see you there! If you have any questions or concerns regarding the process discussed in this article or any related topics, please contact me at Freeman & MacLean, P.C. through email at *emaclean@fandmpc.com* or by phone at 406-502-1594.

Tender is the Night[1]: Should your expert be?

By Cynthia Ford

The 25th Advanced Trial Advocacy School took place in Missoula at the end of May. It is an intense week-long program, combining excellent demonstrations of individual parts of a mock trial by faculty members with actual performances of the same components by the students in small group with individuated critique. The students are both actual law students, who earn academic credit, and practicing lawyers, who earn CLE credits. The faculty are mostly volunteers from Montana, selected for both their prowess in the courtroom and their willingness to give a week of their lives to help improve the quality of trial advocacy in Montana.

This year, we were also fortunate to have a member of the faculty at the National College of District Attorneys, who serves full-time as a state court prosecutor in Memphis, Tennessee. This highly experienced trial lawyer was assigned to demonstrate the direct examination of the expert witness. His direct began with the familiar foundation questions: education, experience, publications, and teaching. These questions, obviously, are meant to show that the witness is indeed an "expert" and therefore should be allowed to give an opinion on a subject of specialized knowledge, to help the jury make its final decision, per Rule 702.

"YOUR HONOR, I TENDER THE WITNESS AS AN EXPERT IN (specific field of specialized knowledge)"Heads snapped around the faculty side of the classroom when our esteemed visitor completed his foundation questions with this request, addressed to the presiding judge. In the ensuing discussion, the Tennessean indicated that in his state's courts, "tendering the witness" is necessary before you can proceed to the opinion questions. Before the judge grants the request to treat the witness as an expert in the specified field, she gives opposing counsel an opportunity to voir dire the witness and then to object to granting expert status to the witness. The judge will finally decide, either accepting or denying the witness as an expert in the specified field under Rule 702.

In my more than 20 years of coaching the University of Montana Trial Team, travelling to courthouses around the country, we saw several other teams following this model. In almost every one of the mock trials where this occurred, either the judge on the bench or the trial lawyers scoring the round informed the student-lawyers that "tender" of the expert was improper. This was rewarding to the UM coaches who had unequivocally forbidden our students from formally requesting that the judge certify the expert. Still, the practice lives on, as the Advanced Trial demonstration showed…

I decided to do a more lawyerly job of researching my strongly held belief that trial lawyers do not and should not formally ask the judge to certify a witness as an "expert" in his or her field. This research, laid out below, includes Tennessee state (because that's what triggered the issue) and Montana state and federal evidence law.

IS TENDER NECESSARY AS A MATTER OF LAW?

A. TENNESSEE

Tennessee Evidence Rule

Tennessee's rules of evidence, like Montana's, appear to be based largely on the F.R.E. Tennessee's version of Rule 702 (adopted in 1990) is:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

The only difference between this rule and M.R.E. 702 is the addition of the word "substantially" in the Tennessee rule. As in Montana, the rule itself contains no specific requirement that the court certify that the witness is "qualified as an expert" before she shares her opinion with the jury.

Tennessee Cases

Two Tennessee appellate cases, one civil and one criminal, indicate that "tender" is not required in that state. Tire Shredders, Inc. v. ERM-North Central, Inc., 15 S.W. 3d 849, 863-864 (Tenn. Ct. of Appeals, 1999); State v. Williams, 2011 WL 2306246 (Tennessee Court of Criminal Appeals at Jackson). However, in a 2010 case, the Tennessee Court of Criminal Appeals did affirm a conviction despite the defendant's allegation that the trial judge committed error in declaring to the jury, both during testimony and in final instructions, that two witnesses were experts in their fields. The Court agreed with the prosecution's position that the federal disapproval of this procedure did not govern the state courts:

State v. Barlow, W200801128CCAR3CD, 2010 WL 1687772

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(Tenn. Crim. App. Apr. 26, 2010). Thus, there are both criminal and civil cases in Tennessee which allow experts to give opinions without being "tendered" by counsel and "accepted" by the trial judge as experts per se, and a criminal case which appears to accept the practice without requiring it.

Tennessee Conclusion

Even in Tennessee, a lawyer need not formally tender and a judge need not formally accept or certify an expert witness.

B. MONTANA, OUR HOME

Montana Evidence Rule 702

Montana's version of Rule 702 has not been changed since its adoption in 1978, and is identical to the original federal version.

> Rule 702. Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Like Tennessee's rule and the federal version, nothing in M.R.E. 702 deals with the process of getting the expert's testimony into evidence. There simply is no rule-based requirement to "tender" or "proffer" the witness prior to asking her for her opinion.

Montana Cases

There are many Montana Supreme Court cases dealing with various expert witness issues. None of them overtly discuss the process of "tendering" an expert, either approving or disapproving of that process. Most importantly, there is no Montana case which requires a formal proffer and acceptance of the expert witness before she gives her opinion.

The issue of overt tender and acceptance might have been raised and resolved in a 2005 criminal appeal involving the admissibility of testimony from handwriting experts. The trial judge allowed the expert to testify about his comparisons of the handwriting on various threatening documents, using overhead projections and blow-ups of trial exhibits. The trial judge also allowed the expert to give the ultimate opinion that the defendant was the author of the threatening documents. The Montana Supreme Court affirmed on both claims, and then observed:

> Although the District Court did not specifically rule that Blanco qualified as an expert, Cheryl did not object to his testimony for lack of qualification. This Court does not address issues raised for the first time in this Court. *State v. White Bear,* 2005 MT 7, ¶ 10, 325 Mont. 337, ¶ 10, 106 P.3d 516, ¶ 10. We decline to address this argument.
>
> *State v. Clifford*, 2005 MT 219, 328 Mont. 300, 308, 121 P.3d 489, 495.

The Court did not indicate further whether a specific ruling that a witness is qualified as an expert is necessary, but my review of other cases did not find any case directly so holding.

In a 2003 case, the Court began its analysis with a recap of the general requirements for expert testimony:

> ¶ 11 We begin our analysis of evidentiary rulings pertaining to expert witness testimony with the recognition that the determination of the qualification of an expert witness is a matter largely within the discretion of the trial judge and such a determination will not be disturbed absent an abuse of discretion. *In re Custody of Arneson–Nelson,* 2001 MT 242, 307 Mont. 60, 36 P.3d 874. Additionally, we note that expert opinion testimony is subject to several caveats. Under Rule 702, M.R.Evid., opinion evidence from a qualified expert is admissible if specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Such expert testimony requires that a proper foundation be established. Expert testimony must also satisfy the relevancy rules set forth in Article IV of the Montana Rules of Evidence. Moreover, full disclosure during discovery under Rule 26, M.R.Civ.P., is designed "to eliminate surprise and to promote effective cross-examination of expert witnesses." *Hawkins v. Harney,* 2003 MT 58, ¶ 21, 314 Mont. 384, ¶ 21, 66 P.3d 305, ¶ 21 (citation omitted).
>
> *Christofferson v. City of Great Falls*, 2003 MT 189, 316 Mont. 469, 473, 74 P.3d 1021, 1025.

Turning to the expert testimony at the trial below, the Court observed: "The parties presented the necessary foundation to qualify these medical professionals as experts in their field **and the court accepted both Drs. Knapp and Watson as experts.** … both parties' expert witnesses presented extensive testimony and both parties were allowed to fully cross-examine the other party's expert. Additionally, the District Court instructed the jury that they were not bound by either expert's opinion and that they were to determine the weight to be given to each expert's testimony based upon the expert's qualifications and credibility. Under these circumstances, we cannot conclude that the District Court abused its discretion." (emphasis added) 2003 MT 189, 316 Mont. 469, 473-74, 74 P.3d 1021, 1025. Notably, the Court did not provide any information about the exact process of this "acceptance," or indicate whether or not the parties in fact formally "tendered" their experts.

