MONTANA LAWYER
State Bar of Montana
December 2013 | Vol. 39, No. 3

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MONTANA LAWYER

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E-mail: pnowakowski@montanabar.org

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

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Registration: Damages and Evidence
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MONTANA TRIAL LAWYERS ASSOCIATION

Think of some little things that can bring a smile this Christmas season

This season, our offices (I hope) are decorated and you have some large or small plan for celebration. As we hang lights, wrap presents, plan parties and dig out the red vest, I pray your festivities help you set aside the hard or stressful work for a time. I love the season and can't wait to wear red ties, green vests and sing carols.

The first Christmas in Bethlehem was a far different story. So too are some from more recent history. Thought I'd share a few:

Charles M. Russell, our Montana-Western Artist, wrote annual Christmas messages to friends, usually accompanied by a drawing. Here's his most popular:

Best wishes for your Christmas
Is all you get from me
'Cause I ain't no Santa Claus
Don't own no Christmas tree.
But if wishes was health and money
I'd fill your buck-skin poke
Your doctor would go hungry
An' you never would be broke.

Lewis and Clark were each steeped in Virginia tradition. They celebrated three Christmases along the trail — more for food, drink, frolic, than expressions of religious feeling. Here's what some of the Corp recorded:

Christmas 1803

[Clark] Christmas 25th Decr: I was wakened by a Christmas discharge found that Some of the party had got Drunk . . . the men frolicked and hunted all day.

Clark further reported that three Indians came to camp to "take Christmas with us." He gave them a bottle of whiskey for a present, and they all sat around talking politics.

Not so different today.

Christmas 1804

At Fort Mandan in present-day North Dakota, on Christmas eve, the captains issued flour, dried apples, and pepper "to enable them to celebrate Christmas in a proper and social manner," as Sergeant Gass put it. (You have to wonder if they tried to make apple pie.) Having finished their fortification the day before, the captains gave the men the day off for merrymaking. They even requested that the Indians stay away from the fort that day, as Christmas "was a Great medician day with us" and they wanted the men to be able to relax. (Clark wrote): I was awakened before Day by a discharge of 3 platoons from the Party and the french, the men merrily Disposed, I give them all a little Taffia and permited 3 Cannon fired, at raising Our flag, Some men went out to hunt & the Others to Danceing and Continued untill 9 oClock P, M, when the frolick ended &c.
The men went to bed happy, full of food and drink, and "all in peace & quietness.

Christmas 1805

[Journal of Sgt Whitehouse] Wednesday Decemr. 25th . . . We saluted our officers, by each of our party firing off his gun at day break in honor to the day (Christmass). Our Officers in return, presented to each of the party that used Tobacco a part of what Tobacco they had remaining; and to those who did not make use of it, they gave a handerchief or some other article, in remembrance of Christmass. . . . A blessing, which we esteem more, than all the luxuries this life can afford, and the party are all thankful to the Supreme Being, for his goodness towards us.— hoping he will preserve us in the same, & enable us to return to the United States again in safety.

In Great Falls, in the 1960's and 70's, the employees at Smelter Hill would light up all the giant evergreens for the city. They were visible miles away and reflected over the Missouri River. My parents drove us through the roads every Christmas season, enjoying the thousands of lights amidst the snow covered company houses.

Ideas for you and your staff

Maybe instead of the big party this year, consider a gift of your time and spirit. Here's a few ideas.

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Left: Salmon Lake sunrise. **Right:** A changing of the guard at the 20th Judicial District.

Notes from the trail

Dear Friends; the trail doesn't slow up for fall or winter. Here's the journal of the latest ride:

Professionalism Committee

I caught up to this lively group met in Helena November 13. They're so spirited they can barely keep focused, for all of the creative ideas they serve up. They're working on the new format for New Lawyer's Workshop, the next Road Show and topics for the 2014 annual meeting. Those were approved and the annual meeting planning continues. Thanks to Peggy and her committee for some real fine work. While driving down the Swan, we caught the morning sunrise over Salmon Lake. Nothing beats a Montana sunrise. Wish'd I'd had a boat & fishing pole!

