MONTANA LAWYER

State Bar of Montana

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> Short history of Montana Rules of Evidence

> Analysis of "Occurrence" trigger for liability insurance

> Summaries of Supreme Court cases through October

> Blast From the Past, featuring former President Robert Phillips

> Year-end planning and the endowment tax credit

> Are franchise agreements all that they appear?

> Mark Parker says farewell to Justice Nelson

> Primary care for elders: Plan for emotions and the unexpected

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FACT OR FICTION?

President Pam Bailey invites you to test your knowledge about the State Bar

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Why do attorneys become successful financial advisors?

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President's Message | Pam Bailey

Fact or fiction?

In the last 15 years, as both a trustee and member of the Executive Committee, I have found there are many misconceptions and assumptions about the State Bar. In fact, at a recent local bar function in Billings, a senior partner at a large firm expressed his concern that the State Bar had decided to switch to the Uniform Bar Exam, and how this would lead to multi-state jurisdiction practice. That got me thinking about the many misconceptions regarding the role and functioning of the State Bar. So, please join me in a fact or fiction quiz to determine your State Bar IQ.

FACT or FICTION: The State Bar chose to switch to the Uniform Bar Exam (UBE).

Answer: Fiction. The Montana Supreme Court appoints various Commissions to assist in rule making and other matters involving the administration of justice. One of the Commissions is the Board of Bar Examiners. The Board of Bar Examiners petitioned the Supreme Court to amend the existing rules governing admission to the Montana State Bar, namely, to adopt the Uniform Bar Exam. On July 3, 2012, the Montana Supreme Court adopted the UBE. The State Bar is required by the Supreme Court to provide staffing and administrative assistance to support this Commission.

FACT or FICTION: The $385 that each active lawyer pays per year to practice law in Montana goes to the State Bar.

Answer: Fiction. Only $200 goes to the State Bar. $125 goes to the Office of Disciplinary Counsel (ODC), while the remainder is allocated to the Lawyers' Fund for Client Protection ($20), CLE filing fee ($15), and Supreme Court license tax ($25).

FACT or FICTION: The Office of Disciplinary Council (ODC) is an entity of and under the jurisdiction of the State Bar.

A**nswer: Fiction.** The Montana Supreme Court established and appoints the Disciplinary Council in addition to the Commission on Practice. The State Bar has no jurisdiction over either entity.

FACT OR FICTION: The State Bar of Montana oversees the administration and distribution of IOLTA funds.

Answer: Fiction: IOLTA funds are collected by the Montana Justice Foundation, not the State Bar. The Montana Justice Foundation allocates and distributes funds as determined by their Board of Directors.

FACT or FICTION: The State Bar has no authority over the rules governing continuing legal education (CLE), including which programs will be approved for CLE credit.

Answer: Fact. The CLE Commission, another Montana Supreme Court Commission, has the authority to administer and interpret the Supreme Court Rules governing CLE. This includes which courses and programs are approved for legal education activities, and the number of credit hours which will be allowed. The CLE Commission is required to report annually to the Board of Trustees of the State Bar, but is appointed and governed by the Montana Supreme Court.

The CLE Institute, on the other hand, is a committee of the State Bar which prepares, sponsors and administers CLE programs in Montana. Whether these programs will be eligible for CLE credit, however, is up to the CLE Commission.

FACT or FICTION: The State Bar hires lobbyists for the legislative session.

Answer: Fact. For the first time, the State Bar hired two lobbyists during the last legislative session. These lobbyists are attorneys Bruce Spencer and Ed Bartlett. The Executive Committee of the State Bar has rehired Bruce and Ed again for the 2013 legislative session. They will report to the Executive Committee on a weekly basis regarding legislation that affects the practice of law.

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FACT or FICTION: The Self-Help Law Centers were created and are funded by the State Bar.

Answer: Fiction. The Self Help Law Centers are an initiative of the Montana Supreme Court. Funding for these centers comes from the legislature, not from the State Bar. Supervision is through the Court Administrator's Office.

The Montana Supreme Court created the Access to Justice Commission this year, which will encompass the Commission on Self-Represented Litigants and Equal Justice Task Force. The State Bar is required by the Montana Supreme Court to provide administrative support for this Commission.

FACT or FICTION: The State Bar's entire operating budget comes from dues.

Answer: Fiction. Only 51% of the Bar's operating budget comes from dues. The rest comes from CLE programs, publications, admission fees, administrative fees, etc.

How did you do? I hope this quiz helped clarify some of the functions of the State Bar. Remember that it is the Montana Supreme Court, not the State Bar of Montana that governs and controls the practice of law. All attorneys who are admitted to practice in the State of Montana are unified into the State Bar. In other words, YOU are the State Bar. Be an informed member. Become involved!

Montana/Member News

Cossitt speaks at recent bankruptcy conference

On Nov. 1, Kalispell attorney James H. Cossitt spoke at the Iowa Chapter of the Federal Bar Association, 31st Annual Bankruptcy Conference. James' presentation was on legal ethics rules applied to bankruptcy proceedings and included an update on the August 2012 amendments to the ABA Model Rules of Professional Conduct.

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

Schwandt is new associate at Smith & Stephens

The law firm of Smith & Stephens, is pleased to announce that Briana E. Schwandt has become an associate with the firm. Briana completed her undergraduate studies with high honors at the University of Great Falls in 2006.

Schwandt

After working as a paralegal for several years, Briana moved to Missoula in 2008 to attend the University of Montana School of Law. While at UM Law she was first a staff member and then the Symposium Editor on the MONTANA LAW REVIEW. She was also research assistant to Professor Cynthia Ford and a member of UM Law's trial team. While in law school, Briana worked for the United States Senate Committee on Finance, the Federal Defenders of Montana, and UM's Criminal Defense Clinic. Briana graduated from UM Law in 2011 with honors. For the past year, she was judicial law clerk to the Honorable Jim Rice of the Montana Supreme Court. She will focus her practice on criminal defense.

Murphy Law Firm welcomes Matt Murphy

Matthew J. Murphy joined the Murphy Law Firm of Great Falls to work in the areas of Workers' Compensation, Social Security Disability, and Personal Injury law.

Matt grew up in Great Falls and graduated from Charles M. Russell High School in 2004. He completed an undergraduate degree in political science at the University of Montana in 2008.

Murphy

During his undergraduate training, Matt studied international law in Rome, Italy. After finishing his undergraduate degree, Matt taught English in Costa Rica. Matt earned his Juris Doctor from the University of Montana School of Law in May of 2012.

Matt brings a lot of energy to everything he does, and he will focus his professional efforts on representing injured people in Montana. Matt is admitted to practice law in all Montana State Courts and before the U.S. District Courts for the District of Montana. Matt is a proud member of the Montana Trial Lawyers Association.

For more information on Murphy Law Firm and their attorneys, please visit www.murphylawoffice.net or call (406) 452-2345, toll free 1-866-706-5771.

Halverson joins Patten, Peterman, Bekkedahl & Green

Patten, Peterman, Bekkedahl & Green, PLLC, in Billings is pleased to announce that Benjamin J. Halverson has joined the firm. Ben was born and raised in Billings, graduating from West High School in 2004. He graduated from Gonzaga

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University in 2008, receiving a B.S. in Political Science with Honors.

Halverson

Ben previously interned for the Yellowstone County Attorney's Office, prosecuting cases in Justice Court. Ben graduated from The University of Montana School of Law in 2012.

His areas of practice include estate and tax planning, bankruptcy, employment litigation, and business planning. The firm further offers legal services including adoptions, civil litigation, estate and tax planning, trust administration, tax controversy, partnerships and personal injury. You can reach Ben at bhalverson@ppbglaw.com or (406) 252-8500.

Lundberg opens consumer protection law office

Lundberg

Jessie Lundberg is pleased to announce the opening of Lundberg Law Office PLLC, a Missoula-based firm focusing on consumer protection law. Lundberg Law will represent consumers with claims against debt collectors, credit reporting bureaus, lenders and loan servicers, landlords, used car dealers, and more, as well as assisting debtors in filing bankruptcy.

Jessie began working in consumer protection ten years ago, including working as a nationally-certified financial educator and foreclosure prevention specialist, drafting and lobbying for anti-predatory lending legislation, helping to found the Montana Financial Education Coalition, and serving as an ABA Janet Steiger Antitrust Fellow with the Montana Attorney General's Office of Consumer Protection.

Jessie earned her law degree from the University of Montana School of Law, where she served as Editor-in-Chief of Montana Law Review and completed her clinical internship with U.S. District Court Judge Donald W. Molloy. Following law school, Jessie clerked for the United States Court of Appeals, Ninth Circuit, for the Hon. James R. Browning and Hon. Sidney R. Thomas, in San Francisco.

Prior to opening her own practice, Jessie worked in private practice and served two terms as an Equal Justice Works AmeriCorps Legal Fellow with Montana Legal Services Association, coordinating MLSA's self-help bankruptcy program and assisting low-income Montanans with consumer law issues. Jessie has also served as an adjunct faculty member at the University of Montana School of Law, teaching Products Liability. Jessie authors a consumer law blog at moolahlaw.com.

Jessie can be reached at: Lundberg Law Office PLLC, 415 N. Higgins Ave., Suite 1, Missoula, MT 59802. Telephone: (406) 531-0630. Email: jessie@lundberglawyer.com. Website: www.montanaconsumerlawyer.com. Blog: MoolahLaw.com. Tweet: @MoolahLaw.

Vicevich opens new practice in Butte; sworn-in in Washington

David L. Vicevich is pleased to announce the opening of his new practice in Butte, Vicevich Law. David, a Butte native, attended law school at Washington University in St. Louis and has been in private practice in Butte since 2001. Before opening his new practice, David spent eight years as a partner in the firm of Joseph, Vicevich and Whelan, PPLP in Butte. His new practice focuses on criminal defense, land use/zoning, appellate law and civil litigation. David is a member of the National Association of Criminal Defense Lawyers, the Montana Association of Criminal Defense Lawyers and the State Bar of Montana Criminal Law Section. He also passed the Washington Bar Exam in Summer 2012 and was sworn in Spokane on October 26, 2012 by Superior Court Judge Jerome J. Leveque, also a member or Montana Bar. David plans a future expansion of his practice into Washington. David and Vicevich Law can be contacted at (406) 782-1111, dlvicevich@gmail.com, or through his website, www.viceivchlaw.com.

Weldon elected chair of regional educational board

Jeff Weldon, a Billings attorney who specializes in school law, has been elected chair of the Board of Directors of Education Northwest, a Portland, Oregon–based nonprofit that works to transform teaching and learning

Weldon

Weldon is a partner in the law firm of Felt, Martin, Frazier, & Weldon, P.C. He brings to the board a long list of credentials, including his experience as legal counsel for the Montana Office of Public Instruction and for Billings Public Schools. He also served four years in the Montana State Senate.

"I am pleased to serve as chairperson and value the benefits that Education Northwest provides to Montana educators," said Weldon. In the past year, Education Northwest has conducted a wide variety of activities in the state, including training teachers in traits-based writing, evaluating two major statewide literacy initiatives, providing professional development in implementing Common Core State Standards in Mathematics, working with the Montana AA District Network on improving graduation rates, and training VISTA volunteers who work in anti-poverty programs throughout Montana.

Weldon joins 22 other community leaders, educators, and chief state school officers in helping guide the work of Education Northwest, which primarily serves Alaska, Idaho, Montana, Oregon, and Washington. "One of the primary reasons for the success and national recognition enjoyed by Education Northwest has been the willingness of leading stakeholders in the region to serve on our board," said Chief Executive Officer Steve Fleischman. "Over the years, our board members have provided solid leadership, advocacy, and support to ensure that we deliver high-quality education improvement and community-building services."

Duffy retired as of October 4

Clerk of Court Patrick Duffy -- United States District Court for the District of Montana -- retired in early October. Duffy had served since September 2001. The clerk is the chief operating officer of the court. Tyler Gilman, who has served as a staff attorney for the past 8 years, has replaced Duffy. The federal court in Montana holds court in five divisional courthouses: Billings, Butte, Great Falls, Helena and Missoula. The district is served by nine judges and 60 clerks of court and chambers staff.

Update to previously published article

RE: Wal-Mart v. Dukes

An article appearing in last month's Montana Lawyer discussed the ramifications of the United States Supreme Court's decision in *Wal-Mart v. Dukes* on Montana class action law. See *Four Lessons From Wal-Mart v. Dukes And Their Application To Montana Class Action Law, Montana Lawyer, Vol 38, No. 2, Nov. 2012.* Among other points made in the article, it was suggested that the Montana Supreme Court's recent decision in *Diaz v. Blue Cross & Blue Shield of Montana* raised questions concerning whether the Montana Supreme Court fully accepted Wal-Mart's holdings that (1) courts must determine that each of Rule 23's requirements have been established, even if that analysis overlaps with the merits, and (2) Rule 23(a)(2)'s commonality requirement was not an easily-satisfied threshold, but rather required a showing that a common question of law or fact could be answered on a class-wide basis in a manner apt to drive the resolution of the litigation. After the article went to press, the Montana Supreme Court issued its decision in *Chipman v. Northwest Healthcare Corporation*, 2012 MT 242 (2012), affirming certification of a Rule 23(b)(1) class. In *Chipman*, the Montana Supreme Court made clear that conducting the required "rigorous analysis" to determine compliance with Rule 23's requirements "will frequently entail some unavoidable overlap with the merits of plaintiffs' underlying claims," citing *Wal-Mart*. (Id., ¶ 44.) The Court further expressly acknowledged that *Wal-Mart* had "significantly tightened" the commonality requirement, and "[f]ollowing this Court's long history of relying on federal jurisprudence when interpreting class certification requirements of Rule 23, we apply the *Wal-Mart* reasoning to this case." (Id., ¶ 52.) Thus, whatever questions were raised by *Diaz* concerning whether the Montana Supreme Court fully embraced the lessons from *Wal-Mart* appear to have now been affirmatively resolved.

Robert H. King, Jr. *wrote the original article, which appeared in last month's Montana lawyer.*

Primer: State Bar of Montana Modest Means

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

Modest Means is a reduced fee civil representation program. When Montana Legal Services is unable to serve a client due to a conflict of interest, lack of available assistance or client income is slightly above Montana Legal Services guidelines, they refer that person to the State Bar Modest Means program.

What are the benefits of joining Modest Means?

You are covered by the Montana Legal Services malpractice insurance and when you spend 50 hours on Modest Means or Pro Bono work, notify us to receive a free CLE certificate entitling you to attend any State Bar sponsored CLE. State Bar Bookstore Law Manuals are available to you at a discount and attorney mentors can be provided.

- 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.
- You pick your areas of law.
- When you sign up for Modest Means you can choose the areas of law you want to work in.
- It's easy to join—Call Us Today!
- Participation in Modest Means program is free.

Want to apply for Modest Means? Have any questions?

Contact Kathie Lynch at (406) 447-2210 or email klynch@montanabar.org

Essmann

Wittich

Jent

Knudsen

Dudik

Blewett

Fitzpatrick

Hansen

Hill

Nine attorneys serving in 2013 MT Legislature

Nine attorneys are serving in the 2013 Montana Legislature: Sen. Jeff Essmann, SD 28; Sen. Art Wittich, SD 35; Sen. Larry Jent, SD 32; Rep. Austin Knudsen, HD 36; Kimberly Dudik, HD99; Sen. Anders Blewett, SD11; Rep. Steve Fitzpatrick, HD 20; Rep. Kristin Hansen, HD 33; Rep. Ellie Boldman Hill, HD 94.

Two attorney legislators have been elected to the highest levels of leadership: Sen. Essmann was elected as Senate President and Sen. Wittich was elected as Senate Majority Leader.

The State Bar will be tracking several bills throughout the session. Check www.montanabar.org for more information as the session nears.

No Montana Lawyer in January

The Montana Lawyer prints 10 times per year with combined December/January and July/August editions. Merry Christmas and Happy New Year to all State Bar members. Please continue to send your content to *pnowakowski@montanabar.org* throughout December and January.

Two seats open on Group Benefits Trust board

The board for the Group Benefits Trust has two seats that expire on December 31, 2012. Current Trustee Perry Schneider will run again. There is one vacancy. We encourage any members interested in placing their names on the ballot to send a letter of interest to Chris Manos by no later than Dec. 17, 2012. Mail to P.O. Box 577, Helena, MT 59624.

The State Bar of Montana established the Group Benefits Trust in 2000 for the purpose of providing cost-effective medical options to members, employees and their beneficiaries at group rates. The Trust has experienced significant growth in participant numbers and premiums collected.

A seven-member Board of Trustees oversees the trust. Board members' terms expire on a rotating basis at the end of each calendar year.

Nonprofit Section offers invite to referral list

The Nonprofit Law Section invites interested and qualified members of the Montana State Bar to add their names to a referral list for the use of the Montana Nonprofit Association (MNA). MNA is a membership organization that "promotes a stronger nonprofit sector in Montana through public policy, affordable products and services, organizational development, research and information sharing, and network building."

From time to time, MNA fields calls from its members about nonprofit legal issues. To aid MNA in connecting its members to attorneys, the Nonprofit Law Section maintains a list of attorneys who self- identify as able to provide high quality legal advice and rule 6.1 pro-bono consultation to nonprofits on a variety of issues, including nonprofit corporate formation, taxation, labor, and other areas of law related to the management of a nonprofit corporation.

The Nonprofit Law Section maintains the nonprofit referral list, shares it with MNA leadership upon request, and offers training opportunities to participating attorneys. Attorneys negotiate ongoing fee- based or other relationships on an individualized basis with each nonprofit. Please send questions and expressions of interest to Kim McKelvey (kmckelvey@alpsnet.com / 406-523-3863) or Carrie La Seur (claseur@baumstarkbraaten.com/ 406-969-1014).