In the *Christofferson* case, in addition to the two medical doctors who were the subjects of above passage, there was an offer of testimony from the two EMTS who responded to the plaintiff's 911 call about the decedent's chance of survival at the time they arrived at the home. The trial court had not allowed them to give their opinions; on appeal the Supreme Court affirmed:

> We conclude that the opinions Neff and Songer gave as to the likelihood of resuscibility had they arrived earlier could not be based on common knowledge, general experience or scene observation, but rather required extensive specialized training and experience. As a result, their testimony fell within the realm of expert testimony requiring foundation, and preclusion of it as lay opinion was not an abuse of discretion.

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Christofferson v. City of Great Falls, 2003 MT 189, 316 Mont. 469, 484, 74 P.3d 1021, 1031.

The opponent moved *in limine* to exclude the witnesses' opinions, so the trial judge was not called upon before the jury to certify—or not—the witnesses' expertise. This is far preferable to the "tender" process because it occurs prior to the seating of the jury.

In another case, decided in 2001, the Court used the term "acceptance" of the expert: "[We conclude the District Court did not abuse its discretion in accepting the qualifications of Dr. Schultz to testify as an expert witness." *State v. Clausell*, 2001 MT 62, 305 Mont. 1, 7, 22 P.3d 1111, 1116. However, the procedural background laid out earlier in the case does not indicate that there was either any specific tender or any specific certification of the witness as an expert. Instead, the State offered a pathologist's testimony, and the defendant asked to voir dire, then objected on the basis of foundation. The Court simply ruled on that objection, overruling it:

> ¶ 19 During its case-in-chief, the State offered the expert testimony of Dr. Dwayne Schultz. In seeking to establish his qualifications as an expert, Dr. Schultz testified that he was board certified in Pathology and that he had conducted over four hundred autopsies, approximately forty of which involved gunshot wounds. In response to voir dire by defense counsel, Dr. Schultz admitted he was not board certified in Forensic Pathology. Clausell's attorney then asserted the following objection: "I would object to this Doctor's testimony regarding Forensic Pathology which would include discussions about homicide cases...." The District Court overruled the objection and Dr. Schultz testified, among other things, as to the cause of Trottier's death, the presence of soot and powder burns in her skull and brain, the trajectory of the bullet through her skull and brain, and the probable orientation of the gun when it was fired in order for the bullet to achieve its trajectory. Clausell did not object further to any of Dr. Schultz's testimony.

State v. Clausell, 2001 MT 62, 305 Mont. 1, 5-6, 22 P.3d 1111, 1115. This is an example of a good objection and voir dire during trial: the qualifications of the witness to give an opinion based on specialized knowledge were fully aired, but neither the lawyers nor the judge used the label "expert."

The Supreme Court discussed a similar trial procedure, without any apparent concern, in 1999:

> ¶ 15 Arrow also called Lawrence Botkin (Mr. Botkin), a mechanical engineer, to give opinion testimony concerning kingpin design, abuse, and misuse, metallurgy, and accident analysis. Appellants were not satisfied with the foundation laid concerning Mr. Botkin's qualifications as an expert witness and **requested permission to voir dire the witness.** The court granted the request. After conducting voir dire, Appellants **objected to Mr. Botkin's testimony on the basis of lack of foundation. The court overruled the objection**, stating that the jury could determine the weight to be afforded Mr. Botkin's testimony. (Emphasis added.)

Baldauf v. Arrow Tank & Eng'g Co., Inc., 1999 MT 81, 294 Mont. 107, 111-12, 979 P.2d 166, 170.

It does not appear that Arrow "tendered" the engineer, or in any other way asked the trial judge to "certify" him as an expert. The trial judge's comment that the opponent's voir dire went to weight, not admissibility, is a common refrain.

In a much earlier rape case, the Court approved the trial judge's ruling that the proffered prosecution expert could give her opinion, and specifically endorsed the judge's method of doing so:

> The appellant claims that the District Court erred in leaving the qualification of the expert to the jury for determination. We disagree. After the appellant had objected that the witness was not qualified the court stated, "Well, the court is going to permit her to testify. If the jury doesn't believe she is qualified—well that will be up to the jury to decide." We find that the District Court made the determination that the witness was qualified when it permitted the witness to testify. The District Court stated afterwards that the jury could determine the degree of the witness's qualification as an expert and weigh the testimony accordingly. **This is proper**. The degree of a witness's qualification affects the weight rather than the admissibility of the testimony. *Little v. Grizzly Mfg.* (Mont.1981), 636 P.2d 839, 843, 38 St.Rep. 1994, 2000. We hold that the District Court did not err in allowing this witness to testify. (Emphasis added).

State v. Berg, 215 Mont. 431, 433-34, 697 P.2d 1365, 1367 (1985).

Montana Conclusion

A Montana lawyer, in state court, need not formally tender and a judge need not formally accept or certify an expert witness. The cases appear to support my own observation that Montana lawyers and judges avoid formal tender and acceptance, so that the Montana practice already conforms to the standards I discuss below. The few changes I suggest below to articulate this practice should not be difficult to implement.

C. FEDERAL COURTS

FRE 702

FRE 702 has been amended twice since its initial promulgation in 1975. It now reads[2]:

> RULE 702. TESTIMONY BY EXPERT WITNESSES
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to

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> understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Like the state rules discussed above, the language of F.R.E. 702 discusses the substantive foundation requirements but not the process for demonstrating that these have been met before adducing the expert's opinion. However, the Advisory Committee Note to the 2000 amendment to Rule 702 specifically identifies the "tender and accept" process as problematic, although it was not outlawed per se by the amendment:

> The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. **The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert."** Indeed, there is much to be said for a practice that **prohibits the use of the term "expert" by both the parties and the court at trial**. Such a practice **"ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion**, and protects against the jury's being "overwhelmed by the so-called 'experts.'" Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials). (Emphasis added)

The ABA's Updated Civil Trial Standards (discussed later) quote from this ACN as support for Trial Standard 14, which prohibits the tender/accept process before the jury.

U.S. SUPREME COURT

There is no direct guidance from the Supreme Court on whether experts must, or may, be tendered before giving their opinion testimony. Both of the two U.S. Supreme Court landmark cases (*Daubert* and *Kumho Tire*; see above) on expert testimony were decided on summary judgment and thus were about the admissibility of affidavits from experts; no "tender" at trial occurred, so the cases do not discuss that process.[3]

THE COURTS OF APPEALS

The Sixth and Eighth Circuits squarely reject the practice of tender and acceptance of experts. The Sixth Circuit recently considered an appeal from a drug-trafficking conviction where the trial did include an overt tender of the prosecution witness as an "expert" and "acceptance" by the trial judge in front of the jury:

> Officer Dews then was permitted to testify as an expert that the activity that he observed constituted drug trafficking:
>
> MR. OAKLEY [AUSA]: And, Your Honor, we would **ask that the witness be identified as an expert in the identification and behavior of street-level narcotics trafficking.**
>
> THE COURT: Mr. Cohen?
>
> MR. COHEN: No objection, Your Honor.
>
> THE COURT: **All right. Officer Dews will be accepted as an expert in the area of street-level narcotics transactions and behaviors that accompany that activity**. (Emphasis added)

United States v. Johnson, 488 F.3d 690, 694 (6th Cir. 2007). Because the defendant did not object to this expert testimony at trial, his appeal on this ground was decided under the plain error doctrine. The Court of Appeals affirmed the admission of the expert testimony but took the opportunity to register its disapproval of the tender/acceptance process:

> We pause here to comment on the procedure used by the trial judge in declaring before the jury that Officer Dews was to be considered an expert. Other courts have articulated good reasons **disapproving of such practices**, with which we agree. *See*, *e.g.*, *United States v. Bartley,* 855 F.2d 547, 552 (8th Cir.1988) (noting that "[s]uch an offer and finding by the Court might **influence the jury in its evaluation** of the expert and the **better procedure is to avoid an acknowledgment of the witnesses' expertise by the Court**"); *State v. McKinney,* 185 Ariz. 567, 917 P.2d 1214, 1233 (1996) (observing that "[b]y submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert.... In our view, **the trial judge should discourage procedures that may make it appear that the court endorses the expert status of the witness. The strategic value of the process is quite apparent but entirely improper**"). When a court certifies that a witness is an expert, it lends a note of approval to the witness that inordinately **enhances the witness's stature and detracts from the court's neutrality and detachment**. "Except in ruling on an objection, the **court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.**" *ABA Civil Trial Practice Standard 17* (Feb.1998); *see also* Jones, Rosen, Wegner & Jones, Rutter Group Practice Guide: Federal Civil Trials & Evidence § 8:1548.1 (The Rutter Group 2006). Instead, the **proponent of the witness should pose qualifying**