Polson Judges & 50 Year Pin

The 20th District saw a changing of the guard this fall. We congratulate the Hon. C.B. McNeil on a well-served career and we welcome Hon. James Manley as his successor. Congratulations also to Keith McCurdy for 50 years of service to his community.

Annual Meeting Planning

We're back in Bozeman November 21 with the planning group. We welcomed a few new members, firmed up some sub-groups and gave approval to a preliminary brochure. Lots of great ideas here, including an early-day schedule allowing

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1. Announce an afternoon off. Give your staff an "office credit" to use at a local business for $25.00. They give you the receipt and you cover the cost.

2. Make a reservation at their favorite restaurant – just for them. Send some flowers they can take home.

3. Visit a local extended care facility (our revised term for nursing home). Cut some evergreen boughs (every forest has them in abundance) and take some with you. They smell great and a little red ribbon make a pretty easy gift. The nursing staff will help you distribute them.

4. Go Christmas Caroling at least once. Great for the soul.

5. Sleep in day. Pick a couple days, maybe alternate with staff – let them come in at 10, but pay them a full day.

6. Ask staff the charity they'd select for Christmas – make a donation in their name.

7. Volunteer a day at the local Food Bank, women's shelter, senior center or the like. Take a stack of Christmas cards. Write and give them out.

8. Make candles or Christmas wreaths at the office to give to others.

Try one. Try several. Should put a smile on your face and make you feel better for sharing something that cost you near nothing. Call me or drop a note – What'd you do this season for celebration? It doesn't have to be meaningful or significant. Just giving a little gift of yourself makes such a difference & it'll put a smile on your face. Guaranteed. Merry Christmas from the Bar officers and staff to you and yours this season.

Randy Snyder
Yer Chief Deputy
837-4383
rsnyder@rsnyderlaw.us

Wolfe joins Matrium Law Group


Wolfe

Matrium Law Group is pleased to announce that Michael T. Wolfe has joined the firm as Of Counsel. Michael graduated with Honors from the University of Montana School of Law in 2009. He clerked for Justice Brian Morris of the Montana Supreme Court in 2009-2010. Michael then worked as an Assistant U.S. Attorney in the U.S. Attorney's Office in Helena, Montana, from 2010-2012. There he served as a criminal prosecutor for the U.S. Department of Justice prosecuting major drug crimes and violent crimes. Michael stepped away from the full-time practice of law to pursue his passion as a professional ultra runner. He now divides his time between running the mountains of the world and working at Matrium Law Group where he specializes in special needs trusts, estate planning, and family law. Michael can be contacted at: Matrium Law Group, 317 East Spruce Street, Missoula, MT 59802; website: www.matriumlaw.com; phone: (406) 579-6804; email: mike@matriumlaw.com.

James Brown Law Office celebrates first year

The James Brown Law Office, PLLC, recently celebrated the anniversary of its first year in business. Founded by attorney James Brown of Dillon, the James Brown Law Office provides quality, affordable legal representation in the areas of government relations, land use, natural resources, real estate, trusts and estates, and water rights. Jim also specializes in association creation, management and lobbying.

Jim Brown holds an LLM in Taxation from the University of Washington and has worked as a judicial clerk for the Washington State Supreme Court, a legislative assistant in Washington, D.C. for several U.S. Senators, and as an associate and senior attorney for Doney Crowley Payne Bloomquist, P.C., before starting his own practice in the fall of 2012.

As a fourth-generation Montanan, Jim is passionate about protecting and preserving the freedoms of Montana's agriculture and sportsmen industries, as well as the constitutional and legal rights of every Montanan. Along with his assistant, Laura Welker, Jim is looking forward to many more years of providing excellent service to Montanans needing legal assistance.

Jim can be contacted at The James Brown Law Office, PLLC, 30 S. Ewing St., Ste. 100, Helena, MT 59601.
Phone: (406) 449-7444; Fax: (406) 443-2478;
Email: thunderdomelaw@gmail.com.