BETTR chairman files amicus brief

At the request of the Montana Supreme Court, Chuck Willey, chairman of the State Bar's Business, Estates, Trust, Tax & Real Property Section (BETTR), has filed an amicus brief *In the matter of the estate of Dennis R. Afrank, deceased.* The full brief may be reviewed on the BETTR section webpage, which is at www.montanabar.org -> For Our Members -> Bar-Related Groups -> BETTR.

Court orders disbarment of attorney

From Nov. 27, 2012 order — PR 12-0058 | In the Matter of Fausto G. Turrin:

On October 11, 2012, the Commission on Practice filed its Findings of Fact, Conclusions of Law and Recommendation in this matter regarding Respondent Fausto G. Turrin. Respondent was served by mail on the same date and, pursuant to Rule 16, Montana Rules of Lawyer Disciplinary Enforcement (MRLDE), had "thirty days from the date of service within which to file with the Court objections to the findings of fact, conclusions of law, and recommendation of discipline, and a written brief in support thereof." Nothing has been filed by Respondent in response to the Commission's filing. The Rule further provides that, "in the event objections are not filed by the lawyer, the matter shall be deemed submitted and the Court shall determine the appropriate discipline...."

After imposing a series of private admonitions upon Respondent, this Court indefinitely suspended Respondent from the practice of law for not less than seven months by order entered May 25, 2011. Informal complaints against Respondent were filed with the Office of Disciplinary Counsel (ODC) on May 23, 2011 and October 18,

2011. For each, ODC wrote to Respondent and asked him to respond. When Respondent did not respond, ODC sent a second letter in both cases, certified and return receipt requested, renewing the request for Respondent to provide information relative to the complaints. Respondent still did not respond. The Commission then issued an order to show cause directing Respondent to personally appear before the Commission on January18, 2012, at the chambers of the Montana Supreme Court. Respondent did not appear.

Based upon this record, the Commission concluded that Respondent had violated Rules 8.1(b), Montana Rules of Professional Conduct, and Rule 8A(6), MRLDE, by his knowing failure to respond to lawful demands for information from lawyer disciplinary authorities and by his failure to justify his refusal or his nonresponse. In its Recommendation, the Commission reasoned that Respondent had engaged in "a pattern of obstinacy and defiance inconsistent with his obligations and duties as a member of the bar of Montana" and observed that "[t]he suspension had no apparent impact on Respondent." The Commission stated that "[s]uch conduct should not be tolerated or the disciplinary process itself will be jeopardized...." Accordingly, the Commission recommended that Respondent be disbarred and assessed with costs of the proceedings.

We have reviewed the findings, conclusions, and recommendations of the Commission. Respondent has not filed objections, and we agree with and adopt the recommendations in their entirety. Based upon the foregoing,

IT IS HEREBY ORDERED:

1. Respondent Fausto G. Turrin is disbarred from the practice of law in the State of Montana effective immediately.

2. Respondent shall pay the costs of these proceedings subject to the provisions of Rule 9(A)(8), MRLDE, allowing objections to be filed to the statement of costs.

3. Pursuant to Rule 30, MRLDE, within ten days of this order, Respondent shall notify, or cause to be notified, the following individuals of his disbarment and that he will be disqualified to further act on any matter: (a) all clients he represents in pending matters; (b) any co-counsel in pending matters; (c) any opposing counsel in pending matters or, in the absence of such counsel, the adverse parties; and (d) the judges in all pending cases. Respondent shall further comply with the remaining provisions of Rules 30(B), 30(C) and 31.

4. Within twenty days of the effective date of his disbarment, Respondent shall further comply with Rule 32, MRLDE, by filing the required affidavits.

5. The Clerk of this Court shall serve a copy of this Order of Discipline upon the Respondent at his last known address; and shall provide copies to the Office of Disciplinary Counsel; Office Administrator for the Commission on Practice; the Clerks of all the District Courts of the state of Montana with the request that each Clerk provide a copy to each district judge for that Clerk's county; the Clerk of the Federal District Court for the District of Montana; the Clerk of the Circuit Court of Appeals of the Ninth Circuit; and the Executive Director of the State Bar of Montana.

Franchises may offer less than meets the eye

By Toni Tease

At first blush, a franchise sounds like a great business opportunity--someone else has already taken the risks associated with developing a product, establishing a market, and protecting a brand. All you have to do is find the right real estate and put up some seed money.

If you meet the initial qualification requirements (which are usually based on prior business experience and net worth), then the franchisor will send you two documents: a Franchise Disclosure Document and a Franchise Agreement. The Franchise Disclosure Document is required by the Federal Trade Commission, and the Franchise Agreement is your agreement with the franchisor. These two documents are typically very long (it is not uncommon for the Franchise Disclosure Document to be more than 100 pages), and it often helps to have the assistance of a professional in evaluating these documents both from a business and a legal standpoint.

In theory, a franchise is a glorified trademark license agreement. The "glorified" part of it means that the franchisor will place a litany of operational requirements on the franchisee

In theory, a franchise is a glorified trademark license agreement. The "glorified" part of it means that the franchisor will place a litany of operational requirements on the franchisee; these operational requirements are typically not present in a trademark license agreement. With that said, however, often the most important asset that a franchisee has--and the reason many people are drawn to franchising--is the brand. Thus, one of the first things we look for in evaluating a franchise agreement is adequate protection of the brand. Below are some of the issues we counsel our clients to consider:

- Has the franchisor registered its trademark(s) with the U.S. Patent and Trademark Office?
- Is the franchisor contractually obligated to pursue infringers?
- Will you be indemnified by the franchisor if it turns out that the franchisor's "brand" is an infringement of somebody else's trademark?

In addition to the trademark issues, franchise arrangements have broader implications for intellectual property rights. A typical franchise agreement states that the franchisee has no intellectual property rights whatsoever in any of the work product or data generated by the franchise. This means that every piece of paper you generate, every computer file you create, and all of the data associated with your business will be owned by the franchisor. If you come up with an idea for a patentable improvement to the franchisor's business methods, equipment or products, these ideas will be owned by the franchisor. In other words, everything you do in terms of intellectual property inures to the benefit of the franchisor (and its other franchisees). This would not be the case with a non-franchise business in which you would typically own the intellectual property rights to all work product, data and inventions generated in connection with the business.

Turning to the business side of things, one important issue that will affect the profitability of your franchise is the scope of your territory. The franchisor will typically define your territory based on various demographic factors. The agreement may also allow the franchisor to sell directly in your territory. You will need to consider the scope of your territory in determining whether and how quickly the business is likely to become profitable. In this regard, you will also want to evaluate carefully the franchisor's published "revenue" and "net profit" figures to determine whether they include all operating expenses and also whether they are typical for your demographic area. Franchise agreements sometimes include hidden costs (such as support and/or maintenance fees) that are not included in the net profit figures. Franchises vary greatly in terms of the amount of support the franchisor is willing to offer without charge; you should ensure that the franchise agreement addresses this as well.

Lastly, from a business standpoint, we counsel our clients to look for a franchise with an established franchise history. The franchisor should be financially solvent, and management should have a proven track record. If you consider all of these factors and the franchise still looks attractive to you, then it just may be the opportunity you've been looking for.

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Year-end tax planning? Don't forget about the Montana Endowment Tax Credit

L. Paul Hood, Jr.

Year-end tax planning is just around the corner and really already is upon us. While federal tax law is somewhat in a state of flux at the moment, don't overlook the Montana Endowment Tax Credit ("METC"), since it could really save your clients a lot of Montana state income tax if a gift is completed before year-end. This article will discuss the METC in a hopefully easy to understand FAQ format.

What is the METC?

First and foremost, the METC is a credit against Montana state income liability, which beats a deduction hands down, since a deduction is only worth what the client's marginal tax rate is at the time. The METC is a dollar-for-dollar reduction in Montana state income tax. Unless the Legislature extends the METC, it will sunset at the end of 2013.

How does the METC work?

The METC is a credit equal to 40% of the charitable gift portion of a "planned gift." In other words, a client would not get the METC for the retained portion of a planned gift. For example, suppose that Mike, age 75 and an individual income tax filer, has an estimated $15,000 of 2012 Montana state income tax before the gift, creates a charitable gift annuity with a Montana charitable organization that will be funded with $100,000 in October of 2012. According to the tables that are promulgated by the American Council of Gift Annuities, which many charities use, and assuming that payments start immediately, Mike's annuity would be 5.8%, or $5,800 per year.

Using the IRS tables to value the gift temporally, the charitable amount of Mike's charitable gift annuity, which would qualify for the federal income tax charitable contribution deduction, is $41,016. Therefore, Mike would qualify to use up to 40% of $41,016 as a direct credit against his 2012 Montana state income tax. Since the maximum METC is $10,000, and 40% of $41,016 is $16,406, Mike would be limited to using not more than $10,000 to offset his state income tax liability. Likewise, if Mike had less than $10,000 of Montana state income tax liability in 2012, then the METC would be limited to the amount of that liability.

What's a "planned gift?"

Under the statute, the following gifts qualify as planned gifts:

Charitable remainder unitrust, charitable remainder annuity trust, pooled income fund, charitable lead unitrust, charitable lead annuity trust, charitable gift annuity, deferred charitable gift annuity, charitable life estate and paid-up life insurance policies. All of the foregoing techniques are specifically defined in the statute to have the definitions that are ascribed to each in federal tax law.

Is there a limit to the METC?

Yes, the limit is up to $10,000 of Montana state income tax. Therefore, a husband and wife who file a joint income tax return can claim up to $20,000 of METC per year. And the METC is limited to the client's Montana state income tax in the year of the planned gift; you can't use the METC to generate a refund like you can with some of the federal income tax credits.

What are the organizations that are eligible to receive a qualifying gift?

In order to meet the definition of "qualified endowment," a fund has to be a permanent, irrevocable fund held by a Montana incorporated or established IRC Sec. 501(c)(3) tax-exempt organization or be a Montana bank or trust company that is holding the fund on behalf of a Montana tax-exempt organization.

In order to issue qualified charitable gift annuities, a charitable organization must either have a minimum net worth of $300,000 or not less than $100,000 in unrestricted cash, cash equivalents or marketable securities. Additionally, the charity (or its successor organization) must have been in existence for a minimum of three years and must maintain a separate annuity fund that has at least one-half of the initial amounts transferred for outstanding annuities.

Can qualifying transfers be carried back or carried forward?

No. There is no carry back or carry forward of the METC. However, excess amounts not used in the calculation of the credit may be deductible against Montana state income as a charitable gift.

Is there any minimum term that a planned gift must last in order to qualify?

Yes. A planned gift that qualifies for the METC has to be set up so that the planned gift or trust does not terminate in favor of the charitable organization sooner than the earlier of the beneficiary's or (beneficiaries') date of death or five years from the date of creation of the planned gift. This is a governing instrument requirement. Therefore, if someone simply uses, for example, the specimen charitable remainder trust or charitable lead trust documents that the IRS promulgated several years ago without modifying them to include this requirement, that planned gift won't qualify. Additionally, a deferred charitable gift annuity can't start later than the estimated life expectancy of the annuitant(s), or it won't qualify as a "planned gift."

This sounds powerful. What needs to happen before year-end? The planned gift has to be completed before year-end. Don't be sorry. Be proactive and discuss Montana charitable planned gifts and the benefits of the METC with your clients before it is too late.

__L. Paul Hood,__ Jr. JD, LL.M., is the director of gift planning for the University of Montana Foundation.

A Full Nelson

By Mark Parker

For almost twenty years, Justice James Nelson has served Montana as a member of the Montana Supreme Court. December 31st, 2012, will be his last day. I write to neither bury nor praise this fine fellow, but to reflect on Justice Nelson's career on Montana's high court. Any elected official deserves the respect of those of us who are far too timid and, perhaps, even selfish to make the sacrifice necessary to suffer through the indignity of a statewide election. Although most describe the effort as educational and rewarding when it is over, running for office in Montana is tough work, and getting tougher. Thus, any quibbling I have over Justice Nelson's achievements are borne of his courage to operate in the public eye. I can see him. He cannot see me.

The Montana Supreme Court has seven Justices for a reason. It is an ensemble, a collage, a cocktail, if you will. Miss America only needs one nose, but REALLY needs the one she has. The Beatles had one Ringo – but that was plenty. The Supreme Court needed Jim Nelson, but, frankly, two would have been too many.

Jim Nelson was a Supreme Court Justice and, before that, a prosecutor. Yet, he reserved his harshest judgment for prosecutors and Supreme Court Justices. A few years back, I wrote an article that chronicled the harsh words dissenting Justices of the Montana Supreme Court had for the majority. "Is the Supreme Court Results Oriented? Let's Ask It." (Montana Lawyer, February 2006). I thought about, but did not, highlight the Justices with the sharpest tongue. Had I done so, Justice Nelson would have been the award winner. He let his colleagues have it from time to time. But, as Malcolm Forbes said, "men who never get carried away should be."

When he let his colleagues have it, he did it through his dissents. Many of his dissents were of the "can't-you-folks-in-the-majority-read" variety. For example he wrote, "Indeed, given the plain and unambiguous language of the statutes at issue, the Court's Opinion is astonishing." *Grenz v. Montana Dept. of Nat. Resources and Conserv.*, 2011 MT 17, ¶ 89, 359 Mont. 154, 248 P.3d 785. His indignation was especially sharp when the United States Supreme Court had spoken, and he knew any further pouting by the Montana Supreme Court would be folly. See, for example, *W. Tradition Partn., Inc. v. Atty. Gen. of State*, 2011 MT 328, 363 Mont. 220, 271 P.3d 1. He read *Citizens United*. In *Citizens United*, the U.S. Supreme Court held bans on corporate political speech were unconstitutional. Montana tried to cling to its unconstitutional statutory scheme and Justice Nelson shuddered at this folly. He predicted, correctly, a summary reversal and remand. I don't think he liked it, but he could read, and expected others to do the same. Similarly, when the United States Supreme Court cauterized all manner of ways state law could undo the rigors of the Federal Arbitration Act, he could read. Montana's decades old fight against the Federal Arbitration Act, and in favor of the jury trial right, had come to an end. Why fight it?

As for prosecutors, he set a higher bar than the other Justices. Recently, the Supreme Court had before it a case where the sitting District Court Judge *sua sponte* mistried a case for prosecutorial misconduct. Six Justices agreed that jeopardy did not attach. Thus, the defendant did not go free; he got a new trial. Justice Nelson was ready to turn him loose. He wanted to turn the defendant free.

> *While society might pay a "high price" if a defendant's conviction is overturned on post conviction relief, Opinion, ¶ 13, society pays even more dearly when the prosecutor—an officer of the court who should be seeking justice, and not merely a conviction—refuses to scrupulously respect the accused's constitutional right to the presumption of innocence and to a fair trial. In those cases, not only is the accused victimized, but so also are society and the criminal justice system.*
>
> *I dissent.*

State v. Duncan, 2012 MT 241, ¶¶ 17-18, 2012 WL 5328632, 5 [footnote omitted][Emphasis supplied].

It was not the first time Justice Nelson let the prosecutor have it. He dissented in *State v. Sanchez.*

> *...I conclude that the prosecutor's misstatements of the law during closing arguments and the District Court's explicit endorsement of those misstatements prejudiced Sanchez's rights to due process and a fair trial under Article II, Sections 17 and 24 of the Montana Constitution. Accordingly, I conclude that this case should be reversed and remanded for a new trial, and I dissent from the Court's contrary decision.*

State v. Sanchez, 2008 MT 27, ¶ 82, 341 Mont. 240, 177 P.3d 444, [Emphasis supplied].

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And in *Clausell v. State*:

> *I conclude that the cumulative effect of the foregoing incidents of prosecutorial misconduct prejudiced Clausell's rights to due process and to a fair trial. United States v. Roberts (1st Cir.1997), 119 F.3d 1006, 1016. Our Opinion makes the same mistake as did the District Court—we view each of these incidents of prosecutorial misconduct in isolation and ignore their combined effect.*

Clausell v. State, 2005 MT 33, ¶ 42, 326 Mont. 63, 106 P.3d 1175.

He wrote (and, some say, wrote and wrote and wrote) for the majority in some high profile cases which garnered national attention, if you call Wikipedia "national attention." His Wikipedia page reads in part:

> *In 1997, Nelson wrote the court's opinion in Gryczan v. Montana striking down as unconstitutional a law that had criminalized gay sex, six years before the U.S. Supreme Court ruled similarly in Lawrence v. Texas.*
>
> *In a 2009 child custody case between two same-sex partners, Kulstad v. Maniaci, Nelson gained attention from the media and civil rights groups for his concurring opinion that stated:*
>
>> *"Naming it for the evil it is, discrimination on the basis of sexual orientation is an expression of bigotry. And, whether rationalized on the basis of majoritarian morality, partisan ideology, or religious tenets, homophobic discrimination is still bigotry. It cannot be justified; it cannot be legalized; it cannot be constitutionalized...Lesbian and gay Montanans must not be forced to fight to marry, to raise their children, and to live with the same dignity that is accorded heterosexuals. That lesbian and gay people still must fight for their fundamental rights...speaks, in unfortunate clarity, of a prevalent societal cancer grounded in bigotry and hate."*
>
> *In 1997, Nelson wrote the court's opinion in Montana v. Siegal ruling that police usage of thermal imaging technology to find a marijuana growing operation required a search warrant, four years before the U.S. Supreme Court ruled similarly in Kyllo v. United States in a decision written by Justice Antonin Scalia.*

But, what in the world were we to expect from a former Army soldier, former rural prosecutor originally appointed to the court by Marc Racicot—George Bush's 1984 campaign chairman? I wonder if Racicot ever felt like Eisenhower reading some of Earl Warren's decisions?