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> **and foundational questions and proceed to elicit opinion testimony. If the opponent objects, the court should rule on the objection, allowing the objector to pose *voir dire* questions** to the witness's qualifications if necessary and requested. *See Berry v. McDermid Transp., Inc.,* 2005 WL 2147946, at *4 (S.D.Ind. Aug.1, 2005) (stating that "counsel for both parties should know before trial that the court does not 'certify' or declare witnesses to be 'experts' when 'tendered' as such at trial. Instead, if there is an objection to an offered opinion, the court will consider the objection. The **court's jury instructions will refer to 'opinion witnesses' rather than 'expert witnesses'** "); *see also Jordan v. Bishop,* 2003 WL 1562747, at *2 (S.D.Ind. Feb.14, 2003). The court should then rule on the objection, "to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means." Fed.R.Evid. 103(c). (Emphasis added).
>
> *United States v. Johnson*, 488 F.3d 690, 697-98 (6th Cir. 2007).

(Three state cases have declined to follow this aspect of the *Johnson* case[4] but the large majority of cases which cite *Johnson* on this point do so with approval.) See, also U.S. v. Kozminski, 821 F.2d 1186 (6th Cir. 1987), *aff'd in part and remanded in part,* 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988) ("Although the practice is different in some state courts, the Federal Rules of Evidence do *not* call for the proffer of an expert after he has stated his general qualifications. In *Kozminski,* this court counseled against putting some general seal of approval on an expert after he has been qualified but before any questions have been posed to him. The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.")

In *U.S. v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988), the appellant alleged error in the prosecution's failure to proffer as, and the trial court's failure to make a specific finding that the witness was, an "expert." He contended that this process violated both F.R.E. 702 and his Confrontation right. The conviction stood:

> Although it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party. Such an offer and finding by the Court might influence the jury in its evaluation of the expert and **the better procedure is to avoid an acknowledgement of the witnesses' expertise by the Court**. This court, therefore, finds no error in the admission of the testimony of Mr. Wagenhofer and the analytical report and exhibits identifying the presence of cocaine in the substance obtained from Bartley. (Emphasis added).
>
> *United States v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988).

The Fifth Circuit considered an appeal in which the alleged error was the judge's comment to the jury that the witness was not testifying as an expert. It did not directly decide whether the comment was error, but did cite to *Johnson* in its discussion and held that if there was error, it was not grounds for reversal:

> The Government objected to Talley providing expert testimony, arguing that Talley's expertise in accounting was not relevant to whether Sepeda's investigation was adequate. The district court sustained the objection and advised the jury as follows:
>
> "Members of the jury, yesterday right before the break, the government had made an objection to Mr. Talley's testimony concerning certain accounting principles. The court sustains the government's objection. Mr. Talley will be testifying, however, he will not be testifying as an expert based upon the four accounting principles that you heard testified about yesterday."…
>
> Ollison argues that the district court's instruction "degraded" Talley's testimony by stating that Talley was not an expert. She observes that the district court did not give a similar instruction regarding Sepeda's opinion testimony.
>
> Because the district court was ruling on the Government's objection, we find that **the error, if any, was harmless**. *See United States v. Johnson,* 488 F.3d 690, 697-98 (6th Cir.2007) ("Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.") (citation omitted). … The district court's instruction did not "degrade" Talley's testimony because both Talley and Sepeda testified as lay witnesses and gave their respective opinions. (Emphasis added)
>
> *United States v. Ollison*, 555 F.3d 152, 163-64 (5th Cir. 2009).

The *Johnson* reference appears to be favorable, but this is at most a lukewarm adoption of the *Johnson* prohibition against labeling witnesses as "experts" (or not); I hesitate to base a categorization of the Fifth Circuit on this issue on this language.

In the Third Circuit, another district court judge refused an ineffective assistance of counsel claim, where the defense counsel did not object to qualifying the witness before the jury. Again, the Court of Appeals recognized the *Johnson* case:

> Napoli then contends that his counsel erred by not objecting when the court stated that Schwartz qualified as an expert in narcotics and code language in front of the jury. Napoli contends that Schwartz should have been qualified as an expert outside of the presence of the jury because the court may have appeared to endorse Schwartz by stating in front of the jury that he was permitted to testify as an expert.

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> At least one court outside of this circuit has disapproved of counsel performing voir dire of an expert witness in the presence of the jury. *See United States v. Johnson,* 488 F.3d 690, 697 (6th Cir.2007). That said, the **cases which Napoli cites from within this circuit do not prohibit a court from qualifying an expert in the presence of the jury.** *See Schneider v. Fried,* 320 F.3d 396, 404 (3d Cir.2003); *Bruno v. Merv Griffin's Resorts Int'l Casino Hotel,* 37 F.Supp.2d 395, 398 (E.D.Pa.1999). Moreover, the government offered to conduct the voir dire outside the presence of the jury, but Napoli's counsel stated that voir dire typically occurred in front of a jury and so should in this case. This accordingly appears to have been a strategic decision of counsel. (Emphasis added.)
>
> *United States v. Napoli, CRIM.A*. 07-75-1, 2012 WL 4459584 (E.D. Pa. Sept. 26, 2012).

The Tenth Circuit also obliquely addressed this issue, in an en banc decision affirming the in limine exclusion of a defense expert in the insider trading prosecution of a Qwest executive:

> Though Mr. Nacchio's expectation that Professor Fischel's admissibility would be established after he took the stand may have been reasonable, *see, e.g., Goebel v. Denver & Rio Grande W. R.R.,* 215 F.3d 1083, 1087 (10th Cir.2000), Mr. Nacchio had **no entitlement to a particular method of gatekeeping by the district court.** Indeed, Mr. Nacchio's purported entitlement is squarely at odds with the directive in *Kumho Tire* that "[t]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." 526 U.S. at 152, 119 S.Ct. 1167. The district court's failure to proceed as Mr. Nacchio anticipated does not by itself constitute an abuse of discretion.[11] *See id.* ("The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable."). (Emphasis added).
>
> *United States v. Nacchio*, 555 F.3d 1234, 1244-46 (10th Cir. 2009).

In *Nacchio*, the judge granted a motion in limine to exclude the expert testimony, so there was neither foundational testimony on the stand nor any formal tender in front of the jury.

I have not been able to find any Ninth Circuit decision specifically commenting on the tender/acceptance method of qualifying expert witnesses. However, there is a published decision from the U.S. District Court for Arizona, located in the circuit, on point. The case was a habeas case, decided in 2009. The defendant alleged, inter alia, that the Arizona state court judge's "conferring of expert witness status" violated his right to due process and a fair trial.

> The claim refers to the prosecutor's practice of submitting certain witnesses as experts in their fields; after laying a foundation for the witness's expertise, the prosecutor stated that he "submitted" the witness as an expert. Defense counsel did not object when this occurred, and the court made no comment beyond telling the prosecutor that he "may proceed."

McKinney v. Ryan, CV 03-774-PHX-DGC, 2009 WL 2432738 (D. Ariz. Aug. 10, 2009). This same claim had been raised on direct appeal. The Arizona Supreme Court disapproved of the process but, as in *U.S. v. Ollison,* supra, did not find it to be the error to be reversible:

> The witnesses' testimony concerned technical and scientific subjects beyond the common experience of people of ordinary education. Thus, we find no abuse of discretion in the judge's admission of the witnesses' opinion testimony.
>
> **We do not recommend, however, the process of submitting a witness as an expert.** The trial judge does not decide whether the witness is actually an expert but only whether the witness is "qualified as an expert by knowledge, skill, experience, training, or education ... [to] testify ... in the form of an opinion or otherwise." Ariz.R.Evid. 702. By submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert. The trial judge, of course, does not endorse the witness's status but only determines whether a sufficient foundation has been laid in terms of qualification for the witness to give opinion or technical testimony. *See United States v. Bartley,* 855 F.2d 547, 552 (8th Cir.1988) ("Although it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party").
>
> In our view, **the trial judge should discourage procedures that may make it appear that the court endorses the expert status of the witness. The strategic value of the process is quite apparent but entirely improper.** Suppose, as is frequently the case, there are two experts with conflicting opinions. Is the trial judge to endorse them both or only one? In our view, the answer is neither. The trial judge is only to determine whether one or the other or both are qualified to give opinion or technical evidence. "Such an offer and finding [of expert status] by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgement of the witnesses' expertise by the Court." *Id.* Thus, we disapprove of the procedure

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followed in this case. (Emphasis supplied).