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afternoon recreation, a group rate and special paralegal registration. Stay tuned!

Judicial Relations Committee

Staying in Bozeman an extra day, I caught up to the Judicial Relations Committee November 22. Another busy group, planning the upcoming Bench-Bar CLE on April 10 (a Thursday) in Missoula. We also discussed pro se litigation and "Bench Guides" similar to Wyoming's summaries of judge preferences.

Time out

Son Tristan and I stayed in Bozeman over the weekend, sampling some new craft brew and barbeque. Cat-Griz and State AA Football made for a crowded town, but lots of well-wishers. Congrats to all the teams for great games and to the Griz for their victory. And hey, did you see all the food and funds donated to the Food Banks in their contest? Over 150,000 pounds of food and over $100,000.00 donated! Thank the teams and colleges for their dedication.

Tristan and I then hit the Bridgers, a short drive toward Livingston to chase some elk. The elk won this year, but dog-gone you Gallatin folk have some pretty territory. Thanks Bozeman for the hospitality.

State Bar at the Law School: "New Lawyer's Perspective"

The chuck wagon and crew returned to school November 25 for a lunch meeting with UM Law students. These monthly meetings offer students a taste of life in the saddle from practicing attorneys. This month, members from the New Lawyer's Section shared their thoughts about transitioning from school to practice. The students asked many questions from billables, to life balance to just enjoying the practice of law. We followed this with planning the next sessions in February, March and April on clerkships, nontraditional forms of practice and pro bono service. Hard to believe it's been so dang long since we sat in those chairs worrying about our first job.

By the time this hits the press, we'll likely know the new Dean and the new property law professor. Welcome to Montana!

The Honor to Serve

In all my travels, in every committee and at every door, you are kind and generous, eager to share and the coffee's always on. Thank you my friends. You make this job an exciting pleasure. Wear some red and green this season, sing a carol or two and celebrate Christmas with your friends, staff and family. Leave the light on and I'll try to knock on your door next.

Respectfully Submitted,

Randall A. Snyder
Your chief deputy

May the road rise up to meet you.
May the wind be always at your back.
May the sun shine warm upon your face;
the rains fall soft upon your fields and until we meet again,
may God hold you in the palm of His hand.

— Traditional Gaelic blessing

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Munro, Georger and Arant join Garlington, Lohn & Robinson


Munro

Garlington, Lohn & Robinson, PLLP is pleased to announce the addition of three attorneys. Mark Munro joins the firm as a partner in our business and tax practice. Mark, a Missoula native, received his Bachelor of Arts degree in English from Willamette University and J.D. from New York University School of Law. In addition, he also earned his L.L.M in Taxation from NYU. Prior to joining GLR, Mark was a partner and chair of the tax department at Foster Pepper in Seattle. Mark advises on tax, business, estate planning and real estate transactional matters. In addition to his work for Montana based clients, Mark currently serves as outside tax counsel to several law firms in Seattle and Portland. Mark may be reached at msmunro@garlington.com.


Georger

Katherine Georger joins the firm as an associate in our healthcare practice. Katherine received her Bachelor of Arts degree in Political Science from the University of Montana and her J.D. from Gonzaga University School of Law. Prior to joining GLR, Katherine spent four years in the health law department with Holland & Hart in Boise, ID. Katherine assists clients with a broad range of healthcare transactions advising them on state and federal laws and regulations. She's also active in advising clients on the impacts of federal healthcare reform under the Affordable Care Act. Katherine may be reached at klgeorger@garlington.com.


Arant

Peter Arant joins the firm as an associate in our commercial litigation and real estate practice. Peter received his Bachelor and Master of Arts degrees in Spanish from the University of Tennessee in Knoxville and his J.D. from the University of Montana School of Law. Prior to joining GLR, Peter spent two years with a law firm in Chattanooga, TN. Before turning his attention to law, Peter taught Spanish and Brazilian Portuguese at the University of Tennessee. Peter may be reached at pjarant@garlington.com.

Garlington, Lohn & Robinson, PLLP, 350 Ryman Street, Missoula MT 59802. Phone: 406.523.2500
Web: www.garlington.com.