Getting all these words out could sometimes take a little time. Lorang v. Fortis Ins. Co., 2008 MT 252, 345 Mont. 12, 192 P.3d 186, a sixty-six page opinion, over 1,000 days after submission. However, contained in Lorang is the Court's best discussion of subject matter jurisdiction. Justice Nelson dissects the problem created by "loose talk of jurisdiction." His effort is a good one, and should be part of any curriculum on civil procedure. Id. at ¶¶ 55-62. Justice Nelson authored some tomes on other topics as well. He wrote for a unanimous court finding causes of action for both intentional and negligent infliction of emotional distress. *Sacco v. High Country Indep. Press, Inc.,* 271 Mont. 209, 896 P.2d 411 (1995). Recently, he took on the issue of implied easements and authored more of a treatise than a legal opinion on the issue. *Yellowstone River, LLC v. Meriwether Land Fund I, LLC,* 2011 MT 263, 362 Mont. 273, 264 P.3d 1065. A very helpful case, however, for the practitioner.

Montana has a good bar and a good electorate. We will backfill the vacancy Justice Nelson leaves us well enough, I hope.

There is one concern. Justice Nelson is the only Justice on the current court who holds, in my view, the correct view of the right to jury trial in a civil case. If you don't believe me, read his concurrence in *Saucier ex rel. Mallory v. McDonald's Restaurants of Mont., Inc.,* 2008 MT 63, 342 Mont. 29, 179 P.3d 481. Mallory worked at McDonald's and suffered all manner of indignations which would have clearly been torts and crimes under the common law. Yet, the case gets shuffled into the Human Rights Division of the Department of Labor where you could not find a jury with a magnet. This worried Justice Nelson, but nobody else. It should worry everybody—especially the person wrongfully accused of an assault or other common law tort. Justice Nelson has been the sole voice on the Supreme Court with respect to this issue for some time.

Some day, years from now, a scholar may pile up missives such as this about Justice Nelson. Some will be laudatory to a point where Nelson himself might file a dissent. Others may wallow in spite and let him have it. From that, some sort of history will be written. His efforts by then will have time to gestate. They will know more than we know now.

But, the real blessing is this: Jim Nelson showed up, did his work, and called 'em as he saw 'em—not always as I saw them—but that's not the issue here. We have a state with a good deal of physical and philosophical elbow room—a bit freak friendly. Jim Nelson's work will always be part of that collage, and maybe someday, even I will appreciate it more.

Good luck, Jim.

Thanks.

A short history of the MT Rules of Evidence

By Cynthia Ford

The original version of the Montana Rules of Evidence was adopted by the Montana Supreme Court on December 29, 1976, effective for all trials beginning July 1, 1977.

The impetus for wholesale revision of Montana's evidence rules stemmed from a corresponding change in the Federal Rules of Evidence two years earlier. In 1973, the U.S. Supreme Court proposed to Congress a set of uniform federal rules of evidence, which in turn were recommended to the Court by the U.S. Judicial Conference. Congress enacted the "new"[1] FREs on January 2, 1975, and they became effective on July 1, 1975.[2]

Creation and Current Membership of the Supreme Court Commission on Rules of Evidence

While the 1975 FRES were winding their way through the federal enactment process, Montana lawyers[3] petitioned the Montana Supreme Court for appointment of a Supreme Court Commission on the Rules of Evidence ("the Commission"). The April 5, 1974 petition informed the Court that the Montana Bar Association had formed a committee "to study the present Montana Code of Evidence and the practice thereunder, together with other developments and proposals in the field of evidentiary law and to make recommendations for appropriate revision of said Code of Evidence." The petition asked the Court to carry on the committee's work by appointing a Supreme Court Commission to "make a complete study, consider and finally prepare Rules of Evidence for the Courts of Montana, comprehensive in scope, and to submit the same to this Court for its consideration and adoption."

The Court granted the petition and created the Commission on April 4, 1974, appointing as members almost all of the existing Bar Association committee's members. The Chair of the Commission was Missoula lawyer Sam Haddon (now U.S. District Judge); other members were: Justice Frank Haswell; Judges Robert Keller, W.W. Lessley, and Peter Meloy; Professor Duke Crowley; and lawyers Douglas Allen, Art Ayers, John Blackwood, Stephen Foster, H.L. McChesney, Peter Pauly, and Jim Sinclair. On February 28, 1978, the Court added Dennis Clarke of Great Falls, the Commission's former research associate, as a formal member of the Commission. Through a series of later orders, the Court adapted Commission membership over the years.[4] The Supreme Court's webpage on the Commission on Evidence now identifies the specific roles to be filled on the Commission[5], with 4-year terms. The current members

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1 The original version of the FRE has been amended in part 22 times prior to 2011. In 2011, the entire set was "restyled" for easier comprehension. The restyled version of the FRE became effective December 1, 2011. See, http://federalevidence.com/legislative-history-overview

2 Act of Jan. 2, 1975, Pub. Law No. 93–595, 88 Stat. 1926 (1975).

3 The petitioners were Henry Loble, as President of the Montana Bar Association (this was before the association became the State Bar of Montana) and practitioner Sam Haddon.

4 The Supreme Court's archives are apparently missing some of these orders, but those which still exist accomplish the following changes: In July 1979, Judge Leonard Langen replaced Justice Haswell, who had resigned from the Commission. In 1984, Judges Harkin and Olson were appointed to replace retiring Judges Lessley and Meloy. Cliff Edwards was appointed in 1986, after the death of Jim Sinclair. Margaret Borg replaced H.L. McChesney in 1990. John Connors succeeded Art Ayers in 1998. In 1999, Jim Molloy replaced John Blackwood. Somewhere before 2003, something must have happened to change the term of service on the Commission from "permanent," used in the earlier orders, to a four-year term, because after that time there are several orders relating to expiration of members' terms. A 2003 Order reappoints John Connor and Elizabeth Best, and recognizes that Peggy Tonon is the current Chair, but I could not find any formal order appointing either Beth or Peggy in the first place. (John and Beth were re-reappointed in January 2007). Similarly, although there is a 2004 Order reappointing Judge Sherlock, Brad Newman and Daniel Buckley, I could not find any antecedent orders appointing them to their first terms. (Judge Sherlock and Daniel Buckley were re-reappointed in December 2007). The same situation exists regarding the Court's January 18, 2005 order "reappointing" Mike Cotter, Wendy Holton and Gary Zadick (who were again reappointed in 2008), and the January 18, 2006 order reappointing Peggy Tonon and Michael McMahon. In February 2007, the Court appointed Kirsten LaCroix to fill "the prosecutor position" in place of Brad Newman, who had become a judge. The 2010 "Commission membership" Order retained Peggy Tonon and Kirsten LaCroix through 2014, and appointed Guy Rogers to replace Michael McMahon. The 2011 Order reappointed Beth Best and appointed Brant Light to fill John Connor's position. The 2012 Order, for the first time, articulates specific roles for members of the Commission: Judge Sherlock is reappointed as "the District Court Judge member;" Gary Zadick is given another 4 year term as "a Civil Defense Attorney member;" Robin Meguire is appointed as "a Criminal Defense Attorney member;" Randi Hood as another "Criminal Defense Attorney member;" and Mike Cok is named as "a Plaintiff's Attorney member."

5 The website indicates that the composition of the Commission on Rules of Evidence should be: "Ten persons, including the following categories of membership--four criminal trial attorneys (two prosecutors and two defense attorneys); four civil trial attorneys (two plaintiffs' attorneys and two defense attorneys); one district court judge; and one law professor." I could not locate any formal order setting out this allocation.

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of the Commission are[6]:

- Peggy Tonon, Chair, "Law Professor"[7]
- Judge Jeffrey Sherlock, "District Judge"
- Elizabeth Best and Mike Cok, "Plaintiffs' Attorney[s]"
- Guy Rogers and Gary Zadick, "Civil Defense Attorney[s]"
- Brant Light, "Prosecutor"
- Kirsten Pabst Lacroix, "Chief Criminal Deputy"[8]
- Robin Meguire and Randi Hood, "Criminal Defense Attorney[s]."

The Original Adoption of the MRE

The first Commission submitted its work product to the membership of the State Bar of Montana (which had recently succeeded the Montana Bar Association) through a series of supplements to the State Bar's monthly publication, The Montana Lawyer.[9] Dennis Clarke summed up the general approach of the Commission in his definitive law review article published the next year:

> *For the sake of uniformity and convenience, the Commissiondecided to use the Federal Rules of Evidence numbering system. Similarly, the substance of the Federal Rules was to be followed whenever possible to provide uniformity between federal and state procedures. However, the Commission adopted the policy that the substance of the Montana Rules would retain the Montana law of evidence when balanced against the Federal Rule; there would be no change for change's sake. Therefore, the Montana Rules were to lean toward the Federal Rules yet retain desirable Montana law.…*
>
> *In the final analysis the Commission chose rules which it felt best served reform within existing Montana law and complied with the Federal Rules whenever possible.*[10]

The Commission included with each proposed rule a "Commission Comment" which identified the source of the rule, compared the proposed rule with the federal version of the same rule, and when the Montana proposal differed from the federal, set forth a detailed explanation for the difference. The final version of the proposed rules, submitted to the Montana Supreme Court in November 1976, included a complete set of the rules and the Commission Comments, as well as three helpful tables comparing the proposed MREs with then-existing Montana evidence statutes and the newly-enacted Federal Rules of Evidence. Table A listed the Montana statutes which would be superseded. Table B cross-indexed the MRE to existing RCM provisions on evidence. Table C compared the proposed MRE with the Federal Rules of Evidence. Because there has been so little change in the MRE since 1978, these materials are still very useful and should be consulted regularly. However, they are very hard to find, especially without a subscription to a paid online service[11].

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6 The Supreme Court's website on the Commission is http://courts.mt.gov/supreme/boards/evidence/default.mcpx
As of October 15, it shows an old list which does not take into account the Court's 2011 and 2012 orders on Commission membership. The Clerk of Court's office is in the process of updating the website. I have myself compiled what I believe to be the current membership from the 2011 and 2012 orders, and have informed the Chair of a couple of status changes of current members which means that they no longer represent the position to which they were appointed. I anticipate that these changes will result in another order substituting those two members.

7 Peggy retired from the law school in 2011.

8 Kirsten is now in private practice as a criminal defense lawyer in Missoula.

9 I got the information about the method of distribution from the Commission to the bar members from the Commission's petition in support of adoption of the MRE and from the Montana Supreme Court's Order of November 8, 1976, setting the hearing date on the proposal. The Jameson Law Library at the law school, the State Law Library and the State Bar all helped me look for these original proposals. Back before the internet, the proposed MREs were sent to Montana lawyers in hard copy via The Montana Lawyer, for review and comment. It appears that they were published as supplements inserted into the State Bar monthly publication, The Montana Lawyer. Neither the Jameson Library nor the State Law Library retained copies of these supplements, although both have the actual issues of the magazine (none of which refer to the proposed MREs in any way). The State Bar of Montana has copies of the MRE proposals distributed with The Montana Lawyer for November 1975 through March 1976, but does not have a copy of the materials apparently distributed with the November 1976 issue, which should have covered Articles VIII, IX and X (Hearsay, Authentication and Best Evidence).

10 Clarke, Montana Rules of Evidence: a General Survey, 39 Mont. L. Rev. 79, 80-81 (1978).

11 The rules themselves appear on the state's free MCA page, but there are no Commission Comments: (http://data.opi.mt.gov/bills/mca_toc/26_10.htm). The free Cornell Law Institute site, usually very helpful, simply links the reader to the same public website, which prints the MRE in Title 26 to the MCA, without the Commission comments: http://courts.mt.gov/library/montana_laws.mcpx#district_court

The two for-pay online services do contain this helpful material. WestlawNext has the original Commission Comments; the Commission apparently made no Comment to the only amendment of the MRE since their adoption, Rule 407, which occurred in 2007. LexisAdvance has even more information about the rules adoption process and includes the original Commission Comments to each rule. However, like WestlawNext, there is no Comment to the amendment of Rule 407 because there was no Comment to the amendment.

Offline, the hard copy of the Montana Code Annotated published by West does have the Commission Comments at the start of the annotation section for each rule, which is probably the best way to access them if you have access to a law library which includes this set.

As a public service, to facilitate access to the original Commission Comments, I have attached them to my faculty webpage both in pdf and in Word formats, as the first entry in the bottom section entitled "Helpful Research Links": http://umt.edu/law/about/faculty/people/ford.php

Note, however, that I have not proofread the Word version to ensure that the translation from pdf is entirely accurate or for format issues, so you should do that if you elect to use this to block and copy any part of a Comment to a legal document.

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The Commission published its proposed MREs to Montana attorneys as it finished work on each article:

- November 1975: proposed Article I "submitted"
- December 1975: proposed Article II
- January 1976: proposed Article III
- February 1976: proposed Article IV
- March 1976: proposed Article V
- Sept. 24, 1976: proposed Articles VI and VII

By letter dated November 3, 1976, the Commission made its final report to the Montana Supreme Court, and recommended that the Court adopt the proposed rules. Its submission included copies of the petition and order establishing the Commission; the complete set of proposed Montana Rules of Evidence, annotated with both "Source" and "Commission Comment" for each rule; and the three tables discussed above.

At this point, proposed Articles VIII through X (Hearsay, Authentication, and Best Evidence) had not yet been distributed to the members of the Bar. On November 8, the Montana Supreme Court issued an Order setting the matter for hearing on December 15, with objections due in writing on December 6. In its November 8 Order, the Court acknowledged that the three articles still had not been distributed to the bar, but "will be published in the forthcoming issue [of the Montana Lawyer] of November 1976, which publication is received by every lawyer licensed and practicing in Montana."[12]

Five objections to the proposed rules were filed with the Court prior to the December 15 hearing. Tom Olson, the U.S. Attorney, wanted to add clarifying language to MRE 803(2), the excited utterance hearsay exception. W.D. Murray, from Butte, objected to promulgation by the Court rather than legislative enactment, and specifically objected to MRE 801(d)(1)(a), which differs from the federal version in that the MRE allows all forms of prior inconsistent statements to be used substantively. The Montana Criminal Defense Lawyers Association, represented by Fred Van Valkenburg[13], also opposed the expansion of 801(d)(1)(a) beyond the federal model, and objected generally that the late publication of several of the articles deprived the bar of a meaningful opportunity to study and comment on those rules. The Montana County Attorneys [sic] Association supported the Commission's version of 801(d)(1)(a). Lastly, Montana Legal Services advocated for two additions, one to Rule 502 (privileges for government informants) and the other to Rule 1004, Best Evidence.

The Commission filed a comprehensive response to the comments and objections prior to the hearing, and the Commission members attended the December 15 hearing to urge the Court to adopt its work. Messrs. Murray and Van Valkenburg also appeared, arguing in opposition. Neither their oral nor any of the written objections were of any avail. On December 29, 1976, the Supreme Court issued its final Order, denying all motions and petitions in opposition, and adopting the Montana Rules of Evidence exactly as proposed by the Commission. The Rules became effective for all trials held after July 1, 1977.[14]

Dennis Clarke, who served as the Commission's researcher, remembers that sometime in the process, either before the actual effective date of the MRE or shortly thereafter, the Commission conducted a "road show" around the state. In each of several locations, the Commission held seminars for local lawyers, distributing little golden booklets which contained the complete set of the new MRE and the Commission Comments, along with oral instruction on the effect of the new rules. Lastly, Mr. Clarke published a comprehensive article in the Montana Law Review, expanding on the reasoning behind each article and individual rule and comparing the Montana version to the federal version as well as to prior Montana law.[15]

Changes, or Lack Thereof, Since 1977

In 2012, the Montana Rules of Evidence remain substantially the same as when they were first adopted in 1977. The few Montana Supreme Court orders on the subject of evidence since then have mostly changed their form, not their substance.

On July 10, 1979, the Court granted a petition from the Commission and issued an Order which listed those sections of the Revised Code of Montana which were "superseded upon the adoption of" the MRE and "thereby rendered obsolete, unnecessary [sic] and redundant" leading to "confusion, uncertainty, and conflict in the law, all of which are contrary to the spirit and purpose of the Montana Rules of Evidence and the ends of justice." (This Order was amended in September of the same year to fix some

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12 Montana Supreme Case No. 12729, Order entered November 9, 1976.

13 Now Missoula County Attorney.

14 Montana Supreme Case No. 12729, Order entered December 29, 1976.

15 Clarke, Montana Rules of Evidence: a General Survey, 39 Mont. L. Rev. 79 (1978).

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typographical errors in the July version).

In June of 1990, several of the Rules were revised to be more "gender neutral;" the Commission Comment to that amendment explicitly, albeit tersely, stated "No substantive change." In April 2007, another amendment repaired a misplaced comma in Rule 806.

There have been only two substantive amendments since 1977, and one of those was later rescinded. In October of 1990, the Court added language to 803(8) [the hearsay exception for public records and reports] which allowed the State to introduce written reports from the State Crime Lab, so long as it notified its opponent sufficiently in advance of trial for the opponent to either depose or subpoena the lab personnel who compiled the report. In April 2007, the crime lab language was removed from 803(8). The Court's order indicated that the change was "to conform with State v. Clark, 1998 MT 221, 290 Mont. 479, 964 P.2d 766 and Crawford v. Washington, 541 U.S. 36 (2004)." Thus, 803(8) is now back to its original form.

Rule 407, Subsequent Remedial Measures, is the only MRE which now differs substantively from the version first promulgated. It was amended only once, in April 2007. According to the Supreme Court's Order[16], the amendment was made to conform to FRE 407 [which had been amended in 1997 to apply to products liability cases as well as negligence] and Rix v. General Motors, 222 Mont. 318, 329-330, 723 P.2d 195, 202-203 (1986). In Rix, the Montana Supreme Court resolved the question of first impression by holding that: "Rule 407, M.R.Evid., is applicable to strict liability actions under both manufacturing and design defect theories, making evidence of subsequent design changes generally not admissible. Rix v. Gen. Motors Corp., 222 Mont. 318, 330, 723 P.2d 195, 203 (1986)."