State v. McKinney, 185 Ariz. 567, 585-86, 917 P.2d 1214, 1232-33 (1996).

The federal district court in the habeas case agreed, holding "the irregularities with which the expert testimony was introduced did not affect the fundamental fairness of Petitioner's trial. Petitioner does not contest that the witnesses were experts by virtue of their experience and training and that their testimony was admissible." *McKinney v. Ryan*, CV 03-774-PHX-DGC, 2009 WL 2432738 (D. Ariz. Aug. 10, 2009).

Another state court in the Ninth Circuit has approved a trial judge's refusal to state before the jury that a particular witness is an "expert":

> The circuit court denied Plaintiffs' requests to qualify Dr. Bretan as an expert. The circuit court also denied Plaintiffs' request to qualify Nurse Carol Best as an expert, stating, **"Inasmuch as this Court does not comment on the evidence and announce whether or not a particular witness is qualified as an expert in a particular field, the Court respectfully denies the request."** …it appears that it was the circuit court's practice to not make findings before the jury as to the qualifications of any expert witnesses. Although the record on appeal does not contain an explanation of that practice, we note that the parties signed a pretrial conference order dated March 14, 2006 which states as follows under "other topics": "Expert witnesses (no need to qualify)." Also, Defendants did not move the circuit court to qualify any of their witnesses as experts. Moreover, the circuit court ruled in limine that Dr. Bretan was not precluded from giving expert testimony as to cause of death at trial, but that Plaintiffs would need to establish a sufficient foundation for his opinion at that time. Thus, although there is nothing in the record explaining the court's approach toward qualifying expert witnesses, it does not appear that the court was singling out Plaintiffs in applying its policy or expressing hostility toward them, or their witnesses. Nor can we say from the record before us that the circuit court's approach to qualifying expert witnesses constituted an abuse of discretion.
>
> In reaching that conclusion, we do not suggest that the circuit court was required to take the approach which it took, but rather that it was not an abuse of discretion for it to do so. While the concerns identified in note 12 *supra* are legitimate, they can also be addressed by other means, such as by giving cautionary instructions to the jury regarding the weight to be given to testimony by expert witnesses. *See* *United States v. Hawley*, 562 F.Supp.2d 1017, 1036 (N.D.Iowa 2008) (noting, with regard to concerns about a court referring to a witness as an expert, that "such potential prejudice can be avoided by instructing jurors on the way in which they are to determine what weight to give to a purported 'expert's' opinion") (citation omitted). Such instructions are consistent with the principle that "[o]nce the basic requisite qualifications are established, the extent of an expert's knowledge of the subject matter goes to the weight rather than the admissibility of the testimony." *Larsen*, 64 Haw. at 304, 640 P.2d at 288 (citations omitted); Commentary to HRE Rule 702 ("The trier of fact may nonetheless consider the qualifications of the witness in determining the weight to be given to the testimony.") (Citation and footnotes omitted).
>
> *Barbee v. Queen's Med. Ctr.*, 119 Haw. 136, 154-55, 194 P.3d 1098, 1116-17.

Federal Conclusion

In federal court in some circuits, a lawyer may not formally tender and a judge may not formally accept or certify an expert witness. In other circuits, the practice has not been outlawed but is not required. The Ninth Circuit has not yet definitively ruled on this issue.

WHAT IS WRONG WITH TENDERING A WITNESS TO BE FORMALLY ACCEPTED BY THE COURT AS AN EXPERT?

Many secondary authorities have criticized, the practice of tendering an expert for acceptance or certification by the court at trial, in the presence of the jury. This was one of the subjects of the ABA's original Civil Trial Practice Standards, adopted in 1998. The ABA website explains the purposes of those standards:

> They recommend procedures and otherwise furnish guidance that is not available elsewhere and are designed to foster and ensure a fair trial in both state and federal court.
>
> http://www.americanbar.org/groups/litigation/policy/civil_trial_standards.html (accessed June 26, 2013).

Those standards were recently reviewed and revised; the current version, known as the "Updated Civil Trial Standards," was adopted by the ABA Section in August 2007. The Updated Standards are available in .pdf format at http://www.americanbar.org/content/dam/aba/migrated/2011_build/litigation/ctps.authcheckdam.pdf

The Preface to the Updated Standards states:

> These Updated Civil Trial Practice Standards have been developed as guidelines to assist judges and lawyers who try civil cases in state and federal court. The Updated Standards address practical aspects of trial that are not fully addressed by rules of evidence or procedure. They are not intended to be a substitute for existing evidentiary or procedural rules but rather to supplement and operate consistently with those rules. The Updated Standards are predicated on the

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> recognition that, in an era of increasingly complicated evidence and litigation, there are methods for enhancing jury comprehension and minimizing jury confusion that merit wider consideration and use. (Emphasis added).

Section 14 of the Updated Civil Trial Standards deals with the process of qualifying expert witnesses:

> **PART FOUR: EXPERT AND SCIENTIFIC EVIDENCE**
>
> **14. "Qualifying" Expert Witnesses.** The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.

As with the FRE and the MRE, the drafters of the Updated Standards provided "Comments" to supplement each standard. Although "**The accompanying commentary has not been adopted by the ABA House of Delegates and, as such, should not be construed as representing the policy of the Association"** Ioriginal emphasis],they are helpful in understanding the standards. The Comment to Standard 14 states, in part:

> It is not uncommon for a proponent of expert testimony to tender an expert witness to the court, following a recitation of the witness's credentials and before eliciting an opinion, in an effort to secure a ruling that the witness is "qualified" as an expert in a particular field. **The tactical purpose, from the proponent's perspective, is to obtain a seeming judicial endorsement of the testimony to follow. It is inappropriate for counsel to place the court in that position.**
>
> A judicial ruling that a proffered expert is "qualified" is unnecessary unless an objection is made to the expert's testimony. If an objection is made to an expert's qualifications, relevancy of expert testimony, reliability or any other aspect of proffered expert testimony, the court need only sustain or overrule the objection. When the court overrules an objection, there is no need for the court to announce to the jury that it has found that a witness is an expert or that expert testimony will be permitted. **The use of the term "expert" may appear to a jury to be a kind of judicial imprimatur that favors the witness. There is no more reason for the court to explain why an opinion will be permitted or to use the term "expert" than there is for the court to announce that an out-of-court statement is an excited utterance in response to a hearsay objection.** (Emphasis added).

The Comment quotes from both the Advisory Committee Note to the 2000 Amendment to F.R.E. 702 (laid out in the F.R.E. section of this column) and from an article which that Advisory Committee Note cited as well:

> As United States District Judge Charles R. Richey has observed in a related context, "It may be an inappropriate judicial comment ... for the court to label a witness an 'expert.'" Hon. Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 554 (1994). The prejudicial effect of this practice is accentuated in cases in which only one side can afford to, or does, proffer expert testimony.