Crowley Fleck welcomes Christiansen, Frick, Jackson, Marquis, Royer, Kuchel

Ashley Christiansen is an Associate in the firm's Kalispell office. Ms. Christiansen graduated from the University of Nebraska College of Law in 2012. Ms. Christiansen received her undergraduate degree in Psychology with High Distinction from the University of Nebraska-Lincoln in 2008. While in law school, Ms. Christiansen spent a summer studying international business law at the Beijing Foreign Studies University in Beijing, China. Prior to moving to Montana and joining the firm, Ms. Christiansen was a contract attorney for Fraser Stryker PC LLO in Omaha, Nebraska.

Joe Frick is an associate in the firm's Billings office. Mr. Frick's Practice will encompass multiples areas of energy and natural resources law, including mining, oil & gas, title examination and administrative appeals. Mr. Frick grew up on a farm in Southeast Kansas. After high school, he enlisted in the United States Air Force as an Aircraft Electrician. After his military duty, Mr. Frick attended Washburn University School of Law and graduated with Dean's Honors.

Ashley Jackson is an associate in the firm's Energy, Environmental and Natural Resources Department. Her practice primarily focuses on oil and gas law and title examinations. Mrs. Jackson graduated with Dean's Honors from Washburn University School of Law in 2013. Mrs. Jackson received both a Bachelor of Science degree in Accounting in 2008 and a Master of Accountancy degree in 2009 from Kansas State University.

Victoria (Vicki) Marquis is an associate in the firm's Billings Litigation Department. Vicki earned a B.A. in Chemistry from Gonzaga University in 1992. She has worked as a chemist in a variety of laboratories, as an enforcement specialist for the Montana Department of Environmental Quality, and as the Coordinator for the Missouri River Conservation Districts Council. Vicki received her Juris Doctor with honors from the University of Montana School of Law in 2013.

Emily Royer is an associate in the firm's Billings office. Ms. Royer graduated from the University of Montana School of Law in May 2013. She received her undergraduate degree in Business Finance from Montana State University in 2008. She is a member of Leadership Billings through the Chamber of Commerce. Ms. Royer's practice will primarily focus on commercial transactions and banking law.

Jeffrey Kuchel is an associate in the Missoula Litigation Department. His practice focuses on all types of litigation, including commercial, civil, and energy and mineral litigation. Jeff graduated with honors from the University of Montana School of Law in 2013. He received a Bachelor of Science degree in Interdisciplinary Studies with an emphasis in Public Management from Northern Arizona University in 2009. While in law school, Jeff served as an Editor-in-Chief of the Montana Law Review. Additionally, he performed his clinical internship with the Missoula County Attorney's Office where he prosecuted misdemeanor criminal offenses.

Comments sought on Federal Rules of Bankruptcy and Civil Procedure; deadline is February 15, 2014

The Judicial Conference Advisory Committees on Bankruptcy and Civil Rules have proposed amendments to their respective rules and forms, and requested that the proposals be circulated to the bench, bar, and public for comment. The public comment period ends February 15, 2014.

Comment and read the proposals at www.uscourts.gov/rulesandpolicies/rules.aspx/

Court changes CLE Rules for ethics

Recent changes to the Montana Supreme Court Rules for Continuing Legal Education will require that Montana attorneys earn a minimum of two ethics credits each year, beginning with the current reporting cycle that ends March 31, 2014. The amendment replaces the previous requirement of five ethics credits every three years. In addition, the requirement for substance abuse/mental impairment, or SAMI, education has been eliminated. While SAMI credits will no longer be mandatory they will continue to qualify as ethics credits in fulfillment of the yearly requirement.

The amendments came about in response to the confusion surrounding the tracking of ethics credits over staggered three-year reporting cycles. All active Montana attorneys will begin the 2013-2014 reporting year with a clean slate in terms of ethics credits. No ethics credits may be carried over from the previous year. Any ethics credits earned prior to this year were applied to the attorney's previous 3-year ethics cycle.