Where now? The future of the MRE

Thus, apart from Rule 407, the current version of the MRE is substantively identical to the version first effective in 1977. By contrast, the FRE, first adopted in 1975, have undergone twenty separate amendments, only two of which were technical without substantive ramifications. Altogether, there have been ninety-two substantive amendments to the FRE, over the course of eighteen revisions. In addition, the 2011 restyling made big changes to the language, if not the sense, of virtually every one of the federal rules.[17]

The drastic difference in pace of change may have derailed an important purpose of the original 1977 Montana Rules of Evidence. To the extent that Montana intended to benefit from the thinking behind the Federal Rules of Evidence, and to promote uniformity between Montana's state and federal trial courts, the federal changes since 1977 may have re-erected gaps between the two systems. Some of these gaps are larger than others, and have been taken care of by Montana common law. Others reflect a conscious choice that the "Montana way" is better than the federal approach. The danger is that many of the differences may be unintended, the byproduct of too little reflection on the part of Montana's bench and bar. As Socrates said: "The unexamined life is not worth living."[18] Conversely, the over examined life is too difficult to live, especially when Montana's lawyers and judges are overwhelmed by the daily press of civil and criminal litigation under the MRE as constituted. As in all else, moderation is key. A 36-year check-up is not unduly burdensome.

The 2011 restyling of the FRE is a good incentive to do a similar line-by-line review of the MRE, to bring the MRE back into conformity with the current FRE insofar as we consciously decide to do so, and at least to similarly simplify the Montana variations we choose to keep.

Montana Rules of Evidence adoption and amendments timeline

— December 29, 1976: Montana Supreme Court ordered adoption of MRE

— July 1, 1977: MRE became effective

— December 19, 1989: Montana Supreme Court ordered publication for comment of the proposed amendments (gender neutral and crime lab exception added to 803(8))

— June 7, 1990: Montana Supreme Court ordered amendment of MRE
Commission comment: "The revision establishes gender neutral format only. No substantive change."
Affected rules:

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16 There is no Commission Comment to the 2007 Amendment, although there is an extensive Comment to the original 407.
17 This synopsis was drawn from the Legislative History Summary Table produced by the Federal Evidence Review: http://federalevidence.com/node/638.
18 As quoted by Plato in The Apology.

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- 104(c) and (d); 106(a)(1) and (b);
- 404(a), (b) and (c); 405(b); 411;
- 502(c)(1) and (c)(2); 503(a);
- 601(b); 602; 603; 604; 606(a) and (b); 607(a); 608(b); 609; 610; 611(c) and (d); 612; 613(a) and (b); 615;
- 701; 703; 705;
- 801(a); 801(d)(1) and (d)(2); 803(5), (12), (18), (19), and (21); 804(a)(1)-(5); 804(b)(2) and (b)(3); 806;
- 902(2) and 902(3);
- 1004(3); 1007

— June 26, 1990: Montana Supreme Court ordered another "gender neutral" amendment, to correct an omission from the June 7, 1990 Order
Affected rule: 806

— October 18, 1990: Montana Supreme Court added specific language to 803(8), "Public Records and Reports," allowing written reports from the Montana State Crime Laboratory as a hearsay exception "when the state has notified… of its intention to offer such reports…in sufficient time" for the other party to either depose or subpoena to trial the report's author.[19]

— April 17, 2007: Montana Supreme Court ordered amendment of several MREs, but declined to follow Commission's recommendation to amend one rule. Amendments effective October 1, 2007.
Affected rules:

- 407 ("Subsequent Remedial Measures"): amended to conform to FRE 407 and Rix v. General Motors, 222 Mont. 318, 329-330, 723 P.2d 195, 202-203 (1986)
- 803(8) ("Hearsay Exceptions: Public Records and Reports"): previous last sentence deleted, to conform with State v. Clark, 1998 MT 221, 290 Mont. 479, 964 P.2d 766 and Crawford v. Washington, 541 U.S. 36 (2004).
- 806 ("Attacking and Supporting the Credibility of a Declarant): deleted a misplaced comma.
- Left unamended: 804(b). The Commission recommended the addition of a new subsection, 804(b)(6), to mirror the FRE. FRE 804(b)(6) added an additional hearsay exception entitled "forfeiture by wrongdoing." The Montana Supreme Court voted 5-1, with one abstention, to "decline at present to adopt proposed 804(b)(6)." [As of 2012, MRE 804(b) ends with subsection (5)].

— May 3, 2007: Montana Supreme Court vacated the April 17 order, because of failure to timely post notice of the public meeting on the proposed amendments.

— June 20, 2007: Montana Supreme Court ordered adoption of the same proposed amendments to Rules 407, 803(8) and 806 it had ordered in April 2007. "The Court determined that discussion of the proposed amendment to 804(b) would be postponed to a future date and time, following duly published notice."

19 This language was deleted in 2007; see below.

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"Occurrence" trigger for liability insurance poses a conundrum for the courts

By Wilton H. Strickland

What is an "occurrence"? The question is almost metaphysical in its implications but absolutely essential to determining the existence of liability insurance coverage. This is because only an "occurrence" – normally defined as an "accident" – can trigger coverage under most liability policies today. So no matter how much bodily injury or property damage a plaintiff endures, no liability coverage is available unless they were accidental.

In a cluster of decisions regarding such policies, the Montana Supreme Court and the U.S. District Court for the District of Montana appeared to have resolved this question for good, holding that an insured's intentional conduct of any sort is not an accident and thus does not constitute an "occurrence" *regardless of whether the conduct produces unintentional harm*. In other words, the fact that an insured intentionally performed an activity or provided a service removes coverage even if the insured had no idea that he or she did something wrong. But just when this picture looked crystal clear, it has become murky once again.

One instance where intentional conduct categorically disproved an "occurrence" appears in *Blair v. Mid-Continent Casualty Company*, 167 P.3d 888 (Mont. 2007). In *Blair*, the insured intentionally excavated gravel from his land and drew the ire of a typically vigilant homeowners' association, which sued him for disrupting the surrounding views and diminishing the area's property values. The insurer denied coverage on the basis that intentional activity categorically is not an accident. The Montana Supreme Court agreed, noting that it made no difference that the insured never intended to harm his neighbors. In reaching this conclusion the Court was careful to distinguish its earlier decision in *Lindsay Drilling & Contracting v. U.S. Fidelity & Guaranty Company*, 676 P.2d 203 (Mont. 1984), noting that the definition of "occurrence" in that policy included harms "neither expected nor intended from the standpoint of the insured." Such additional language expanded coverage to unintentional harms, but the absence of such language in the *Blair* policy definition meant that unintentional harms were left uncovered.

Only a year later the Court reached a similar conclusion in *Lloyd A. Twite Family Partnership v. Unitrin Multi Line Insurance*, 192 P.3d 1156 (Mont. 2008). Echoing the rationale in *Blair*, the Court found no coverage for a company that was sued for negligently constructing housing complexes in a manner that did not adequately accommodate the disabled and thus violated state and federal law. Without much discussion on the issue, the Court explained that such conduct is not an accident and thus does not qualify as an "occurrence" because "[e]ach injury alleged . . . stems from the . . . design and construction of the housing complexes." So once again, intentional conduct alone was sufficient to eliminate an "occurrence" regardless of whether there was or was not intentional harm.

The U.S. District Court for the District of Montana joined the chorus in *King v. State Farm Fire & Casualty Company*, No. CR 09-96-M-DWM, 2010 WL 1994708 (D. Mont. May 18, 2010). Judge Donald Molloy held that a company was not covered for alleged negligent misrepresentation, breach of contract, and a host of other torts stemming from a defective log-home package the company had sold, reasoning that inaccurate statements and poor workmanship are by their very nature not accidental but rather the fruit of intentional conduct.

At this point the issue looked settled: intentional conduct alone bars occurrence-based coverage because any consequences, no matter how tenuous or remote, are fruits of the poisonous tree (to borrow a phrase from criminal jurisprudence).

Only a year after *King*, however, Judge Molloy again addressed the issue and offered a contrary interpretation of "occurrence" in *Conley, et al. v. American States Insurance Company, et al.*, No. CV 10-116-M-DWM (D. Mont. June 13, 2011). In *Conley*, the insured accountants were sued in state court for a pattern of deliberate misconduct when holding themselves out as financial experts, but dispensing very poor advice. The complaint asserted theories of fraud and negligence, seeking punitive damages as well. After the insurer denied coverage, the plaintiffs entered a sizeable consent judgment with the insureds and acquired their rights against the insurer, which the plaintiffs soon asserted in the U.S. District Court, Missoula Division. The insurers moved for summary judgment on various grounds, one of which was Judge Molloy's prior ruling in *King* and the Montana Supreme Court's ruling in *Blair* (which *King* had cited heavily). Specifically, the insurers argued that the giving of professional advice cannot be an "occurrence" when considering that the policy definition was the same as in *King* and *Blair*, and especially considering that the complaint repeated throughout that the insureds had acted in a deliberate manner. The insurers argued they were entitled to prevail

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because any sort of deliberate conduct, even innocent, should perish the notion of an accident.

Judge Molloy granted the insurer's motion for summary judgment on alternative grounds, but he also held that the insureds' conduct constituted an "occurrence." The basis of his holding was a policy exclusion for harms "expected or intended from the standpoint of the insured." In older policies this exclusionary language had appeared within the very policy definition of "occurrence," such as in *Lindsay*. Reading the exclusion as if it were still part of the definition, however, Judge Molloy reasoned that coverage must extend to intentional conduct that causes unintentional harm. Judge Molloy distinguished the policies in *King* and *Blair* by asserting that they lacked such an exclusion, and he stated that *Blair* itself noted this distinction in an older decision – *Northwestern National Casualty Co. v. Phalen*, 597 P.2d 720 (Mont. 1979) – where the Montana Supreme Court had read the exclusion in this manner to expand the meaning of "occurrence."

Molloy's reasoning displayed some problems. First and foremost, a review of the policies in *King* and *Blair* revealed that they *do* have the exclusion for "expected or intended harms," so the distinction the court was drawing did not exist. Additionally, even though *Twite* was not addressed in *King* or *Conley*, a review of that policy revealed the same exclusion as well. So despite policies in *Blair*, *Twite*, *King*, and *Conley* that all featured the identical "occurrence" coverage and exclusion, only the policy in *Conley* was held to cover intentional acts causing unintentional harms. Such an outcome seems contrary to the common-law doctrine of *stare decisis*, whereby litigants confronting similar circumstances must be treated in a similar manner.

Another problem with the U.S. District Court's analysis in *Conley* is that it construed the insurance policy backwards, i.e., it focused on the exclusion and reasoned that what is not excluded must be covered. This approach, however, collides with a fundamental legal doctrine: insurance exclusions cannot create coverage where it otherwise does not exist. Coverages must be analyzed first and by themselves, whereas exclusions are considered *if and only if* coverage is triggered. The insurers in *Conley* cited precedent from the Ninth Circuit observing this doctrine; Judge Molloy refused to apply it because, he reasoned, the Montana Supreme Court never had applied it to this situation in older decisions such as *Phalen* and others. But once again there was a problem: in *Phalen* and the other older decisions by the Montana Supreme Court, the definition of "occurrence" indeed contained the language excluding expected or intended harms; the language was not confined to a separate exclusion as in *Blair*, *Twite*, and *King*. Despite all this, Molloy effectively held that an *insurance exclusion increases coverage* for the purpose of defining "occurrence" under Montana law.

Molloy's ruling in *Conley* was appealed by the plaintiffs to reverse summary judgment, and the insurers cross-appealed to reverse Molloy's interpretation of "occurrence" if necessary. The insurers went to great lengths to inform the Ninth Circuit Court of Appeals that the District Court was incorrect and that the policies in *Blair*, *Twite*, and *King* indeed had the same exclusion for expected or intended harms as the policy under review. Yet while the appeal was still pending, Molloy followed the same reasoning in *Penn-Star Insurance v. Coyote Ridge Construction & Flotre*, 39 M.F.R. 311 (D. Mont. Feb. 27, 2012), holding that an "occurrence" encompasses intentional conduct that produces unintentional harm. In so holding, Molloy relied once again on a policy exclusion for expected or intended harms, and he repeated the mistaken position that the policies in *Blair* and *King* were distinguishable because they lacked the exclusion.

A Montana trial court soon latched onto Molloy's reasoning in *Penn-Star*; interpreted the exclusion for expected or intended harms in conjunction with the definition of "occurrence"; and held that unintentional harms are also covered "occurrences." *Cincinnati Insurance Company v. Spanish Peaks Holding, LLC, et al.*, Cause No. DV-10-77A (Mont. 18th Dist. Ct. Aug. 23, 2012). What makes *Cincinnati* truly confounding, though, is that the court was informed that the policy in *Blair* was indistinguishable because it also had the same exclusion for expected or intended harms (the policies in *Twite* and *King* do not seem to have been mentioned). The insurer argued, as did the insurers in *Conley*, that this identical policy language required following *Blair* and finding that intentional conduct of any sort is categorically not an "occurrence." Yet the court explicitly refused to apply *Blair*, opining that the Montana Supreme Court must have overlooked the policy exclusion. To say the least, it is quite rare for a trial court to refuse to apply precedent on the assertion that the appeals court did not know what it was doing.

At this stage of the game, Montana jurisprudence on the meaning of "occurrence" is remarkably confused. Applying the exact same type of policy**,** three decisions (*Blair*, *Twite*, and *King*) hold that intentional conduct is never an "occurrence" regardless of consequences, yet three other decisions (*Conley*, *Penn-Star*, and *Cincinnati*) hold that intentional conduct is an "occurrence" if it produces unintentional consequences. The precedent established by the Montana Supreme Court in *Blair* and *Twite* is thus being disregarded even in circumstances where the policies are the same. The federal district court disregarded *Blair* on a belief that the policy at issue was distinguishable, which is incorrect. The Gallatin County District Court disregarded *Blair* on a belief that the Montana Supreme Court did not know what it was doing, which is an unusual basis for distinguishing controlling precedent. And the Ninth Circuit Court of Appeals recently declined to wade into this thicket, affirming summary judgment on alternative grounds for the insurers in *Conley*.

From a legal practitioner's perspective, the necessary approach to establishing an "occurrence" under policies of this sort is to apply controlling precedent issued by the Montana Supreme Court in *Blair* and *Twite*, and echoed by the federal district court in *King*. From a pragmatic perspective, though, it's anyone's guess what the courts will do next.

Wilton Strickland *is an attorney with the law firm of Bohyer, Erickson, Beaudette & Tranel, P.C., in Missoula. He graduated from the University of Virginia School of Law in 2000 and practiced commercial litigation in Florida before moving to Montana in 2010.*

Selected case briefs: Sept. 12 – Oct. 31, 2012

By Beth Brennan

Non-Unanimous Decisions

***MEA-MFT v. McCulloch*, 2012 MT 211 (Sept. 25, 2012) (4-3) (McGrath, C.J., for the majority; Baker, J., dissenting)**

Facts: The Legislature enacted Legislative Referendum 123 in 2011 as SB 426. It proposed a vote in the Nov. 2012 general election asking voters to decide whether the state should provide a tax credit and potential tax refund, or outright payment, to individuals in years when the state enjoys a certain level of projected surplus revenue. If the unaudited ending state general fund balance exceeds 125% of the projected fund balance and is at least $5 million, a taxpayer may claim the tax credit.

LR-123 requires the Legislative Fiscal Analyst (LFA), employed by the Legislative Finance Committee, to calculate a projected general fund balance by August 1 for the end of the current fiscal year. An affidavit by the LFA details the numerous steps involved in making this calculation.

Procedural Posture & Holding: MEA-MFT contends LR-123 is unconstitutional because it unlawfully delegates legislative power to the LFA. The district court granted summary judgment to MEA-MFT. McCulloch appeals. The Court holds that the pre-election challenge to LR-123 is justiciable and ripe, and is an unconstitutional delegation of legislative power. Justice Baker, joined by Justices Rice and Cotter, dissents from the majority's decision that the challenge is ripe for review, and would not reach the second issue.

Reasoning: McCulloch argues that the issues raised by MEA-MFT will not be ripe for adjudication unless and until the voters approve LR-123 in the November general election. Montana is generally reluctant to allow pre-election challenges to initiatives and referenda, although the Court cites several exceptions. Here, the issues are definite and concrete. "Placing a facially invalid measure on the ballot would be a waste of time and money for all involved. . . ." ¶ 18.

On the merits, the Court relies on *Judge v. Leg. Finance Comm.*, 168 Mont. 470 (1975), to hold that LR-123 impermissibly delegates legislative power to the LFA. LR-123 requires the LFA to exercise independent judgment and evaluations consistent with executive branch functions. The legislative branch enacts laws; the executive branch implements them. Because the LFA is an employee of the Legislative Finance Committee, and the executive branch is the responsibility of the governor, LR-123 violates the constitutional separation of powers.

Dissent (Baker, J.): As Justice Baker discussed in her dissent to *Reichert*, the constitutionality of legislation should be determined only after a law has been enacted. Because the LFA would not have to make his first calculation until August 2013, there is no need to decide this prior to the election. Voter rights are at stake here, in spite of the majority's statement to the contrary. "Efficiency should not outweigh the people's constitutionally prescribed right to vote on measures referred by the Legislature." ¶ 38.

***Turner v. Wells Fargo Bank*, 2012 MT 213 (Sept. 25, 2012) (5-2) (Baker, J., for the majority; Cotter, J., dissenting)**

Facts: Turners built a home in Shepherd in 1977. After they divorced, the property was titled in James Turner's name. In 2005, James married Julie Viers, and they decided to remodel the Shepherd property so they could sell it. They opened a line of credit with Wells Fargo, and granted Wells Fargo a deed of trust as security. Wells Fargo recorded the deed on Jan. 23, 2006, and loaned James and Julie $169,540, the maximum allowed under the credit line agreement.