Professor Stephen Saltzburg, who was a member of both the ABA original and updated Task Forces on Civil Trial Standards, published an article in *Criminal Justice* magazine in 2010, in which he addressed just this issue. Prof. Saltzburg hits the nail on the head so I simply replicate his language here:

> Long ago, I wrote in *Criminal Justice* magazine about the problems when judges anoint experts and explained why it is unnecessary and unwise for jurors to be told that the judge has "qualified" a witness as an "expert." (*Testimony from an Opinion Witness: Avoid Using the Word "Expert" at Trial, 9* Crim. Just. 35-38 (Summer, 1994).) The American Bar Association's Civil Trial Standards agree**:**
>
> 14. "Qualifying" Expert Witnesses. The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so….
>
> If judges simply rule on objections to testimony by sustaining or overruling them and permitting lay witnesses to offer permissible opinions under Fed. R. Evid. 701, expert witnesses to offer permissible opinions under Fed. R. Evid. 702, and dual witnesses to offer both lay and expert opinions, **there is no reason for a trial judge to qualify a witness as an expert and no reason for the judge to instruct the jury on the dual roles that a witness plays**. If the jury is not told that a witness is an "expert," it can judge the totality of the witness's testimony for what it is worth….
>
> The reality is that the process of tendering a witness and an expert and having the court find the witness to be an expert is problematic in all cases… (Emphasis added). 25-Fall Crim.Just. 32, 34-35.

My particular favorite secondary source on federal trial practice is Wright and Miller. Here is what they say about the procedure to be employed in presenting expert testimony:

> Rule 702 does not require that courts employ any specific procedure for receiving evidence concerning expert qualifications. Normally a trial court will hear qualification evidence before permitting the witness to give opinion testimony. That hearing may take

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place either in the presence or absence of the jury, at the discretion of the court. Before the court rules on whether a witness is qualified to testify as an expert, the opposing party should be afforded an opportunity to conduct a voir dire examination of the witness concerning the witness's qualifications.

In some jurisdictions the practice is to proffer the witness as an expert after eliciting evidence as to his credentials. This proffer precipitates a ruling from the court as to whether the witness is qualified to testify as an expert. This procedure is not mandated by Rule 702. The trial court need not and often should not make a finding before the jury that a witness is qualified to testify as an expert since such a finding might induce the jury to give too much weight to the witness's testimony. In addition, it is often premature for a court to find a witness qualified to testify as a expert even after that witness's credentials have been fully presented. This is because, until specific questions are posed to the witness, the court cannot know if the witness is qualified as an expert in the area of inquiry.

Even after a judge has permitted a witness to testify as an expert, cross-examination concerning the witness's qualifications should be allowed so that the jury may properly weigh the witness's testimony. (Footnotes omitted; emphasis added)

§ 6265 General Rule—"Qualified as an Expert", 29 Fed. Prac. & Proc. Evid. § 6265 (1st ed.)

All of these authorities agree: as a matter of policy, both lawyers and judges should refrain from using the term "expert" when referring either to a witness or her testimony. Instead, the recitation of the witness' qualifications, and voir dire and cross-examination by the opponent, should suffice to help the jury assign the proper weight to be given to the witness' opinions.

ANOTHER ISSUE TO CONSIDER: SHOULD LAWYERS BE ALLOWED TO ASK AN EXPERT WHETHER SHE HAS EVER BEEN QUALIFIED TO TESTIFY IN ANOTHER COURT PROCEEDING?

This issue is tangential to the main subject of this article, but worth considering as well. I agree with the conclusion of the authors of an article in the *Review of Litigation*, which discusses this question in depth:

A prior witness's knowledge, proficiency, and experience should be assessed when considering whether he or she is qualified to testify as an expert. **Evidence that judges in other cases deemed the witness to be an expert, however, is inadmissible hearsay and opinion evidence**. The presentation of this evidence is simply an effort to support the witness in a way that is often unduly prejudicial…. accordingly, the questionable **questions regarding an expert's prior qualification and/or disqualification simply should be forbidden.** (Emphasis added).

Irving Prager & Kevin S. Marshall, Examination of Prior Expert Qualification and/or Disqualification-(Questionable Questions Under the Rules of Evidence), 24 Rev. Litig. 559, 579 (2005).

WHAT SHOULD MONTANANS DO?

Montana should follow the preferred practice of omitting any "expert" stamp on a particular witness or testimony in a jury trial. Because most Montana lawyers and judges already do so, this recommendation should not cause any great difficulty. However, because lawyers from other jurisdictions do appear here pro hac vice, or move here permanently, Montana should affirmatively and clearly voice its agreement with ABA Updated Civil Trial Standard 14.

The Comment to the ABA Updated Civil Trial Standard 14 ends with some practical advice which instructs both advocates and judges on how to comply:

This Standard suggests that the court should not use the term "expert" and that the proponent of the evidence should not ask the court to do so. The party objecting to evidence also has a role to play in assuring that the court does not appear to be anointing a witness as an "expert." A party objecting that a witness is not qualified to render an opinion or that a subject matter not the proper subject of expert testimony should avoid using the word "expert" in the presence of the jury. Any objection in the presence of the jury should be "to the admissibility of the witness' opinion." If the objecting party objects that testimony is inadmissible "expert" testimony and the court overrules the objection, it may appear that the judge has implicitly found the witness to be an "expert." When an objection is made, if the proponent wishes to argue the matter, it should be outside the hearing of the jury. *See* Fed. R. Evid. 103 (c) (providing that inadmissible evidence should not be heard by the jury).

The Montana Supreme Court

The Montana Supreme Court should clearly adopt Standard 14 of the ABA Updated Civil Trial Standards for all state trials. The best way to do that is to amend the Uniform District Court Rules[5] by adding a new rule entitled "Procedure for Qualifying Experts." Additionally, UDCR 5, "Pre-trial Order and Pre-trial Conference" should be amended to add a similar provision into the required form for the Pre-trial Order. The Comment to the ABA Updated Standard 14 contains helpful suggestions.

Based on those, I suggest that a new UDCR read as follows:

Procedure for Qualifying Experts. In a jury trial, neither the court nor the lawyers should, in the hearing of the jury, use the term "expert" in referring to any witness, testimony, or opinion. The proponent of such evidence should not ask the court to do so,

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> for instance by "tendering" the witness as an "expert" or asking the court to "accept" or "certify" the witness as an expert. The party objecting to evidence on the basis that the witness is not qualified to render an opinion or that a subject matter not the proper subject of expert testimony should not use the word "expert" in the presence of the jury. Any objection in the presence of the jury should be "to foundation" or "to the admissibility of the witness' opinion." The lawyers and judge may use the term "Rule 702" in argument and ruling before the jury, but not the title of that rule nor any language from it which refers to "experts."

This rule does not apply to motions, hearings, or rulings outside the hearing of the jury.

UDCR 5(c) should also be amended to add a section to the Pre-Trial[6] Order, so that every litigant is informed of the correct procedure prior to trial and knows she may be subject to sanctions for violation of a court order for non-compliance:

> Treatment of Expert Witnesses. No party shall, in the presence of the jury, request that a witness be declared, certified, accepted or otherwise recognized as "an expert." No party shall, in the presence of the jury, refer to any testimony as "expert." Such witnesses and testimony may be called "opinion witnesses" and "opinion testimony."

Alternatively, the Court could indicate in its next case involving expert testimony that henceforth Montana will follow the ABA Updated Trial Standard 14.

Montana Pattern Jury Instructions

The benefits of the practice of not labeling particular witnesses or testimony as "expert" will be lost if the jury instructions themselves do not comply. As Professor Saltzburg et al observed:

> The utility of the Standard can be undermined if the court is not careful to excise the term "expert" from the instructions it gives to the jury before it deliberates. Juries can be fully instructed on their role in assessing credibility without any mention of the term. The following instruction is illustrative:
>
> Some witnesses who testify claim to have special knowledge, skill, training, experience or education that enable them to offer opinions or inferences concerning issues in dispute. The fact that a witness has knowledge, skill, training, experience or education does not require you to believe the witness, to give such a witness's testimony any more weight than that of any other witness, or to give it any weight at all. It is important for you to keep in mind that the witness is not the trier of fact. You are the trier of fact. It is for you to decide whether the testimony of a witness, including any opinions or inferences of the witness, assists you in finding the facts and deciding the issues that are in dispute. And, it is for you to decide what weight to give the testimony of a witness, including any opinions or inferences of the witness.
>
> 6 Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, Federal Rules of Evidence Manual 144 ((8th ed. 2002) .