Ethics credits may be earned from live programs or by self-study methods. Beginning with the 2014-2015 reporting year, excess ethics credits earned from live or "interactive" methods may be carried forward to the next two reporting years. Excess ethics credits earned by self-study methods such as on-demand internet programs or audio or video recordings may not be carried forward.

Other changes to the CLE rules will eliminate the use of the notarized affidavit form to determine individual CLE compliance. Year-round reporting of CLE attendance will establish an up-to-date electronic record of each attorney's CLE compliance which will be verified at the end of each reporting cycle.

3 Easy Steps to CLE Compliance

1. Always obtain an attendance certificate when participating in CLE programs. These are issued by the program sponsor for both live and online programs.
2. Send copies of all certificates to the Montana Commission of CLE at: cle@montanabar.org.
3. Remember to include your State Bar of Montana member number to assure proper credit.

HEALTH CARE LAW SECTION

Put a face to the name | Join the Health Care Law Section members at the annual CLE & Ski in Big Sky on Friday, January 17, 2014, at 6:30 p.m. We are holding an informal gathering with State Bar President Randy Snyder. This is an excellent opportunity to meet other Health Care Law Section members and discuss common goals for the New Year. We cordially invite any Montana lawyer, regardless of whether you are in the Health Care Law Section, to join us and share ideas. Most importantly, you do not need to register for the CLE & Ski to attend. We hope to see you there!

If you're interested in joining the Health Care Law Section or have suggestions for additional health care law related topics that you want to see in the Montana Lawyer, please contact Erin MacLean at *emaclean@fandmpc.com*.

ATJC recommendations on pro bono requirements

From Nov. 26, 2013 report — AF 11-0765

In accordance with this Court's order of September 9, 2012, the Access to Justice Commission (ATJC) designated a committee to study a proposal to establish a requirement that applicants to the Montana bar must complete fifty hours of pro bono service within three years before they are admitted to the Bar. The Committee included representatives of the ATJC, a student and a member of the faculty of the University of Montana School of Law, members of the judiciary and court staff, legal staff of the Montana Legal Services Association, and representatives of the State Bar of Montana.

Over the course of the year, the Committee has gathered extensive information from other states that have adopted or have considered adopting a similar requirement; reviewed the curricula and clinical programs of the University of Montana and the pro bono service requirements of other law schools; researched current pro bono and self-help support efforts and programs operating in Montana; conducted a survey of law school students and faculty; and participated in discussions with the Commission on Character and Fitness, the Board of Bar Examiners, and the State Bar staff. The Committee also obtained and considered a white paper presented in October 2013 by the ABA Standing Committee on Pro Bono and Public Service regarding the potential pros and cons of New York's 50-hour preadmission pro bono rule.

After thorough analysis and numerous meetings , the Committee presented its recommendation to the ATJC at its November 25, 2013 meeting. Following discussion, the ATJC voted unanimously to approve the recommendations and to present them to the Court for an appropriate period of public comment and consideration at a public meeting of the Court. The recommendations are attached to this report and submitted herewith.

In summary, the ATJC has concluded that the paramount twin goals of serving Montanans' unmet legal needs and establishing in law school a culture of service that will endure throughout a lawyer's career will best be met by taking an approach different from that adopted in New York. The ATJC proposes an alternative approach that it believes will promote pro bono service by bar applicants, will bring emphasis to the professional responsibility each lawyer has to provide legal services to those unable to pay, and will help build, on a sustainable basis, a bridge from law school to law practice so that students begin with productive pro bono experiences and proper training before they are asked to do it on their own. The attached recommendation includes a reporting requirement, rather than a service requirement, coupled with a signature program at the University of Montana School of Law to be developed under the auspices of a standing committee of the ATJC working in partnership with the law school and others.

The experience of New York and other states convinces the ATJC that simply imposing a 50-hour requirement will not meet the objectives of the Court or best serve the administration of justice for several reasons, among which are the following.

Public comment period

Comments will be accepted for 90 days, starting Dec. 3, 2013. The order calling for comments wasn't published as of press time. Please direct comments to the Clerk of Supreme Court Office, or visit the Court's website for more info. The order and report will also be posted at *www.montanabar.org*.