In August 2006, the John Turners (James' brother and his wife) bought the Shepherd property by depositing $322,000 into James and Julie's joint account. That day, James and Julie met with the bank representative, told her the property had been sold, and asked that the sale proceeds be used to pay off the credit line balance. Wells Fargo debited the balance from James and Julie's account, noting it was a "mortgage payoff."

A month later, unknown to James Turner or the John Turners, Wells Fargo advanced Julie another $120,000 under the credit line agreement secured by the Shepherd property. A month after that, James and Julie executed a quitclaim deed to the John Turners for the Shepherd property, which was recorded two days later. Six weeks later, in November 2006, Julie requested and was granted $42,459 under the credit line agreement.

In December 2008, as part of his bankruptcy proceedings, James discovered Wells Fargo still held a deed of trust on the Shepherd property. Wells Fargo refused to release the deed. The John Turners filed a complaint to quiet title in 2010. James and Julie are divorced, and she is responsible for the debt she incurred under the credit line agreement.

Procedural Posture & Holding: The lower court denied the John Turners' summary judgment motion and granted Wells Fargo's summary judgment motion, concluding the John Turners could not require Wells Fargo to release the deed of trust because they were not intended beneficiaries of the credit line agreement, and the John Turners failed to establish a prima facie case for promissory or equitable estopped. The John Turners appeal.

Reasoning: The John Turners contend they are third-party beneficiaries of the credit line agreement, and that Wells Fargo was contractually obligated to release the deed of trust. Wells Fargo argues the contract required James and Julie to send a signed letter asking that the account be closed, which neither of them did. Moreover, they argue the John Turners

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lack standing to enforce the agreement. The Court holds the John Turners are strangers to the credit line agreement, and lack standing to enforce it. Third-party beneficiaries must be intended beneficiaries based on the face of the contract. Incidental beneficiaries lack standing to enforce the contract.

The John Turners invite the Court to merge the doctrines of promissory and equitable estoppel by adopting section 90 of the Restatement (2d) of Contracts. Because the Court's precedents treat promissory and equitable estoppel as distinct claims, it declines to adopt § 90 and merge the doctrines. Instead, it applies the multi-factor tests for each type of estoppel, and finds the John Turners fail to meet either one.

Because James and Julie conveyed title to the John Turners via quitclaim deed, the John Turners received title that James and Julie had, i.e., burdened by Wells Fargo's security interest.

Dissent (Cotter, J.): Justice Cotter would apply equitable estoppel and conclude that the bank should be estopped from asserting a first position with respect to the deed of trust, and that the deed of trust should be released as a lien on the property. The bank representative who took the mortgage payment from James and Julie was a friend of Julie's who "knew that Julie was not a record owner of the Shepherd property and that the advances would constitute a lien upon the sold property." ¶ 40. The representative concealed this fact from James, the sole owner of the property, and "by extension from the John Turners, the buyers of his property." ¶ 41. Justice Cotter finds that this conduct satisfies the first element of equitable estoppel. Because the remaining elements are met, the bank should be directed to release the deed of trust.

***State v. Cooksey*, 2012 MT 226 (Oct. 9, 2012) (5-2) (McGrath, C.J.) (Nelson, J., concurring and dissenting); *State v. Mitchell*, 2012 MT 227 (Oct. 9, 2012) (5-2) (McGrath, C.J.) (Nelson, J., concurring and dissenting)**

Issue: Whether § 45-3-112, MCA, enacted in 2009, imposes a new and independent duty on law enforcement to investigate cases involving justifiable use of force.

Short Answer: No.

The Court interpreted § 45-3-112, MCA, enacted in 2009, in these two cases. Bobby Cooksey was convicted of deliberate homicide after killing his neighbor, Beardslee, with a rifle. Cooksey called 911 immediately, saying he had killed Beardslee because Beardslee had threatened to kill him.

In *Mitchell*, Mitchell and Corbin were fighting when Mitchell thought he saw Corbin reach for a knife. Mitchell yelled to a bystander to call the police, saying Corbin had tried to pull a knife on him. Officers arrived and broke up the fight. Corbin had a Leatherman multi-tool in his back pocket, and told officers he reached for it to bluff Mitchell. The officers did not confiscate the tool or take pictures of it, testifying that they did not believe it was an issue in their investigation. Mitchell was charged with and convicted of aggravated assault. On appeal, he contended the officers' failure to inspect, photograph or confiscate Corbin's weapon violated § 45-3-112, resulting in the loss of key evidence to his defense.

Prior to trial, Cooksey filed a motion under § 45-23-112, asking the court to order the prosecution to produce Beardslee's medical records, including drug and alcohol evaluations; Beardslee's criminal record; Beardslee's mental health records, and "any other evidence of Mr. Beardslee's violent character to demonstrate the reasonableness of force used by the Defendant." ¶ 33. The district court held a hearing, and the defense called several sheriff's deputies to testify about whether they had adequately secured the crime scene and whether they had investigated Cooksey's claim of justifiable use of force.

Noting the prosecution's *Brady* obligations to produce exculpatory evidence, and similar obligations under state law, the district court refused to construe § 45-3-112 as imposing a new duty on law enforcement to investigate cases involving justifiable use of force. The Supreme Court affirms, finding the statute "plain and clear on its face." ¶ 37. It finds the statute consistent with the prosecution's *Brady* obligations, and consistent with existing Montana law.

Mitchell argues that law enforcement failed to properly investigate his claim of justifiable use of force, in violation of his due process rights as well as § 45-3-112. He sought plain error review, which applies when a criminal defendant's constitutional rights are implicated, even if a timely objection was not made at trial. The Court refuses to apply plain error review, holding that § 45-3-112 does not impose a new duty on law enforcement, and Mitchell failed to show that the claimed error may result in a "manifest miscarriage of justice." *Mitchell*, ¶ 18.

Dissent (Nelson, J; Rice, J.): Justice Nelson, joined by Justice Rice, dissents to the Court's interpretation of § 45-3-112 in *Cooksey* and *Mitchell*. "In my view, the Court completely emasculates this statute." ¶ 51. He faults the majority for implying that the statute applies to prosecutors, when by its terms it applies to "peace officers." *Cooksey*, ¶ 74. He criticizes the Court's interpretation, as it renders the statute meaningless. *Id.* He does not think it imposes a duty to commence an investigation; once an investigation has begun, and the incident allegedly involved a justifiable use of force, Justice Nelson believes the statute is triggered, and requires officers to obtain and disclose all evidence supporting the defense. ¶ 75.

***Clark Fork Coalition v. Dept. of Environmental Quality*, 2012 MT 240 (Oct. 29, 2012) (4-2) (Wheat, J., for the majority; Rice, J. dissenting; Baker, J. did not participate)**

Facts: Revett Silver Company proposes to open the Rock Creek mine in the Cabinet Mountains. The final EIS was issued in 2011, and describes two phases of development: exploration and production. The majority of mine infrastructure will be constructed in the Rock Creek watershed, which is bull trout habitat. Bull trout were listed as threatened in the Columbia River Basin in 1998, triggering a formal consult by the Forest Service with the U.S. Fish & Wildlife Service about the mine's effect on the trout. USFWS issued a formal biological opinion in 2000, then revised and supplemented its findings in 2003, 2006, and 2007. It issued a no jeopardy finding in 2007 as to the Lower Clark Fork

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bull trout, but did not make a finding as to jeopardy to the Rock Creek population. The final EIS concluded "Rock Creek is an essential stock for conservation purposes." ¶ 9. Sedimentation is already heavy in Rock Creek, and additional sedimentation could threaten the Rock Creek bull trout.

Construction in the first phase of the Rock Creek mine is likely to lead to sediment discharge in the West Fork of Rock Creek. The EIS requires Revett to use BMPs, but admits that bull trout will be adversely affected because of "unavoidable fugitive sediment loading during project construction." ¶ 13.

Revett sought approval to discharge sediment under the state General Permit for Storm Water Discharges Associated with Construction. DEQ approved Revett's plan in August 2008.

Procedural Posture & Holding: Plaintiffs sought a declaratory judgment that using general permits to approve stormwater runoff from the Rock Creek Mine would violate ARM 17.30.1341(4)(e), which prohibits the use of general permits in areas of "unique ecological significance." The district court granted summary judgment to Plaintiffs and declared the general permit void. Revett appeals, and the Supreme Court affirms.

Reasoning: An agency's interpretation of its own rules are deferred to unless "plainly inconsistent with the spirit of the rule." ¶ 19. Revett argues the district court failed to defer to DEQ's expertise in water quality and permitting. "However, since we review a district court's grant of summary judgment de novo, and we defer to an agency's interpretation of its own rule, it is immaterial whether the District Court deferred to the DEQ." ¶ 21.

The primary issue on appeal is whether the district court properly found that Rock Creek is an area of "unique ecological significance." ARM 17.30.1341(4)(e) directs DEQ to consider several factors in making that determination; the district court relied on two -- impacts to fisheries and local conditions at the proposed discharge sites -- to find Rock Creek is an area of unique ecological significance. Because DEQ failed to consider the relevant factors in the law, it committed a clear error of judgment, and no deference is owed to its interpretation.

Dissent (Rice, J.): The Court applied an incorrect standard of review for administrative law cases. A district court's failure to apply the proper standard of judicial review must either be reversed or remedied by a determination that the case can be affirmed notwithstanding the error. "We do not have the option of dismissing a district court's erroneous application of the standards of review as 'immaterial.'" ¶ 35. The district court's error improperly shifts the burden of proof, and is particularly prejudicial in complicated case with a "massive evidentiary record." *Id.* The Court selectively summarized the facts rather than determining whether DEQ addressed all of the relevant factors, which it did. Give the limited review in an administrative record case, the Court's role is to determine only whether the agency's decision was "wholly unsupported by the evidence," or arbitrary and capricious. ¶ 43. Because the Court substituted its judgment for the agency's, Justice Rice would dissent.

***State v. Duncan*, 2012 MT 241 (Oct. 30, 2012)(4-1) (Baker, J. for the majority; Nelson, J., dissenting)**

Issue: Whether double jeopardy prevents the state from re-prosecuting Duncan.

Short Answer: No.

Facts: Duncan was charged with sexually assaulting his stepdaughter, CS, and her friends, VG and NM, all minors. The jury convicted him of assaulting VG and NM, and acquitted him of assaulting CS. Duncan filed for postconviction relief, and the court granted the petition because Duncan's counsel failed to object during the prosecution's closing statement suggesting Duncan had to refute the state's proof, and mischaracterized the burden of proof in his closing. The court granted Duncan a new trial, and ordered his sentence vacated and his guilty verdict stricken. The state then notified Duncan it intended to prosecute him again for the same crimes.

Procedural Posture & Holding: Duncan moved to dismiss the charges against him, arguing that the double jeopardy clause affords protection when prosecutorial misconduct prevents an acquittal, citing *Oregon v. Kennedy*, 456 U.S. 667 (1982). The district court denied the motion, concluding Duncan did not establish that the prosecutor intended to goad him to move for a mistrial, as required by *Kennedy*. Duncan appeals, and the Supreme Court affirms.

Reasoning: When a mistrial is granted on a criminal defendant's motion, the double jeopardy clause does not usually bar the state from trying the defendant again. The *Kennedy* exception applies when the government goads the defendant into moving for a mistrial. Duncan argues there should be no distinction between a defendant who successfully moves for a mistrial based on prosecutorial misconduct, and a defendant whose conviction is overturned because of prosecutorial misconduct and ineffective assistance of counsel. The state argues against expanding the *Kennedy* exception.

Duncan's proposed exception conflicts with § 46-11-505(2), MCA, which states that prosecution is not barred if the former prosecution resulted in a conviction that was later overturned. Duncan did not challenge the constitutionality of the statute. Moreover, when a defendant is granted a new trial on appeal, the retrial is not barred by double jeopardy.

Dissent (Nelson, J.): Justice Nelson believes the prosecutor did goad Duncan by undermining his presumption of innocence.

***State v. Longjaw*, 2012 MT 243 (Oct. 30, 2012) (4-1) (Rice. J., for the majority; Nelson, J. concurring and dissenting)**

Issue: Whether Longjaw's standby counsel had an actual conflict of interest.

Short Answer: No.

Facts: Longjaw forced his way into the apartment of a mentally disabled woman with whom he was acquainted, and sexually assaulted her. The woman's daughter called police to check on her mother, and when they arrived they found Longjaw intoxicated and asleep in the living room. The victim was examined by a nurse with the hospital sexual assault program, who found that her injuries were inconsistent with consensual sex.

Longjaw was represented by four different attorneys until

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2010, when he moved for leave to appear pro se. The court held a hearing and denied the request. Longjaw renewed his motion, and the court granted his request and appointed Jordan Kilby and Gregory Hood of the public defender's office as standby counsel.

On the morning of trial, Kilby and Hood told the court that Haygood, a witness on the state's list, had previously been represented by their regional office on a different but tangentially related matter, which presented a potential conflict of interest. The state indicated it would not call Haygood, and it did not. The court did not make a ruling and the case proceeded to trial. Longjaw called Haygood as a witness and questioned her briefly.

The jury convicted Longjaw of aggravated burglary and sexual intercourse without consent. Longjaw was sentenced to 40 years for aggravated burglary and 60 years for sexual intercourse without consent.

Procedural Posture & Holding: Longjaw argues on appeal that his convictions should be reversed because his standby counsel had a conflict of interest, the lower court erred by modifying the aggravated burglary instructions during jury deliberations, and his counsel was ineffective for failing to obtain an independent medical expert. The state concedes reversible error on the instructions, and requests that Longjaw's conviction on aggravated burglary be vacated. The Supreme Court affirms Longjaw's conviction for sexual intercourse without consent.

Reasoning: (1) The Court has earlier held that it will take a case-by-case approach in analyzing purported conflicts within the Office of the Public Defender. If no actual conflict existed, the inquiry ends. An actual conflict exists when a defense attorney "is required to make a choice advancing another client's interests to the detriment of his client's interest." ¶ 15. Although a potential conflict may have been present here, the Court holds there was no actual conflict.

(2) Longjaw contends his earlier counsel's failure to obtain a second opinion of the victim's medical records constitutes ineffective assistance of counsel. Because the record does not fully explain why an independent medical exam was or was not obtained, the claim cannot be reviewed on appeal, but may be pursued through postconviction relief.

Dissent (Nelson, J.): Justice Nelson dissents from the Court's conclusion that the trial court adequately inquired into the conflict interest raised by Longjaw's standby counsel. He would hold that "when a trial court knows or should know of a conflict of interest between the defendant and standby counsel, the court must conduct an inquiry into the nature and extent of the conflict." ¶ 33. Because the lower court did not hold a hearing, the record does not provide sufficient facts to determine whether an actual conflict existed. He would remand for a new trial on the charge of sexual intercourse without consent.

Unanimous Decisions

***Gordon v. Kuzara*, 2012 MT 206 (Sept. 18, 2012) (5-0) (McGrath, C.J.)**

Facts: The parties created an LLC in 2006, with Gordons owning 50% and Kuzaras owning 25% through their ranch corporation and 25% through their children. Kim Kuzara was the managing member of the new LLC, Half Breed Land and Livestock. A purpose of the LLC was to raise and sell cattle. Kuzaras contributed cattle, and Gordons contributed cash.

Issue: (1) Whether the LLC was properly dissolved by the court; (2) whether Kuzaras should have been allowed to file an amended answer.

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

The cattle contributed by Kuzaras were originally owned by Kim Kuzara and David Stacy. Kuzaras' ranch corporation bought out Stacy's interest and contributed a half-interest in the herd to the new LLC. Kuzara failed to call meetings of the LLC as required by the operating agreement; failed to keep an accurate accounting; and failed to produce receipts for charges made to the LLC account. Kuzara also charged personal expenses to the LLC.

Gordons demanded an audit, which showed that the Kuzara-Stacy cattle had never been transferred to the LLC, the brand was registered to R Three, and there was no bill of sale for the cattle from Kuzara or Stacy to the LLC.

Procedural Posture & Holding: Gordons filed suit seeking judicial dissolution of the LLC. During discovery, Gordons learned that Kuzara claimed the LLC owed him $79,000 for work done by him and his wife at $20/hour. Kuzara sought reimbursement for expenses, but had no receipts. Kuzara allowed others to graze on the LLC land, and fed those animals without payment to the LLC. Gordons also learned of several irregularities in the LLC checking account.

The district court denied Kuzaras' motion for leave to file an amended answer, and granted Gordons' motion for summary judgment, ordering dissolution of the LLC and appointing a receiver. The Supreme Court affirmed.

Reasoning: The lower court ordered dissolution after applying MCA § 35-8-902(1), finding the LLC's economic purpose was frustrated, it was not reasonably practicable to carry on the company's business with R Three as a member, the LLC has not been run in conformity with the operating agreement, and R Three and Kim Kuzara had acted in a manner that was unfairly prejudicial to the Gordons. Kuzara argues genuine issues of material fact precluded summary judgment, but the Court holds that the facts they raise are not material. Any of the five grounds in § 35-8-902(1) can support judicial dissolution. Substantial undisputed facts supported the lower court's order.

Kuzaras also appealed the district court's denial of the motion for leave to file an amended answer, adding tort and contract counterclaims. Although leave to amend is freely given, it should be denied when the amendment is legally insufficient to support the request relief, or if the amendment would be futile. Here, the LLC operating agreement required claims arising out of the LLC to be arbitrated. Kuzaras claim Gordons waived the arbitration requirement by resisting Kuzaras' earlier motion to compel arbitration of the petition for dissolution, which was denied and affirmed. 2010 MT 275. The Court held that the arbitration clause did not apply to dissolution, as that remedy is available only

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from the district court. *Id.* ¶¶ 12-13. Because Gordons did not contest the validity of the arbitration clause, only its application to a dissolution action, they did not waive their right to require disputes arising from activities of the LLC to be submitted to arbitration. Thus, Kuzaras' motion to amend was futile, as all claims they sought to add had to be arbitrated first.