The current (2009) version of the Montana Criminal Jury Instructions do use the term "expert:"

> INSTRUCTION NO. [1-113]
>
> [Expert Witness]
>
> A witness who by education and experience has become expert in any art, science, profession or calling may be permitted to state an opinion as to a matter in which the witness is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

This could be easily amended by simply removing the word "expert" and substituting in the first sentence "has gained specialized knowledge." (While we are at it, shouldn't it be "by education OR experience?" See M.R.E. 702). The second sentence is even easier: just omit "expert" and retain "opinion."

Similarly, the Montana Civil Pattern Jury Instructions need tweaking to excise the term "expert." Civil Pattern Instruction 1.12 now reads:

> A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give his/her opinion as an expert as to any matter in which he/she is skilled. In determining the weight to be given such opinion you should consider the qualifications and credibility of the expert and the reasons given for his/her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

This instruction could be fixed easily by simply deleting the first bolded phrase, and for the second bolded phrase substituting "the witness" for "the expert."

Civil Pattern Instruction 3.06 is entitled "Professional Negligence—Expert Testimony—When Not Required." It instructs:

> The testimony of an expert is ordinarily required to establish the appropriate standard of care owed by a doctor to his/her patient. However, the law permits an exception where you, as lay persons, are able to say as a matter of common knowledge and observation that it is plain and obvious that the injury the patient has establish could not have been sustained if due care had been exercised.

I do not think this pattern instruction needs to be amended globally, because it is sets forth the substantive requirement for

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expert testimony, rather than describes a particular witness as an expert. Further, this instruction normally is used in the absence of an expert, rather than where one has testified. However, courts and counsel should consider changing the language if the circumstances of the individual case mean that the instruction might be construed to violate Updated Civil Trial Standard 14.

Montana District Courts

The Montana District Courts should include in their Local Rules provisions which mirror the suggested UDCR amendments above, at least until such time as the UDCR are amended (and afterwards, if the UDCR truly do govern only civil cases). Additionally, each trial judge should include in all his or her Pre-Trial Orders similar language so that the parties are aware of the trial judge's adherence to this practice in his or her courtroom. The court should forbid the tender of expert witnesses in front of the jury, and should refuse to accept or certify any witness as an "expert." Thus, the judge's role is to assess and rule on any foundation objections raised when the expert with specialized knowledge is asked for his or her opinion.

Lastly, the court should ensure that its jury instructions do not undo the good obtained by the trial process. The quotation from Professor Saltzburg et al, set forth in the earlier discussion about Pattern Jury Instructions, should be implemented immediately, even before the Pattern Instructions are amended. This is the language they suggest:

> Some witnesses who testify claim to have special knowledge, skill, training, experience or education that enable them to offer opinions or inferences concerning issues in dispute. The fact that a witness has knowledge, skill, training, experience or education does not require you to believe the witness, to give such a witness's testimony any more weight than that of any other witness, or to give it any weight at all. It is important for you to keep in mind that the witness is not the trier of fact. You are the trier of fact. It is for you to decide whether the testimony of a witness, including any opinions or inferences of the witness, assists you in finding the facts and deciding the issues that are in dispute. And, it is for you to decide what weight to give the testimony of a witness, including any opinions or inferences of the witness.
>
> 6 Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, Federal Rules of Evidence Manual 144 ((8th ed. 2002).

Montana Lawyers

A. Motion *in Limine* to Exclude a Listed Expert

Montana lawyers, in both state and federal court, should attempt to resolve disputes about the admissibility of expert testimony under Rule 702 before trial, through motions in limine, if at all possible. This process does not require the caution necessary when arguing this issue before the jury at trial, and has the even more important benefit of giving the court and parties enough time to carefully consider the question raised.

B. Objection at Trial

If, however, the motion in limine procedure is not used, then at trial neither the lawyers nor the judge should use the label "expert" at any point before the jury. The proponent of the testimony should simply ask the witness the opinion question.[7] The proponent should **not** say to the judge "I tender/offer this witness as an expert in (specified field)."

The opponent should simply object: "Objection. Foundation, Rule 702" and add a request: "May I voir dire?" The voir dire is a mini cross-examination, the only purpose of which is to show the court that this witness in fact does not meet the requirements of Rule 702 and thus should not be allowed to give his or her opinion. Here is an example:

> Q: It is not really "Dr.", is it, Mr. Jones?
>
> A. I don't know what you mean.
>
> Q. Well, you never attended any medical school in the U.S., did you?
>
> A. No.
>
> Q. And you never attended any medical school outside the U.S., did you?
>
> A. No.
>
> Q. You do not actually have an M.D. degree, do you?
>
> A. Not yet.
>
> Q. And you failed the First Aid training class in Cub Scouts, didn't you?
>
> A. Well, that was a long time ago, but yes.
>
> Q. You haven't passed any First Aid training class since then, have you?
>
> A. No.
>
> Q. You have never been licensed as a physician in any state in the U.S.?
>
> A. No.
>
> Q. You have never been licensed as a physician in any country in the world, have you?
>
> A. No.
>
> Q. You have never worked in any capacity in an Emergency Room anywhere in the U.S.?
>
> A. No.
>
> Q. Nor in the world?
>
> A. No.
>
> Q. You have never once, anywhere, cared for a patient as an emergency room doctor, have you?
>
> A. No.
>
> Q. And you bought your scrubs on EBay?
>
> A. Some, and some from the hospital thrift shop.
>
> Q. Isn't it true that the only thing which you know about emergency medicine is what you have learned from watching the TV show "ER"?
>
> A. No. I also watched "Doogie Howser."
>
> "Your honor, I renew my objection to this witness giving any opinion under Rule 702."

Now the judge simply rules on the objection. In this

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example, it is obvious that the witness does not meet even the relaxed Daubert standard reflected in Rule 702, so the objection would be sustained and the witness prohibited from giving any opinion on the basis that he does not have the specialized knowledge that would be helpful to the jury. The judge only has to say "Sustained" without using the word "expert."

If the example were less clear, so that although the witness did not graduate from Harvard Medical School, she did obtain an M.D. from the University of Mississippi and has practiced in an ER for a few years, the judge might let her give her opinion. To do so, the judge should only say "Overruled. She may give her opinion" and should not go on to say "I find that she is an expert."

C. Recommended Motion in Limine to Preclude Use of "Expert" Label at Trial

As the authorities discussed above recognize, there is a strong temptation to have the judge state, before the jury, that your witness is an expert. "The tactical purpose, from the proponent's perspective, is to obtain a seeming judicial endorsement of the testimony to follow**."** Comment to A.B.A. Updated Civil Trial Standard 14. If one lawyer does this, her opponent naturally will want to follow suit to make sure that the jury considers the other expert in the same light. Mutual disarmament is the solution, and a procedural motion in limine is the way to do it.

A recent federal district court opinion shows how a good advocate can ensure compliance with the Johnson and ABA Guidelines by using a motion in limine:

> Defendant requests that the Court issue a pretrial evidentiary ruling barring the Government from requesting in the presence of the jury that one or more of its witnesses be declared an expert. Defendant also requests that no witness be referred to as an expert or their testimony referenced as an expert opinion. Defendant asserts that such references would improperly invade the province of the jury to evaluate the evidence and weigh the credibility of the witnesses. Defendant relies on *United States v. Johnson,* 488 F.3d 690 (6th cir.2007), in support of his argument…
>
> *United States v. Cobb*, CR-2-07-0236, 2008 WL 2120845 (S.D. Ohio May 19, 2008). Your brief in support of your motion should cite the A.B.A. Updated Civil Trial Standard 14 as well as the cases I have discussed above, particularly *U.S. v. Johnson*.

Because I think that a good motion always includes a proposed order, I suggest that you use the following language from the Cobb case as a template:

> Therefore, in accordance with the A.B.A. Updated Civil Trial Standard 14 and the Sixth Circuit's holding in United States v. Johnson, Defendant's Motion is GRANTED. The Court will act in accordance with the instruction as set forth in detail in the A.B.A. Updated Civil Trial Standard 14 and Johnson. Further, the Court will instruct the jury in accordance with Johnson and the A.B.A. Updated Civil Trial Standard 14.

See, *United States v. Cobb*, CR-2-07-0236, 2008 WL 2120845 (S.D. Ohio May 19, 2008). (I have added the Civil Trial Standard language; the *Cobb* case referred only to *Johnson*.)