***Somont Oil Co. v. King*, 2012 MT 207 (Sept. 18, 2012) (5-0) (Baker, J.)**

Facts: Somont hired King as an office manager in 2008. In 2009, when Somont was hiring an operations manager, King facilitated a background check on one of the applicants, Joseph Alborano, which revealed a negative credit history but no criminal record. Somont hired Alborano. King expressed concern about him based on his credit history and rumors of a violent background and family issues. She provided no examples. She continued to express concerns about him, and her concerns were largely ignored. In November 2009 King received an excellent performance evaluation and was given a raise. She continued to raise concerns about Alborano, and Somont eventually terminated King's employment.

Procedural Posture & Holding: King applied for unemployment benefits, and the department determined she had not been discharged for misconduct. Somont requested a second determination, and a second adjudicator found the same thing. Somont appealed to the department, which held an evidentiary hearing. King appeared by telephone, without counsel. The hearing officer reversed. King appealed to the Board of Labor Appeals (BOLA), which held a hearing where both parties appeared in person and were represented by counsel. The board reversed, concluding King's conduct was "at best a good faith error in judgment." The decision noted her positive employment history, and found Somont failed to present evidence of willful or wanton disregard of the employer's interests. Somont petitioned the district court for review, and the court dismissed it, refusing to re-weigh the evidence and finding substantial evidence to support BOLA's decision. Somont appeals, and the Supreme Court affirms.

Reasoning: Somont contends BOLA adopted the hearing officer's findings, but its written decision states that the findings made by the hearing officer were in error. Further, the hearing transcript showed the board questioned counsel and provided reasons for reversing the hearing officer.

BOLA's legal conclusions are reviewed to determine if the agency's legal interpretation is correct. Here, BOLA applied two administrative rules, since repealed, defining misconduct. ¶ 14 (quoting A.R.M. 24.11.460, 24.11.461). The legal issue is whether King's conduct was willful, wanton, and in substantial disregard of Somont's interests. BOLA's conclusions were correct based on its finding that King's actions did not amount to substantial disregard of Somont's interests.

***State v. Thompson*, 2012 MT 208 (Sept. 18, 2012) (5-0) (Morris, J.)**

Facts: Anthony Thompson and Debbie Love were in a relationship. While gambling at a Billings casino in 2010, they ran into Thompson's ex-girlfriend. Love questioned her presence there, and Thompson left. They returned to Love's house. Love wanted to talk about his ex-girlfriend, and Thompson wanted to have sex. When Love refused sex, Thompson held her down and punched her repeatedly. He stopped when she asked why he was beating her if he loved her. She cleaned up her wounds and returned to sleep in the same bed as Thompson. The next morning she made breakfast, then called 911 while noisily cleaning the dishes.

Procedural Posture & Holding: Thompson was charged with partner or family member assault, and the state filed timely notice of its intent to request he be designated a persistent felony offender (PFO). The jury convicted Thompson. At the sentencing hearing, the Court found Thompson was a PFO and sentenced him to the statutory minimum of five years. He appeals the district court's exclusion of evidence that Love had been charged with felony forgery more than a decade earlier, and his five-year sentence. The Supreme Court affirms.

Reasoning: The district court excluded the forgery evidence based on M.R. Evid. 608(b), which gives courts discretion to admit specific conduct to show a witness's credibility. Because Love was charged but never convicted of forgery, as she entered a pretrial diversion program, and the charge was made 10 years before trial, the court did not abuse its discretion in excluding the forgery charge. Moreover, other evidence was admitted to attack Love's credibility, and other evidence supported Love's testimony regarding the assault.

Courts generally must impose five-year minimum sentences for persistent felony offenders. MCA § 46-18-502(1). They may not defer or suspend the first five years of a PFO sentence. MCA § 46-18-502(3). However, a court may forego these restrictions when the offender did not inflict serious bodily injury on the victim. MCA § 46-18-222(5). Thompson argues the state failed to present evidence that Love suffered serious bodily injury as defined by § 45-2-101(66), but the Court does not decide that issue because the lower court exercised its discretion under § 46-18-222(5) to depart from the mandatory minimum sentence and sentence Thompson to the Department of Corrections rather than the Montana State Prison. It properly applied the applicable statutes.

***Marriage of Wheeldon*, 2012 MT 212 (Sept. 25, 2012) (5-0) (McGrath, C.J.)**

Facts: Corey Wheeldon is a deputy sheriff with the Yellowstone County Sheriff's Department, and Sarah is an FBI agent living near Boston, Massachusetts. The parties were married in 2001 and have two children. They lived in Shepherd during their marriage, and Sarah worked as a therapist at the Mental Health Center in Billings.

Sarah petitioned for dissolution in 2009. She lived in Shepherd until she left to train for the FBI in early 2011. The FBI training was a five-month program in Virginia, so when she left the children moved in with Corey. After completing her training, Sarah was assigned to Boston.

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Procedural Posture & Holding: The district court granted Sarah primary residential custody, and divided the marital estate. Corey appeals, and the Supreme Court affirms.

Reasoning: Corey appeals the order granting Sarah primary residential custody on the grounds that the children will have to move from Shepherd, where they have always lived and have friends and family. One of the children was diagnosed with an adjustment disorder, and he argues that the lower court did not properly weigh the detrimental effects of moving in determining the children's best interests. The Court finds substantial evidence supports the district court's custody award, and affirms the order granting Sarah primary custody.

Corey next argues the court erred in awarding Sarah all of her retirement from her Billings job, but splitting his retirement between the parties, and argues the court erred by using the time rule to value his pension. Pensions can be valued using either the present value method, which is generally proper, or the time rule method, which defers distribution and divides the marital portion of the benefits when they are paid. The time rule method is preferred when the present value cannot be determined, or sufficient marital assets do not exist to offset the non-employee spouse's portion. The value of Corey's non-vested retirement account cannot yet be known; therefore, the time rule method was appropriate. Sarah's retirement, in contrast, was cashed out prior to dissolution, and therefore could be valued precisely.

***Johnson Farms, Inc. v. Halland*, 2012 MT 215 (Oct. 2, 2012) (5-0) (Wheat, J.)**

Facts: Dora and Edward Johnson operated a family farm for many years through Johnson Farms, Inc. They had five children, some of whom are parties herein. Edward died in 1984, and Dora executed a trust agreement in 1989 naming herself as trustee and two of her children, Ethel and Floyd, co-trustees. The net income of the trust was to be delivered to Dora until she became incapacitated; upon her death, all of her shares in Johnson Farms, Inc. were to be distributed equally between her two sons, Ray and Floyd, with certain sums of money going to her daughter, Ethel, Phyllis and Kathy.

Dora died in 2006. Ethel was primarily responsible for Dora's care and finances during the last years of Dora's life. Ethel also held Dora's power of attorney from 2003-2005, and was secretary of the corporation until 2005. In 2005, the children entered a Family Agreement providing that the operation and management of Johnson Farms, Inc. would be turned over to Ray and Floyd, with the sisters receiving cash.

Procedural Posture & Holding: In 2009, Johnson Farms, Inc. and Floyd filed suit against Ethel alleging she breached her fiduciary duties as secretary of the corporation by diverting funds to herself and others, and seeking an accounting. They further alleged Ethel had breached the trust agreement by conferring gifts to herself and other family members, and sought an accounting of all money that should have been in the trust. Ethel moved for summary judgment, arguing the complaint was barred by the statute of limitations, and that no genuine issues of material fact precluded judgment in her favor. The court held a hearing, after which it granted Ethel's motion, and awarded her attorneys' fees and costs. Johnson Farms, Inc. and Floyd appeal; the Supreme Court affirms.

Reasoning: Although it is unclear whether the district court granted summary judgment based on the statute of limitations or because Johnson failed to raise a genuine issue of material fact, the Court finds the complaint is barred by the statute of limitations and affirms on that basis.

Count one sounds in tort, as either a breach of fiduciary duty or conversion claim, and is subject to a three-year statute of limitations. Because Ethel has not been secretary of Johnson Farms, Inc. since 2005, the complaint filed in 2009 was untimely. Count two also sounds in tort. Although Johnson alleges a breach of the trust agreement, he fails to point to the violation of a specific provision. The Court concludes this count is either a breach of fiduciary duty claim or a conversion claim. The complaint was therefore untimely.

Johnson argues that equitable estoppel and the discovery rule should apply. He argues that he was not aware of Ethel's misappropriation of funds until she turned over bank statements in 2010 as part of discovery. However, the Court finds no evidence that Ethel concealed information, and finds that Johnson had the same opportunity to determine the facts as Ethel did.

***Gary & Leo's Fresh Foods, Inc. v. State*, 2012 MT 219 (Oct. 9, 2012) (5-0) (Rice, J.)**

Facts: Kaylee Reed worked as a deli clerk at Gary & Leo's, a Havre grocery, from February 2009 to October 2010. Gary & Leo's terminated her employment after receiving complaints from customers about her poor service and inappropriate language. Reed applied for unemployment insurance.

Procedural Posture & Holding: The department initially determined Reed was eligible for benefits, and Gary & Leo's asked for a redetermination. The department concluded she was not eligible because she had been discharged for misconduct. Reed appealed, and the hearing officer determined that although five customers had filed written complaints during Reed's employment, she had not been rude intentionally. Citing A.R.M. 24.11.460(1), the officer concluded she had not engaged in misconduct and reinstated her benefits.

Gary & Leo's appealed to the Board of Labor Appeals (BOLA), arguing the officer should have applied A.R.M 24.11.460(1)(d), which says misconduct also includes carelessness of such a degree as to show intentional disregard of the employer's interest. BOLA affirmed, and Gary & Leo's petitioned for judicial review. Reed did not participate at the district court, and BOLA and the department indicated they would not participate but reserved the right to intervene.

The district court reversed BOLA's decision, finding Reed had engaged in misconduct under the carelessness standard. The department appeals; the Supreme Court affirms.

Reasoning: The department did not give any weight to the customer complaints because they were "inadmissible hearsay." It argues the district court erred by considering this evidence, and

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impermissibly re-weighed the evidence. Gary & Leo's contends the department did not preserve this issue for appeal, as it did not participate in the proceedings before the district court; the department argues it preserved the issue through its notice of non-participation and Rule 50 motion to alter or amend the judgment. The Supreme Court finds the department did not raise the issue in its notice of non-participation, and parties may not raise an issue for the first time in a motion to alter or amend. Thus, the department did not preserve this issue for appeal, and the customer complaints remain part of the record.

The Court finds there were multiple complaints about Reed's service, five of which were reduced to writing, and finds that Reed had been warned repeatedly in writing that she must change her behavior. BOLA erred in its legal conclusion that these acts did not constitute misconduct. The Court notes the factual differences between this case and *Somont Oil*, where the employee's behavior was "isolated." Here, it was recurring.

***In the Matter of D.B.J.*, 2012 MT 220 (Oct. 9, 2012) (5-0) (Wheat, J.)**

Facts: DBJ was born in 2003. In 2004, his mother and father successfully petitioned to appoint DR, DBJ's maternal grandmother, and CR, the step-grandfather, as guardians. There was no durational limit on the guardianship, and the parents' rights were not terminated. Both of DBJ's parents were sentenced to prison for dug charges around that time. DBJ has lived with his guardians since he was about five weeks old. In 2010, DPHHS removed DBJ from DR and CR's home following a social worker's report that DBJ feared CR would yell at and hit him. DBJ told DPHHS that CR had previously hit and kicked him, and he feared he would do so again if he got in trouble at school. DR confirmed that both she and DBJ feared potential physical abuse. After DBJ was removed from the home, DR separated from CR.

Procedural Posture & Holding: DPHHS filed a petition for emergency protective services, adjudication as a youth in need of care, and temporary legal custody.

After a few pre-termination hearings, the district court removed CR as guardian. CR appeals, arguing (1) his due process rights were violated, (2) the district court did not comply with statutory timelines, and (3) the district court did not properly apply the best interests of the child standard. The Supreme Court affirms.

Reasoning: Although the lower court initially did not allow CR to cross-examine or present witnesses, it corrected that later.

***Musselshell Ranch Co. v. Seidel-Joukova*, 2012 MT 222 (Oct. 9, 2012) (5-0) (Cotter, J.)**

Facts: This is the parties' second appeal. Plaintiffs Musselshell Ranch et al. own the right to appropriate water from the Musselshell River. They get their water from the Cooley ditch, which has been in its location for more than 100 years. The ditch is accessible via two routes – one through Joukova's property and another created in 2002 by the Montana Dept. of Transportation when it widened Highway 12. MDT contoured the sides of the Cooley ditch and installed a lining, an underground pipeline, and an access gate. Defendant Joukova bought her property in 2006. A portion of the Colley ditch flows through her property. Shortly after moving in, Joukova graveled the two-lane road running along the north bank of the ditch, which the ranch had historically used to access the ditch. She also created an approach from the southern end across the pipeline installed by MDT. She placed a permanent culvert in the ditch, then covered it with a rock bridge that allowed her to drive over the ditch to another section of her property. Plaintiffs brought suit against Joukova in 2009, claiming she was interfering with their easement rights.

Prior to the first appeal, the district court ruled that the culvert and bridge could remain, despite the ranch's demand that they be removed. It also ruled that Joukova had to provide the ranch access through a locked gate, and reinstall a gate she had removed. Because the court concluded neither party had "prevailed" as required by § 70-17-112(5), MCA, which prohibits interference with ditch easements, it declined to award attorneys' fees and costs. The ranch appealed the ruling regarding the culvert and bridge, but not regarding attorneys' fees. The Supreme Court held that the culvert and bridge interfered with the ranch's secondary easement rights, and remanded. 2011 MT 217.

Procedural Posture & Holding: On remand, the district court ordered Joukova to remove the culvert and bridge. The ranch then moved for attorneys' fees and costs under § 70-17-112(5), MCA. The district court denied the motion because (1) the ranch did not appeal the issue of attorneys' fees in the first appeal, and (2) the ranch did not prevail on all issues. The Supreme Court affirms.

Reasoning: Applying case law interpreting § 70-17-112(5) MCA, the Court concludes that a prevailing party must prevail on all claims raised under the statute. The ranch prevailed on all claims but one. Thus, it is not entitled to fees and costs.

Concurrence (Rice, J.): Justice Rice concurs in the holding and agrees that precedent establishes the rule, but "harbor[s] doubts" about the rule. "At a minimum, the trial court should be able to determine, under the usual standards, whether the party seeking enforcement is the 'prevailing party' of the entire litigation and thus entitled to fees." ¶ 31. However, "until the Legislature addresses the issue or a persuasive argument is made for this Court to overturn precedent, I believe *stare decisis* requires that Musselshell Ranch's claim for fees be denied." *Id.*

Concurrence (Nelson, J.): Justice Nelson dissented from *Musselshell Ranch I*, and encourages the Legislature to amend the statute accordingly. He adds here that "the Legislature may also wish to include a revised attorney's fees provision" so that an irrigator can obtain costs and fees if it prevails on its main claim under the statute.

***In re the Parenting of MMG*, 2012 MT 228 (Oct. 16, 2012) (Morris, J.) (5-0)**

Facts: Gail and Ron Armstrong began raising MMG when she was about one year old, after Gail saw Arrah Lane holding MMG at a gas station, commented what a beautiful child she was, and Lane asked Gail if she wanted the baby. Armstrongs cared for MMG for the weekend, and told Lane if she needed help caring for the child they would do so. Lane began leaving MMG with Gail several days a week, then weeks at a time, until MMG

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Issue: Whether district court has jurisdiction to order parenting plan for nonparents when parents' rights have not been terminated and proposed parenting plan places child almost exclusively with nonparents.

Short Answer: Yes.

lived primarily with Armstrongs. When MMG was four, Lane told Armstrongs she was no longer interested in parenting MMG. Lane visited MMG a few times a year for the next six years. When MMG was ten, Lane took her for the weekend, then called to tell Armstrongs she was moving to Wyoming with MMG.

Procedural Posture & Holding: Armstrongs petitioned for a parenting plan. The district court initially granted an interim plan providing MMG would live primarily with Armstrongs, but when Lane objected, the court concluded Armstrongs could not seek a parenting plan unless Lane's parental rights had been terminated, and dismissed the petition. Armstrongs appeal; the Supreme Court reverses and remands.

Reasoning: The lower court declined to apply the nonparental statutes because Armstrongs' proposed parenting plan places MMG almost exclusively with Armstrongs, a distinction deemed important in *Parenting of JNP v. Knopp*, 2001 MT 120. There, however, Knopps had not established a parent-child relationship. Armstrongs seek to prove that they have. "The nonparental statutes place no restrictions on the type of parenting plans that a nonparent may seek after the nonparent has established a child-parent relationship." ¶ 10. Living with a third-party nonparent is not prohibited if it is in the best interest of the child, as determined by the district court.

If the district court determines that Armstrongs have established a parent-child relationship with MMG, and MMG's parents acted contrary to their child-parent relationship with MMG, it will have jurisdiction to consider granting a parental interests in MMG to Armstrongs. Armstrongs' petition asserts facts that, taken as true, could establish a parent-child relationship. The Court has earlier held that a parent acted contrary to the parent-child relationship by ceding exclusive parenting authority to a nonparent. Armstrongs must further show by clear and convincing evidence that it is in MMG's best interests to continue the child-parent relationship they have developed.

***In the Matter of DB, Youth in Need of Care*, 2012 MT 231 (Oct. 22, 2012) (5-0) (Morris, J.)**

Issue: Whether the district court abused its discretion in terminating father's parental rights.

Short Answer: No.

Facts: JB is the biological father and MS the biological mother of DB, born in 2000. Mother primarily raised DB, although Father lived with DB for a few months when DB was less than six months old. Father has had few visits with DB with the exception of weekend visitations in 2008 and 2009. Father moved to Mississippi in 2009, leaving DB entirely in Mother's custody. In 2010, DB was removed from mother's custody after she was arrested for partner or family member assault. DB and his stepbrother had been subject to numerous incidents of domestic violence before Mother's arrest. The district court granted DPPHS emergency protective custody. Father stipulated to DB's status as a youth in need of care, and agreed DPHHS should have temporary legal custody.

DPPHS developed a treatment plan for Father, which detailed Father's criminal history, history of drug and alcohol abuse, and history of domestic violence. The plan noted that Father demonstrated an inability to meet DB's physical and emotional needs, and that DB did not want to live with Father. Father stipulated to the findings, and to the tasks he had to complete. He proved unable to develop a parenting relationship with DB, although he complied with other parts of the plan. DPHHS scheduled a supervised visit in Montana for a week in 2011, buying Father's plane ticket and offering to pay for his hotel room. A few days before the visit, Father discovered DB did not want to see him. He refused to come to Montana.

Procedural Posture & Holding: After 20 months of poor cooperation, DPHHS decided to seek termination of Father's parental rights. Father challenged the treatment plan's validity, and sought more time to comply. The district court terminated Father's parental rights, and Father appeals. The Supreme Court affirms.

Reasoning: DPHHS hoped the parenting assessment would address DB's fear of his father. Father stipulated to the plan, and does not offer an alternative. The lower court did not abuse its discretion in determining that the plan was appropriate. Nor did the court abuse its discretion in determining that father's behavior would not change within a reasonable amount of time. Finally, father fails to raise an ineffective assistance of counsel claim.

***Northern Plains Resource Council, Inc. v. Montana Bd. of Land Commissioners*, 2012 MT 234 (Oct. 23, 2012) (McGrath, C.J.) (5-0)**

Issue: Whether the State Land Board properly issued leases to Ark Land Co., a subsidiary of Arch Coal, Inc., without first conducting environmental review under MEPA.

Short Answer: Yes.

Facts: State Land Board entered into mineral leases with Arch Coal in March 2010, for state lands in the Otter Creek drainage, a tributary of the Tongue River. Arch Coal intends to strip mine for coal. The state holds its mineral interest in trust for the financial support of public education. The 2003 Legislature authorized the state to offer the Otter Creek mineral interests for leasing. After study, appraisal, presentation of a draft lease, and public comment, the Land Board approved the leases in 2010. The state received a bonus payment from Arch Coal of $85 million.

Section 77-1-121(2), MCA, exempts the Land Board from MEPA prior to issuing any lease if the lease is subject to further permitting under Title 75 or 82.

Procedural Posture & Holding: NPRC seeks a declaratory

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judgment that § 77-1-121(2) is unconstitutional under the Montana constitutional right to a clean and healthful environment. It contends that deferring MEPA review until mine permitting unconstitutionally denies early environmental review, which would preserve the state's right to place conditions on mining, obtain better financial terms, or decide not to enter the leases at all.

On cross-motions for summary judgment, the parties agreed to a joint statement of uncontested facts, which includes evidence of direct and indirect effects of mining and burning Otter Creek coal. The district court found it reasonably certain that mining and burning the coal will exacerbate global warming, and that the effects of climate change will include specific adverse effects on Montanan's water, air, and agriculture. However, it found that Arch Coal was acquiring "nothing more than the exclusive right to apply for permits," and that MEPA review will occur before any significant ground or water disturbance. It therefore granted summary judgment to the state, holding it retained sufficient ability to require environmental protections to meet its constitutional and trust responsibilities. The Supreme Court affirms.

Reasoning: The leases do not authorize or permit mining, or any degradation to land or water. No significant surface disturbance will occur without required permits from the state. The leases require Arch Coal to comply with state and federal law, and the state may forfeit the leases if Arch fails to discharge its duties. MEPA review will occur prior to issuance of a prospecting permit, and prior to mining. The operation and reclamation plans must be approved by the Land Board.

State statutes do not provide any bright line rule for when an EIS is required under MEPA. An EIS must be prepared prior to "major actions of state government significantly affecting the quality of the human environment." "Significant effect" is defined as the "go/no go" point, beyond which the state will make an "irretrievable commitment of resources." ¶ 15. Because additional permits are required before Arch Coal can mine, the leasing stage is not a "go/no go" point. Section 77-1-121(2), MCA, is subject to rational basis review, and it does not contravene the Montana Constitution.

***Richards v. County of Missoula*, 2012 MT 236 (Oct. 23, 2012) (5-0) (Morris, J.) (Nelson, J., concurring)**

Facts: John Richards bought 200 acres near Clearwater Junction in 2005, intending to develop it into a 119 lot subdivision. He submitted a subdivision application to Missoula County in 2006, and the county commissioners denied it in 2006. Richard modified his proposal to a 59-lot subdivision, which the commissioners considered in 2007. Montana FWP provided comments that recommended no more than 20 lots based on concerns about wildlife habitat. The commissioners denied the application. Richards petitioned for judicial review, which was denied, and this Court affirmed. 2009 MT 453.

Richards worked with FWP to mitigate adverse effects on wildlife, including fencing the entire subdivision. FWP suggested it had no objection, and Richards submitted another application for a 59-lot subdivision in 2010. About a month before the commissioners considered the application, FWP changed its position based on new research about bears in the area, and advised the commissioners it opposed the application. The commissioners unanimously rejected the application.

Procedural Posture & Holding: Richards petitioned the district court for judicial review of the commissioners' decision. The county moved for summary judgment. Richards moved to depose FWP officials; the district court denied the request, and granted summary judgment to the county on all claims, including Richards' takings claim. Richards appeals, and the Supreme Court affirms.

Reasoning: A party seeking additional discovery to respond to a summary judgment motion must provide an affidavit setting forth the specified reasons why the party cannot present facts in opposition to the motion without additional discovery. M.R. Civ. P. 56(c). Richards' affidavit fails to specify what discovery he wanted to conduct, or how it would help him defeat summary judgment. Because he failed to comply with M.R. Civ. P. 56(c), the district court did not abuse its discretion by denying his request.

Judicial review of a governing body's decision is limited to determining whether the governing body's action was arbitrary or capricious, or otherwise unlawful. "We limit this review to consideration of the record before the governing body when it issued its decision." ¶ 18. Richards argues he can establish the arbitrary and capricious nature of the county's decision by attacking FWP's report. But "[t]his Court long has stated that it will consider only the record before the governing body in reviewing whether the body's decision is arbitrary and capricious." ¶ 20. It is not the courts' role to "assess the credibility of information and arbitrate disputes over conflicting information." *Id.*

Richards point to *Aspen Trails Ranch, LLC*, 2010 MT 79, to argue that a party challenging a governing body's decision may rely on extraneous record not found in the administrative record, and should be allowed to seek discovery and attack FWP's science. The Court distinguishes *Aspen Trails*, holding that a party may not "re-evaluate" the administrative record. Richards disputes the accuracy of FWP's comments, but the commissioners are the "sole arbiter of disputed facts." ¶ 25. The commissioners did not act arbitrarily or capriciously, and did not have to defer to Richards' proposed mitigation because of their concerns that adverse effects could not be mitigated adequately.

Richards then argues that the county's denial of his subdivision application is a compensable taking. Richards cannot allege economic loss when he stands in the same place today as he did when he bought the property – he owns 200 acres that remains subject to subdivision review prior to being developed.

Concurrence (Nelson, J.): *Aspen Trails* suggested the administrative record can always be supplemented in the district court, contrary to federal administrative law jurisprudence. Justice Nelson would hold that *Heffernan* states the correct rule that judicial review of a governing body's action "is limited to the record before the governing body at the time of its decision," and is subject to three narrow exceptions: (1) if necessary to determine

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whether the agency considered all relevant factors and explained its decision, (2) if the agency relied on documents not in the record, (3) when necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing that the agency acted in bad faith. ¶ 44.

***State v. Gai*, 2012 MT 235 (Oct. 23, 2012) (5-0) (Rice, J.)**

Facts: Gai was involved in a single-car crash outside of Billings. MHP investigated for DUI. Gai blew .081 about two hours after the crash, and was cited for DUI per se. The state gave notice under M.R. Evid. 803(6) that it would introduce the breathalyzer reports at trial. Gai's counsel cross-examined the MHP officer about the accuracy of the breathalyzer, and offered a 2005 letter from a Crime Lab scientist to an attorney acknowledging the Intoxilyzer's margin of error of up to five percent. The justice court excluded it as hearsay. Gai moved to dismiss for lack of evidence, arguing the margin of error created reasonable doubt. He reoffered the 2005 letter, and the court admitted it. The court denied the motion and found Gai guilty of DUI.

Procedural Posture & Holding: Gai appealed to the district court, which affirmed, reasoning that a defendant who intends to challenge the Intoxilyzer result must do so before trial. Because Gai had not, he had acquiesced in the veracity of the report and forfeited his right to challenge the breathalyzer results at trial. The Supreme Court holds it was error to require Gai to challenge the breathalyzer before trial, but finds additional evidence of Gai's behavior to support his conviction, and affirms.

Reasoning: Written reports from the Montana crime lab are admissible as exceptions to the hearsay rule as long as the state notifies the court and parties that it intends to offer the reports, and does so with sufficient time to allow the defendant to depose or subpoena the persons who compiled the report. M.R. Evid. 803(6). This rule does not result in the forfeiture of the defendant's right to challenge the reports at trial if he does not do so before trial; it is a rule of admissibility. Once evidence is admitted, the opposing party is free to challenge the weight or credibility of the evidence. Rule 803(6) allowed the state to introduce the breathalyzer results, and Rule 104 allows the defendant to challenge them. The Court looks to the record to determine whether there was sufficient evidence for the Justice Court to find Gai guilty of DUI per se. The Court holds that Gai's observable conduct and his admissions to the officer are relevant to determining whether the breathalyzer result was accurate. Gai's breath smelled of alcohol, his eyes were glassy and bloodshot, and he admitted to the officer that he had been drinking.

***B Bar J Ranch, LLC v. Carlisle Wide Plank Floors, Inc.*, 2012 MT 246 (Oct. 30, 2012) (McGrath, C.J.) (5-0)**

Facts: B Bar J owns and operates a 680-acre ranch near Tarkio. It has an 18,000 square foot lodge with ten bedrooms, a full commercial kitchen, conference room, massage room, and saloon. Carlisle is a custom manufacturer of high-end wide-plank wood flooring. While building the lodge in 2005, B Bar J bought about 6,000 square feet of Carlisle flooring. After installation, about 2,000 square feet started buckling and had to be replaced.

Issue: (1) Whether Carlisle's expert was properly disclosed after the deadline; (2) whether Carlisle was properly awarded attorneys' fees under the MCPA.

Short Answer: (1) Yes; (2) yes.

Procedural Posture & Holding: B Bar J sued Carlisle in 2008, alleging negligent misrepresentation, breach of implied warranty, and violation of the Montana Unfair Trade Practices and Consumer Protection act, §§ 30-14-101 *et seq.,* MCA. Carlisle joined the general contractor and the subcontractor who installed the floor as third-party defendants. Two months after the expert witness disclosure, and after the discovery deadline, Carlisle moved to disclose a tax expert. The district court granted Carlisle's motion over B Bar J's objection. B Bar J settled with the general contractor and subcontractor, and proceeded to trial against Carlisle in March 2011.

One issue at trial was whether B Bar J is a "consumer" under the MCPA, which requires the lodge to be used primarily for personal, family, or household purposes. Carlisle's tax expert explained how B Bar J's tax records indicate it was used as a business asset and not a personal residence. The jury found for Carlisle on all of B Bar J's claims. Carlisle moved for attorneys' fees as the prevailing party under the MCPA, and the court granted its motion. B Bar J appeals, and the Supreme Court affirms.

Reasoning: (1) B Bar J argues Carlisle should have disclosed a tax expert before receiving B Bar J's tax records. The district court reasoned that Carlisle could not have known it needed a tax expert until after it received the records. B Bar J did not produce its tax returns until compelled to do so by the court, more than a month after the expert disclosure deadline. The lower court did not abuse its discretion by allowing Carlisle's tax expert after the deadline.

(2) MCPA allows an award of attorneys' fees to a party that successfully prosecutes or defends against an MCPA claim. A defendant may be awarded fee only upon a finding that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." ¶ 17. The lower court properly applied this standard. The Supreme Court declines to award attorneys' fees on appeal.

***Horn v. Bull River Country Store*, 2012 MT 245 (Oct. 30, 2012) (Baker, J.) (7-0)**

Facts: Horn sued Bull River, alleging he bought 42 gallons of water-contaminated diesel at the Bull River store in 2008. Horn used the fuel to fill the tanks of two heavy machines he owned, and the engines began to run poorly thereafter. Horn and his mechanic determined the problem was water in the diesel, and Horn called Bull River to complain. An employee told Horn the station had received multiple complaints. Bull River's owners told Horn to contact Bull River's insurer, Farmers.

Bull River shut down its diesel pumps and called its supplier, Moore Oil. They tested the tank and found a small amount of

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water in the bottom of the tank. Bull River claimed it was a normal result of condensation, and below the pump intake, but Moore Oil nonetheless pumped the water out and replaced the diesel.

Procedural Posture & Holding: Horn submitted a claim to Farmers for damages to both of his heavy machines. Farmers ultimately tendered $16,042 to Horn, but was unable to resolve Horn's remaining claims. Horn sued Bull River, claiming loss of use damages for both machines for a 1,320-day period. The parties stipulated that a reasonable rental rate for similar machines was $400/day. Horn sought damages of more than $1 million. The jury returned a verdict for Bull River, and Horn appeals. The Supreme Court affirms.

Reasoning: (1) Horn settled with three defendants, Moore Oil, Watts Trucking, and Jerry Amoruso. Bull River then sought leave to plead a settled-party defense under § 27-1-703, MCA. Horn moved in limine to preclude Bull River from raising the defense at trial, arguing it was unconstitutional on substantive due process grounds. The district court denied the motion. Amoruso appeared and defended at trial, as authorized by statute. The special verdict form, prepared by Horn's counsel and approved by Bull River's counsel, asked jurors whether Bull River was negligent. If yes, the jury was to determine whether Moore Oil or Watts Trucking was negligent. If no, the jury was to sign the verdict form and call the bailiff. The jury answered "no."

Because the jury found no negligence, there was no fault to be apportioned. The question of whether § 27-1-703 denied Horn due process is not properly before the court.

(2) Bull River contended Horn did not submit proper documentation of his claims to Farmers. Horn questioned a Farmers adjuster, who claimed no knowledge of Horn's prior claims because of a motion in limine prohibiting testimony about past litigation involving plaintiffs. Bull River argued that Horn opened the door through these questions, and cross-examined Horn about "a litany of insurance claims he had filed since 1997." Horn's counsel did not object. On appeal, Horn asserts he properly objected, and that the lower court erred in allowing questions about these unrelated claims. Because Horn acquiesced, he waived his objection.

(3) Horn contended Farmers acted as an agent of Bull River in its dilatory handling of Horn's claims. (The parties agreed to allow evidence of insurance.) Bull River argued to the jury that "Mr. Horn's beef is very clearly against the insurance company here," and said Horn had the right to bring a bad faith case. Horn argues this misled the jury, but fails to point to specific objections he made. He therefore waived the right to claim error on appeal.

(4) Horn submits two affidavits from jurors stating that a third juror brought information into the jury room by discussing her position as a gas station manager in Thompson Falls, and describing precautions taken to prevent water contamination. Horn claims this violated his right to a fair trial, especially in light of Woods' failure to disclose her employment on her jury questionnaire. Bull River contends the juror's statements were based on personal knowledge, and therefore permissible. Because there is no evidence the juror engaged in independent research, her statements were permissible internal influences. Omitting employment information from a juror questionnaire does not amount to misconduct, and Horn could have been alerted to the juror's employment based on her statements during *voir dire*.

***In re the Marriage of Wyrick*, 2012 MT 244 (Oct. 30, 2012) (Morris, J.) (5-0)**

Facts: Donald and Lora filed for dissolution in 1993. They entered into a separation agreement requiring Donald to pay $150/month in child support for each of their three minor children, and maintenance of $150/month. Lora moved to Minnesota in 1994, and applied for public assistance. She assigned her rights under the separation agreement to the Minnesota CSED, which asked Montana CSED to collect child support from Donald. Montana CSED mistakenly assumed the separation agreement was a court order, and commenced enforcement. It added a fourth child born to the parties and set Donald's child support obligation at $156 each for the four minor children, for a total monthly obligation of $624. Montana CSED eventually suspended Donald's driver's license for failure to pay.

The district court entered a final dissolution decree in 1999. It found Donald's support obligations unconscionable in light of his $12,000 annual income, and reduced the child support to $50/month/child. Montana CSED realized its earlier error, and restored Donald's driver's license. It moved to intervene and was joined as a party in 2000. It moved to approve the 1993 separation agreement and the accompanying child support obligations. The district court granted CSED's motion in 2001, concluding Donald owed $22,542 in unpaid child support.

In 2006, Donald discovered a largely intact T-Rex dinosaur fossil on his property, and sold it for a substantial sum. He received $25,000 a month until 2008.

In 2007, the parties filed a stipulated amended child support agreement stating that one child would reside primarily with Donald, that Donald had paid $19,150 in back support since September 2006, and that he would pay $21,116 for Sept. 2006-Sept. 2007. He also agreed to pay Lora monthly child support of $2,273 beginning June 1, 2007 until modified by the court. The agreement did not state that the support obligation would change upon cessation of his fossil payments in 2008, although Donald thought that it did.

In October 2008, Donald signed an affidavit in support of his motion to modify child support, but his lawyer did not file the motion until April 2009. Montana CSED suspended Donald's commercial driver's license in July 2009.

Procedural Posture & Holding: The lower court determined it could modify Donald's child support obligations only for the period after he filed his motion in April 2009. The court did not hold a hearing until December 2010, and did not enter an order until October 2011. It adjusted Donald's child support to $155/month. It initially determined Donald's past overpayments would cover all future child support payments, retroactive to May 2009, based on Lora's social security benefits, but determined it could not modify Donald's obligations from June 2008 to April 2009, which CSED determined to be $9,631.28. The district court ordered Donald to pay this amount, plus $$155/child per month until the youngest child graduates from high school. Donald appeals. The Supreme Court remands for additional findings.