CONCLUSION

I hope your nights are tender, especially these great Montana summer evenings, but not your witness. Montana courts and lawyers can take the high road, comply with A.B.A. Updated Civil Trial Standard 14, and let juries assess the testimony of a Rule 702 witness without being blinded by the gleam of a special designation

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

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ENDNOTES

1 This is the title of F. Scott Fitzgerald's fourth and last novel, originally published in 1934. Fitzgerald took the title from a line in a poem by Keats entitled "Ode to a Nightingale." See, being an English major has been helpful…

2 The extra language in the federal version which is not in the MRE results from an attempt to codify the holdings of the U.S. Supreme Court on the requirements for admission of expert testimony. "Rule 702 has been amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999)." Advisory Committee Note to 2000 Amendment of F.R.E. 702.

3 In Daubert, each side submitted affidavits from experts, opining on the causal relationship between prenatal Bendectin and birth defects. The trial judge excluded the plaintiffs' affidavits, finding that the methodology used by the plaintiffs' experts did not meet the "general acceptance" standard of reliability. (The Supreme Court's decision imposed a new and different standard, and remanded the case).

In Kumho Tire, the Court extended its Daubert analysis to engineering and other technical but non-scientific specialized knowledge. The plaintiffs opposed the defense motion for summary judgment with deposition testimony from an expert in tire failure analysis, who concluded that a manufacturing defect in the tire had caused the blowout which injured the plaintiffs. The trial judge concluded that the plaintiffs' expert's methodology fell short of the Daubert standard, excluded the affidavit and granted summary judgment for the defense. The Supreme Court held that the trial court had employed the correct standard, and did not abuse its discretion in excluding the affidavit as based on insufficiently reliable methodology.

4 See, Kihega v. State, 392 S.W.3d 828 (Tex.App., 2013); In re Commitment of Simmons, 2012 IL App (1st) 112375-U, Ill.App. 1 Dist.; State v. Barlow, 2010 WL 1687772, *12+, Tenn.Crim.App. (2010).

5 I myself am unclear about whether the Uniform District Court Rules apply to all, or only civil, cases in Montana District Courts. There is nothing in the UDCR themselves which addresses this issue, but they are located in the MCA Title 26, which is entitled "Civil Procedure." My intent is that the expert witness process be the same in both civil and criminal trials.

6 While we are at it, why is Pretrial hyphenated as Pre-Trial in this rule?

7 Under Article VII of the M.R.E., the proponent can lay out the witness' qualifications and then ask the opinion question, or simply ask the opinion question right up front and then back it up with the witness' qualifications and reasoning. "The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise." M.R.E. 705.

The first method is the more traditional, and leaves your opponent room to object on foundation grounds. The middle, and my own personal, choice is to do the qualification part, then ask for the opinion, then ask for the reasons the witness came to that opinion, and then conclude with the opinion again (technically this last question is redundant under Rule 403, but if it's quick, it usually works).

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Questions?

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Barbara Dockery Tremper

Barbara Dockery Tremper, 84, of Polson, peacefully died on June 7, 2013, of Alzheimer's disease at Footsteps Memory Care at The Springs in Missoula.

Born November 30, 1928 to Raymond E. and Bohnda Akins Dockery in Lewistown, she attended Fergus County High School, and was active in drama and music.

She earned a bachelor's degree in English from the University of Montana in 1950, and pursued a number of degrees and careers over the next fifty years, all while raising six children. Her graduate degrees and professional accreditations include CPA, MBA and J.D.

She pursued careers in secondary education and accounting before becoming an accounting instructor at MSU from 1976 to 1980 and then U of M from 1980 to 1983. In 1986, at the age of 58, she graduated from the U of M School of Law and began a law career that included private practice as well as judicial clerkships.

Barbara is survived by her college ski buddy and husband of nearly 64 years, William ("Bill") Tremper, of Polson, as well as their children and their respective spouses: Laura (Roger) Wagner of Nashua; Jane (Mike) East of Missoula; Bruce (Susi) Tremper of Salt Lake City; Hal (Karen) Tremper of Lolo; John Tremper, of Columbia Falls; and Glenn (Peggy) Tremper of Great Falls. She also leaves 13 grandchildren, 9 great grandchildren and numerous nieces and nephews and their families.

She was preceded in death by her parents, and her siblings: Raymond E. Dockery, Jr., Margy Lou O'Donnell, and Mary Ann Pickrell. A brother, Halbert, died in infancy.

She also leaves many special friends in Polson and Missoula, including the wonderful community of residents and staff at Footsteps Memory Care at The Springs in Missoula. The family is most appreciative of their kind and competent service provided to Barbara and her family.

A more complete narrative of Barbara's remarkable life is available online at http://www.groganfuneralhome.com. Condolences may be made online as well.

In lieu of flowers, the family requests memorials be made in Barbara's name to the University of Montana Foundation, School of Business Administration -- Accounting and Finance Faculty Scholarship, P. O. Box 7159, Missoula, MT 59807-7159.

Robert Francis Conwell

Robert Francis Conwell, 88, passed away at Highland Manor in Mesquite, NV on Wednesday, July 3, 2013. He was born January 24, 1925 in Red Lodge, MT to Edward and Callista Shay Conwell. Robert married Frances Eileen Irish on October 22, 1955 in Billings, MT.

He graduated from Carbon County High School in Red Lodge, MT in 1942 and the University of Montana's School of Law in 1951. Robert returned to Red Lodge where he joined his father's law practice. Robert later had his own law office in Red Lodge and was Carbon County Attorney for 16 years. In 1987, Robert retired to California and then he and Frances moved to Mesquite, NV in 1994.

Robert enlisted in the US Army in July of 1943. He was with the 12th Armored Division as an infantryman, when on January 17, 1945 he was wounded and captured in a battle near Herrlisheim, France. Robert spent 3 months in Stalag 4B as a Prisoner of War. Robert received the Bronze Star, Purple Heart, Prisoner of War Medal, Expert and Combat Infantryman Badges and was honorably discharged as a corporal on September 1, 1945.

Robert is survived by his loving wife of 57 years, children John (Mayumi) Conwell (Brian and Sean) of Unalaska, AK, Colleen (Jeffrey) Jennings (Justine and Jeremy) of Salt Lake City, UT, Kevin (Barbara) Conwell (Laura, Jennifer, and Mary) of Bozeman, MT, James (Jennifer) Conwell (Jack and Henry) of Billings, MT, and Gregory Conwell of St George, UT; one sister, Rose Sullivan of Butte, MT and many nieces and nephews. He was preceded in death by his parents; son, Dennis Conwell; brother, Edward Conwell; sisters Mary Hudak and Margaret Heyd.

Funeral services and interment were held on Monday, July 8, 2013 at Southern Nevada Veterans Memorial Cemetery in Boulder City, NV.

Larry Cozzens

Larry Cozzens passed away on June 3 from congestive heart failure. He was born in Red Lodge on May 12, 1948, the third child of Lawrence E. Cozzens and Margery Boyd. He grew up in Deer Lodge, surviving hard working days at the family's gas station, and being the only boy with five sisters. His family moved to Cody, WY in 1964 where he graduated high school in 1966 and made connections that would last the rest of his life.

He attended Northwest Community College in Powell, WY, notable mostly for being the place where he met and married Jeannine Orendorff, who would be his wife for nearly 45 years. He attended the University of Wyoming, where he obtained a bachelor's degree in sociology on the way to an award-winning academic career at the University of Wyoming law school, where he graduated with top honors in 1975. From law school he moved on to the Department of Justice in Washington, DC, and then on to a storied career in private practice in Cody, WY and then Billings, MT. In 2006, he was named Montana Trial Lawyer of the Year.

He enjoyed golfing with good friends, listening to music, and building and riding motorcycles. In his last 3 years, his greatest joy came in spending time with his grandsons, who were the light of his life. The feeling was mutual.

Larry is preceded in death by his parents and his sisters Dawn Rolfe and Cathy Cozzens. He is survived by his wife, Jeannine; his daughter Jessica, her husband Jourdan Guidice, and their sons Russell and Owen; his son Ryan; his sisters Betty Jean (Ronald) Knudson, Cherry (Dave) Peterson, and Carol (Greg) Barber; and numerous nieces and nephews. He was much loved and will be much missed.