Reasoning: The Court affirms the district court's holding that it could not modify Donald's child support obligations before the date he filed his motion to modify. While the Court acknowledges

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that the district court "struggled to resolve a hopelessly convoluted child support arrangement that festered for nearly 20 years," it finds the lower court's 2011 orders are irreconcilable and require remand.

***Chipman v. Northwest Healthcare Corp.*, 2012 MT 242 (Oct. 30, 2012) (7-0) (Cotter, J.)**

> **Issue**: (1) Whether the district court properly determined that plaintiffs have standing because the juridically linked defendants were operating under a common scheme; (2) whether the lower court properly certified the class under M.R. Civ. P. 23(a) and (b).
>
> **Short Answer:** (1) Yes; (2) yes.

Facts: Appellants own and administer a hospital and other health-care business in northwest Montana. NWHC is the umbrella parent corporation, and the remaining defendants are wholly owned subsidiaries of NWHC. Plaintiffs are employees of Appellants. At various times between 2002-2007, Appellants implemented a benefit buy-back program that allowed eligible employees to accrue unused paid leave to accommodate long-term illness, injury, or approved Family and Medical Leave Act time. Leave could be accumulated. Permanent full- and part-time employees were eligible for the program after six months of employment. Employees who worked 25 or more years could cash out their accumulated hours upon retirement or severance. They could accrue up to 866 hours, which would be bought back at the employees' rate of pay at the time of buyout.

In 2008, Kalispell Regional Medical Center's auditors told it to begin accounting for the future payouts on its books. In response, KRMC eliminated the buy-back program for all employees except those who had already reached 25 years of employment. Three KRMC employees filed suit alleging breach of contract and violation of the Montana Wage Protection Act, and seeking class certification. None of the named employees had worked for 25 years at the time the suit was filed, although two have since reached that mark.

Procedural Posture & Holding: The district court granted Plaintiffs' motion for class certification. Employers appeal, and challenge Plaintiffs' standing. After oral argument, the Supreme Court affirms.

Reasoning: Employers argue that the case does not present a justiciable controversy. Applying the three-part test for justiciability from *Powder River County v. State*, 2002 MT 259, the lower court held there was a genuine dispute, that judgment would have real impact on the parties' rights, status, or legal relationships, and that the court's decision would have the effect of a final judgment. The Supreme Court affirms on all three prongs.

Employers also argue that the employees don't have standing because they have not suffered an injury in fact, and because they lack standing to sue non-KRMC employers. Standing asks whether the plaintiff is the proper party to seek adjudication of a particular issue. Employers argue it is impossible to determine which employees will reach the 25-year mark and carry a balance of buy-back hours at retirement. Because eligibility and entitlement hinge on unknown future events, employers contend employees have not suffered an injury in fact. Employees argue that the benefit vested when the policy was instituted, and that employees continue to work for employers. Employees argue that reaching 25 years only affects the time of performance and the amount of the buyout, and is not a condition precedent to the vesting of the benefit. A plaintiff has standing to bring a claim for a threatened injury. The Court holds that employees are entitled to declaratory judgment regarding their rights, status, and employment relationship under the employers' manual and handbook.

Employers also argue that claims against all employers other than KRMC should be dismissed, as all of the named plaintiffs work for KRMC and have no relationship with other employers. Employees argue that the employers are "juridically linked," and have injured class members through a concerted scheme. A juridical relationship connects all defendants in a way that makes single resolution of a dispute preferable to a multiplicity of similar actions. Looking to federal law, the Court holds that the injuries alleged by the class members were the result of a concerted scheme, and a juridical link exists among the employers, all of whom are owned and controlled by a common parent corporation, NWHC.

The district court did not abuse its discretion in certifying the class. Employers do not dispute numerosity, or adequacy of class counsel's representation. The Court applies *Wal-Mart Stories, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), to affirm that the questions of fact and law raised by employees satisfy the commonality requirement. It finds that employees have met the typicality requirement by establishing that the interests of the named plaintiffs are aligned with the interests of the class members. Finally, the Court finds that the district court did not abuse its discretion in certifying the class under Rule 23(b)(1).

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

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"Be patient, be flexible, and let go of what you cannot control."

For primary caregivers, planning only goes as far as emotions and the unexpected allow

By Anne Yates

Like many of us, I am the primary caregiver to my aging parent. My mother was diagnosed with dementia almost six years ago. As of the diagnosis, she was forgetful, but still fairly competent. She was living in the same house in North Carolina she had been in for 40-plus years. While I had a sister in North Carolina, she was not capable of being the primary person to oversee my mother's care. At the time I assumed my mother's care, I had only limited exposure to elder care. My mother now lives in an assisted living group home for women with memory disorders. It was a long and at times tumultuous journey from diagnosis to where we are today.

Plan as much as you can, but realize it will not be enough

Attorneys plan. It is what we do best. While planning will make it easier, realize that you are dealing with people, relationships and emotions, which don't always fit into a schedule or predictable path. Be patient, be flexible, and let go of what you cannot control.

Get your legal documents in order. This includes any estate planning documents such as a will, trust, and powers of attorney prepared for both business and health care purposes, including access to HIPPA information. Additional requirements may apply. For example, in North Carolina the document can be executed but it is not effective until it is recorded with the clerk and recorder's office. Have the discussion with your parent about a living will. As a caregiver, the power of attorney (POA) will ultimately become almost like an appendage – you will almost always have a copy with you. These documents are best drawn up with your parent by an attorney outside the family. No matter who you are, there will always be a question about who drew up the papers and gave mom or dad legal advice.

Know where the money is and how to get into the checking account. It may be a difficult subject to broach with your parent, but you should at least have some limited access to the accounts. You can monitor expenditures, make sure bills are getting paid, and in general look for anything out of the ordinary. Routine incoming checks like Social Security and Medicare reimbursements should be direct deposit. Eventually, you will likely need to be the payee for your parent's Social Security account so that you get communications concerning Social Security and Medicare.

Be sure you know where any investments or financial holdings are located. This sounds simple, but it may not be. Have a discussion about this before your parent's memory starts to fade. Again, you will also need authority to access these accounts so you can monitor activity and get funds into the checking account to pay bills.

Use Online Bill Pay or Drafts from Checking. My mother began to misplace and not pay bills due to memory issues. I had most of the routine bills drafted directly from checking, which I could monitor online. These included credit card, electricity, telephone, and insurance. Some charges were billed directly to the credit card, like physician bills. Some bills should not be drafted directly from checking because you will want to see each them month. For example, I had issues with the local propane company that continued to fill my mother's tank month after month at the spot price, before the billing caught up to me. Be sure to watch for predatory activity involving your elderly parent.

Make sure that state and local property taxes are paid, which can generally be checked online. Make sure federal income taxes get paid as well. Because these are not paid more than once or twice a year, they are easy bills to miss with significant consequences to families.

Also, have your parent call the phone company, utility companies, and all other regular household bills, and give those companies permission to talk to you about the accounts. It can be difficult to cancel or modify service without your parent's permission regardless of your legal authority.

Check and Update Insurance. We tend to think that Medicare has everything covered. It doesn't. My mother also

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has Medicare supplemental insurance and a drug prescription plan. The supplemental insurance is optional, but has paid for itself. A Medicare prescription plan is usually required, but is well worth the costs. Her out-of-pocket drug costs while she was in the Medicare gap, also known as the "donut hole," where the drug plan does not cover costs for prescription drugs went down after the passage of the Affordable Care Act, as it did for most seniors. For my mother, the gap runs from about July through the end of the year. This may require families whose parents are on limited income to plan and budget if the elderly parent is not eligible for any prescription drug subsidies.

In hindsight, I wish I had helped my mother obtain long-term care insurance before her decline. It is a sensitive subject to discuss with your parent. My mother generally did not want to discuss anything related to her leaving her home or recognizing the need for home care. However, it is critical that families realize that custodial care, with no skilled nursing or rehabilitation, *is not* covered by Medicare and an aging parent and her family have to find a way to cover those costs. Long-term care insurance can help cover those costs at least for a few years, depending on the plan.

Plan to Cover Costs. The cost of care was probably the biggest shock. Again, custodial care -- day to day assistance with activities of daily living -- is not covered by Medicare. Skilled nursing care in a facility and limited home care for rehabilitation can be covered by Medicare for a short period of time. My mother's out-of-pocket costs ranged from $500-$900/month for home health care. My mother's Medicare supplemental insurance is about $230/month. The Medicare Part D prescription drug plan is about $65/month. Assisted living facilities can cost between $3,000 and $5,000 (or more) per month, depending on the facility and level of care. Nursing home care, depending on the location of the facility, can cost from $200 to $300 a day or $6000 to $9000 a month, some of which may be covered by Medicare.

My mother's care began with home health care. Someone came by the house everyday to check on her and give her medication. When her short-term memory declined, she could not remember to take her medication or whether she had taken it. When she didn't take her medication, her mental state became altered. When she became altered, she didn't eat and drink. She then became dehydrated and her mental state declined further.

The level of home health care increased as she mentally declined. Even with medications, she began to forget to eat and drink. I increased the services from home health care because she would forget to eat and drink when she was not reminded. The women who took care of my mother helped her eat and drink, and took her for outings. Still, she declined. She is now in a small assisted living group home for women with memory disorders. She is cared for by the same women who took such good care of her at home.

Plan the Next Step Now. Investigate senior resources in your community, because some facilities have waiting lists. Senior care facilities can include: communities that provide independent living through skilled nursing often referred to as continuing care retirement communities or CCRCs; communities with only independent living; communities with independent living through assisted living; assisted living facilities; rehabilitation facilities; facilities specializing in memory disorders; and skilled nursing facilities. Some facilities have waiting lists that can be years long. Most waiting lists require a deposit, and depending on the type of facility, the deposit can be substantial. I had my mother on two waiting lists, one in North Carolina and one in Montana. The waiting list in North Carolina had a substantial deposit, refunded when she did not ultimately move into the facility. The community in Montana had a modest deposit, also refunded. Although I encouraged her for three years to move into either community for safety and health reasons, she ultimately refused. Her health declined past the stage of admission of one community and beyond the care services of the other community for which she was on waiting lists. Because of the memory issues, she ultimately needed a secure facility where her care is monitored 24/7 and she cannot wander off.

Investigate potential facilities and build relationships with those facilities because events often happen in crisis when you need to find resources within days. My mother was ultimately taken from her home by the rescue squad to the local hospital. Her health rebounded in the hospital, but we were told that she could not return home to live by herself. Fortunately, we were already planning to take her for a "stay" at the assisted living group home owned by the same person who provided the in-home health care. Had we not had this arrangement already planned, we would have had three days to find a care facility.

Events Tend to Happen in a Crisis. Prepare for unexpected absences from work and home to provide care for your parent. Be aware of your rights under federal and state family medical leave laws. Inform a partner or supervisor of your situation. Keep organized files and keep someone informed of your caseload and responsibilities. Do the same with your immediate family and any community or volunteer responsibilities you may have. There are times when you get a call and must leave immediately. If your parent is out-of-state, keep a frequent-flier ticket on hand. While there is a bereavement fare there isn't generally a medical emergency fare.

Keep Records. Keep records of actions taken on behalf of your parent. This includes interactions with caregivers, interactions with siblings regarding care, business transactions, bills, and interactions with anyone related to your parent's finances. It can be as little as notations in a day planner or a folder of emails and texts. Someone will always question the actions of the person in charge of care and the finances.

Spend Time with Your Parent Now. Spend time with your parents now while their health is good. Ask about the stories of their childhood, their parents, their grandparents, etc. Ask about the people in the pictures and the keepsakes buried in the old chest of drawers. My mother left her house of forty years with the rescue squad, never to return. When it was time to sell her home, I was the primary family member who went through the house to decide what to keep, donate, or sell. I didn't have time to linger over items or pictures, nor did I know the full stories behind them. I know that things of sentimental value and family history were lost as a result.

Let Go of What You Cannot Control. Your parents are adults entitled to make their own decisions until their health declines to where they cannot. The line is not always clear. While

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you, especially as an attorney, can see the crisis coming, it may not be yours to control. Your parent is entitled to make decisions even where you strenuously disagree with those decisions. For me, it was my mother's decision to remain in the home even as her health declined. It may sound odd, but it was a relief to us when she entered the hospital and was told she could not go home; the decision was made for her and she had no choice.

Build relationships; prepare for the emotional

You Can't Do It by Yourself. Your care-giving depends on relationships with doctors, caregivers, neighbors, and family. My mother's long-time neighbor, who was there when I was a kid, checked on my mother every day when she was in her house. This relationship and the home health care were the only reasons she was able to stay in her home as long as she did. I have a measure of solace now only because I have a great relationship with her caregiver in the assisted living home. I know that she is safe and well cared for by people who genuinely care about her.

Keep Family Members Informed. The lack of information on care-giving or management of finances for a parent can create conflict where there should be none. Knowledge is power and if family feels like they are in the loop it can head off a lot of misunderstandings. You have to keep in mind whatever family dynamics may have been in play growing up will re-emerge when everyone is under stress. Remember, however, that if you are the designated family member in charge, you were designated for good reason, and be vigilant. Remember also the old adage: *count to ten then speak or send the text or email*.

It is Stressful. No matter how you cut it, taking care of a parent is stressful. A role reversal of parent and child evolves over time. To a certain extent you lose the person you looked to for guidance and now become a parent figure guiding care of your more child-like parent. At times, it can be like dealing with a parent, a teenager, and a child. Don't forget your parent is wrestling with diminished independence, mobility, mental acuity, and living arrangements. Be patient and recognize which decisions are yours and which still belong to your parent. It is a scary time for your parent and they need reassurance you will take care of them.

It isn't a Sprint. Care-giving may be a long-term situation. As attorneys, we tend to be deadline-oriented. In this case, there is no defined deadline. You will need your own support structure at home to help you fulfill your obligations. You will go through a range of emotions. You will have competing demands on your time from care-giving, your immediate family, and work. You will miss basketball and soccer games, family gatherings, work and career opportunities, and volunteer opportunities. You will likely always feel that you need to spend more time with your parent. You can't be everything to everyone. A compromised caregiver doesn't help your parent. Find a balance and try to let go of the stress.

__Anne Yates__ is deputy chief counsel for water for the Montana Department of Natural Resources and Conservation

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A case for the jury trial

Diverging trend leading to higher costs, fewer trials

We former bar presidents have been asked to return to the pages of the Montana Lawyer to impart the wisdom we've gleaned from our years of practice. Not having a reserve of wisdom to draw from, I will write on a topic I know something about-- jury trials.

Each year on the day before the Griz Cat football game, the Montana Chapter of The American Board of Trial Advocates (ABOTA) meets in either Bozeman or Missoula — wherever game is being held. ABOTA is dedicated to the promotion and preservation of the jury trial which we see as an essential component of American jurisprudence. ABOTA is dedicated to the proposition that jury trials have a value in and of themselves. Jury trials keep our justice system grounded in strong, democratic roots. Jury trials have long been a check on the power of government. For those of us in the business, jury trials give us the foundation we need to evaluate our cases. The ultimate question we try to answer for clients in the civil justice system is what a jury would do.

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Our membership is getting older, greyer and fewer. Attorneys that have tried at least 25 civil jury trials first chair are few and far between. The last few meetings of ABOTA make me think the members are a dying breed — it is very difficult to qualify for membership because of the lack of jury trials, particularly in our state courts. When we discuss the issue, all of us nod gravely when we think how difficult it is to build experience in the newer attorneys.

When we start to discuss ways to counter the trend, however, the solutions do not jump out at us. It seems self evident that trials are more expensive than ever before and some cases take years to get to trial. That begs the question why. The most recent trial I was involved with was a fairly straight forward auto accident, but the defense cost over $80,000. We all have horror stories where cases have lingered for years, even a decade, waiting for a trial. There are many factors that contribute to the increased cost of trials today. Discovery is more extensive than it was when we were pups. Rarely do we examine a witness at trial who has not been deposed. Discovery fights can consume tremendous fees and raise the hackles of both sides. Motion practice has become far more common. In negligence cases, dispositive motions, it seems, are often filed and rarely successful. Every case seems to have a cadre of experts on each issue. We usually try cases with at least two attorneys and a paralegal. Finally, mediation sessions require much attention, personal attendance by the parties, and delay trial settings.

The length of time from filing to trial is perhaps the biggest contributor to the trend away from jury trials. Personal injury plaintiffs need swifter justice, but courts and lawyers seem perfectly content to allow cases, particularly in state court, to linger for years. If our state courts pushed us like the Federal courts do, the delay would be reduced significantly. That delay gives us time to overdo discovery, file useless motions, retain unnecessary experts and in the most egregious of cases, churn the files.

We cannot look to the courts alone to solve this problem. The practicing bar must take an active role in reducing the cost and delay of resolution of cases. Courts can assist significantly by setting cases for trial early in the process and holding trial counsel to those dates. Some of the departments and districts in Montana are keeping up quite well, but others are woefully behind. There is no data collection system for reporting that information to the public, but there should be. If we don't solve this problem ourselves, someone will do it for us (or to us). What we don't need is for the Legislature or, more dreadful the press, to become involved in this issue. While both of them could bring needed attention to the issue of cost and delay, the effect could be much more destructive. The Legislature has no business involving itself in the business of a separate branch of government (we should never allow ourselves to be referred to as the "third" branch of government). In those states where the press has tried to evaluate and report on inefficiencies in the courts, the result has been the loss of good, effective jurists.

Those of us in the private practice of law and in the administration of justice have all heard this before. That is no argument for not keeping the issue at the forefront.

__Robert J. Phillips,__ Phillips Haffey P.C., served as bar president in 1994-1995.

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