State Bar mourns passing of George L. Bousliman

Our master gardener: *We're grateful for George's vision and care*

Editor's note: *State Bar President Molly Shepherd wrote this piece upon George's retirement in 2001. She shared it as her President's Message for the June/July 2001 Montana lawyer. Molly gracefully captures George's legacy, and her words are as fitting now as they were then.*

George L. Bousliman's many friends celebrated his career at a recent retirement party in Helena. Multiple speakers paid well-deserved tribute to George and his work before and after he became executive director of the State Bar of Montana in 1983.

The topic for my own remarks was, "We couldn't have done it without him." I puzzled about what to say for several weeks. "We" plainly referred to the State Bar and "him" to George. But what about "it?" What was it that the Bar could not have done without George? The following parable finally came to mind. It's repeated here both to honor George and the association that he has shaped and defined.

♦ ♦ ♦

Almost 18 years ago, a master gardener began to care for a raggedy Montana garden. To be sure, vigorous trees, high-yielding plants and beautiful flowers were scattered here and there. But they had been sporadically tended and were crowded by noxious and insistent weeds. The effects of an unpredictable and sometimes inhospitable climate were apparent. The garden needed a determined horticultural visionary to fulfill its promise.

Patiently, but with passion for his work, the master gardener tilled and enriched the soil. Each year, he pruned, thinned and cultivated what already grew there. He also planted new root stock, shoots and seeds, recognizing that a garden is perennially in the making. He did not hesitate to experiment in order to produce more vigorous trees, more high-yielding plants and more beautiful flowers. And he did not give up when the weeds proved resilient and the climate, intractable. He knew that when one gardens for the long haul, hope and perseverance must predominate over despair and surrender.

Today, the comeliness and productivity of the garden are markedly enhanced. The soil is fertile and the weeds have been reckoned with if not vanquished. The climate's effects have been mitigated. Sturdy younger trees, plants and flowers appear among the older ones. Hardy volunteers and native wildflowers have been encouraged. The limited, now antiquated tools that came with the gar den have been used wisely and well; makeshift tools have been improvised. The gardener's character, resourcefulness and vision are evident wherever one looks. Although no garden is perfect, this one would do any master gardener proud.

♦ ♦ ♦

The State Bar would not be what it is today without George Bousliman. For many Montanans, both lawyers and non-lawyers, George personifies the Bar. To commemorate his accomplishments, the Board of Trustees has renamed what was known in the past as the Local Professionalism Award. Henceforth, it will be known as the George L. Bousliman Professionalism Award and will recognize the qualities that he has cultivated in us. His work in the garden will continue to produce fruit and flowers long after his departure.

George's work also serves as a model for us all. His habit of tending to things that matter reminds me of an observation by E. B. White:

If the world were merely seductive, that would be easy.

If it were merely challenging, that would be no problem.

But I arise in the morning torn between a desire to improve the world, and a desire to enjoy the world.

This makes it hard to plan the day.

We're grateful for the number of days on which George Bousliman arose in the morning and set out to improve the world by laboring in the garden.

George L. Bousliman

George L. Bousliman, of Helena, died July 28, after a long battle with Parkinson's Disease. He was 72.

George was born to George and Leona Bousliman, in Williston, ND. The family, including George Jr.'s older brother Charlie, moved to Columbia Falls in 1946, where George Sr. opened a bar. Pulitzer Prize-winning author Mel Ruder once featured George Jr. in a Hungry Horse News column, describing how he used to wow bar patrons with his math skills. Ruder wrote, "When George was seven years old, we'd get him to add, multiply and subtract in his head. At age seven, he was better at math than most adults."

George took those skills to Columbia Falls High, where he graduated in 1958 after an impressive career in wrestling and an unremarkable one as a 120-pound guard for the football team. He then went to Carroll College, graduating in 1962. After he and his high-school sweetheart Joan were married, the couple headed to Missoula, where George undertook graduate studies in political science.

After George completed his master's program, they moved to Pierre, SD, where George worked as a researcher for the South Dakota Legislative Council. The family moved to Boise in 1966, when George took a job as assistant director for the Idaho Legislative Council. In 1969, they returned to Montana, when George was named deputy director of the Montana Executive Reorganization Program, under the direction of UM Law Professor Duke Crowley.

As Crowley noted at George's retirement from the State Bar of Montana in 2001, "The UM political science department recommended George, saying, 'this guy is a hard worker, quiet, goes about things almost silently, and gets results. You should hire him.' I'm so glad I did."

George looked at reorganization plans across the nation and over time, from Depression-era New York to contemporary Georgia. When he didn't find a template fitting Montana's circumstances, he devised his own.

After assessing the size and performance of Montana's state government, George and his team developed a plan to dramatically streamline it, paring 161 agencies down to 19. Bill Groff, who served for nearly 20 years as a senator in the Montana Legislature, including as president of the Montana Senate, said, "I don't think there's any initiative in the last 100 years as important for Montana as executive reorganization."

But for all that George rejected from other states' plans, he found one lesson quite useful: the way they managed their money. George found that rather than investing the funds it received through taxes and fees, the State of Montana was simply depositing the money in banks, earning a very modest return. So he proposed establishment the Montana Board of Investments. And the results were dramatic. As described in the Board's most recent annual report:

"Prior to the Board's assumption of the state's investment program, state funds were invested by individual state agency staff, usually on a part-time basis. The creation of the Board in 1972 permitted a full-time professional investment staff to invest all state and local government funds…. The unified investment program has grown from a book value of $321 million at year-end 1972 to a book value of $12.91 billion at year-end 2012, an annual average increase of 9.7 percent."

As Crowley noted, "I learned that in addition to getting an excellent administrator, we had also picked up a financial wizard. If I ever encounter a recording angel who asks what I've done to make the world a better place, my answer is simple: I hired George. In the more than 30 years since I've done so, everything that has resulted from that decision has been good…and some of it has been marvelous."

When he finished with Montana executive reorganization, George took a similar job for the State of Washington, where the family moved in 1974.

Three years later, Governor Tom Judge asked George to return to Montana to be his budget director. Having worked himself out of a job as the Washington State Productivity Improvement Coordinator, and having determined that he was neither good at nor fond of selling life insurance, George told Gov. Judge that he would be honored to serve as Budget Director. He accepted the job, and in late 1977 the family moved back to Helena.

Following his service in the Judge Administration, George worked in a variety of jobs, including stockbroker, county commissioner and lobbyist. In 1983, he landed the job that would cap his career: Executive Director of the Montana Bar Association.

When he was hired by the Bar, George wondered whether he was up to the task, as he would be managing an association of attorneys without being one himself. His hiring also roughly coincided with his Parkinson's diagnosis. But George excelled as Bar director, with accomplishments including establishment of a program to support the provision of legal services for the poor; initiating a health insurance program for more than 1000 attorneys, their staff and family members; and forming, along with the state bars of Kansas, South Dakota and West Virginia, the Attorneys Liability Protection Service, the lawyer-owned malpractice carrier. True to his roots as a budgeter, he did it all while maintaining Bar dues at $100 for his entire 18-year tenure. George would be quick to note that he couldn't have done it without a loyal and dedicated staff, most notably Betsy Brandborg.

Though he eventually relinquished his official duties, George didn't check out of public service. Until the very end, he submitted regular letters to the editor at newspapers across the state, sharing his views about the world and how it could be improved. One reader, commenting on a letter George wrote in 2011, said, "Mr. Bousliman (speaks) courageously with clarity, the facts and wisdom. If he were running for president I'd give him my vote."

George never wanted to be president. But he did want to leave the world a better place than he found it. His loving family and friends agree that on that score, he certainly succeeded. We miss you, George. If there's life after this one, we hope yours includes successful afternoons fishing; World Series championships for your New York Yankees; and Indian paintbrush along your hiking path.

George is survived by his wife Joan; his daughter Stephanie and her husband Todd; his son Mike and his wife Theresa; his son Pat; six grandchildren; his brother Charlie; and lifelong friends Melvin P. and JoEllen Estenson.

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