First, implementation of New York's rule has resulted in a very broad definition of "pro bono service" that encompasses nearly all clinical and volunteer work of a law student, and even some paid work. Most Montana law students already would meet a 50-hour service requirement if the rule were adopted with similar definitions here, thereby accomplishing little while inadvertently diluting the definition of "pro bono publico" reflected in Rule 6.1 of the Rules of Professional Conduct.

Second, simply adopting the requirement without making sure that bar applicants have the education and opportunity to provide meaningful service could result in frustration among law students unable to find appropriate means by which to fulfill the requirement; could impose a new burden on the law school without making sure the school is prepared to meet it; and could tax the resources of existing legal services programs-especially those based in Missoula, where the law school is located-who already are experiencing funding shortfalls and may not be able to assume the additional administrative responsibility of supervising a host of law students. For law students to enter the practice of law with enthusiasm for pro bono service, they will need to have productive and positive experiences with the pro bono work they perform in law school.

Finally, it would ill-serve the public if students are inadequately prepared or mentored in their pro bono work, and failing to tailor the service to the goals of Rule 6.1 will not achieve the goal of delivering legal services to those who most need them. The ATJC also recognizes that persons not yet admitted to the bar cannot practice law, and that a system needs to be in place for those persons to perform meaningful law-related public service that will serve the objectives of the rule.

With these views in mind, the ATJC commends its working group for developing a recommendation tailored to the needs and opportunities that exist in Montana. The Commission submits the attached recommendation for the Court's consideration and approval.

FINAL RECOMMENDATIONS

The Access to Justice Commission of the Montana Supreme Court makes the following recommendations to the Court to achieve two specific goals: (1) to assist in creating a culture of volunteerism in future members of the Bar by providing students with opportunities to work with clients in a supervised pro bono setting, and (2) to serve the unmet legal needs of

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Montanans. Implementation of these recommendations should be done in a manner that furthers these goals.

Every lawyer has a professional responsibility to provide legal services to those unable to pay. The Commission recommends that the Court determine that this professional obligation begins in law school.

The Commission recommends that law students should be expected to render at least 50 hours of pro bono publico law-related services during their legal education, prior to applying for admission to the State Bar of Montana. This service should meet the spirit of Rule 6.1 of the Rules of Professional Conduct, with some accommodation to account for the fact that a law student is not licensed to practice law.

I. Law Student Pro Bono Publico.

In meeting the professional obligations of a student practitioner over the three-year term of law school, consistent with Rule 6.1, the student should:

(a) provide a substantial majority of the student's law-related services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide additional law-related services through:

(1) delivery of law-related services to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and education organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; or

(2) participation in activities for improving the law, the legal system or legal profession. For reporting purposes by student bar applicants, "law-related services" include:

(a) Direct legal services under supervision of a licensed attorney or legal services provider;

(b) Similar volunteer law-related services that do not constitute the practice of law, provided that such services are designed primarily to address the legal needs of persons of limited means. Examples of qualifying service include, but are not limited to, services as a volunteer for a self-help legal clinic, domestic violence program, Court Appointed Special Advocates (CASA) program, or providing community legal education; or

(c) Services provided to and under the direct supervision of a court-based program designed to facilitate the resolution of cases involving self-represented litigants of limited means.

II. Mandatory Reporting for Bar Applicants.

The Commission recommends that the Court adopt a rule requiring all applicants for admission to the Bar to submit reports of their pro bono publico law-related services. Reporting by law students should be available beginning in their first year of law school. All applicants for admission to the Bar should be required to submit a report of all pro bono services performed during the three-year period preceding their admission. The report will be required for bar applicants even if they have no hours to report. The reporting form should be developed by the State Bar in coordination with the Montana Board of Bar Examiners, the Supreme Court's Commission on Character and Fitness, and the Supreme Court's Pro Bono Coordinator.

III. Character and Fitness.

Reports of law student and bar applicant pro bono publico legal services will be referred to the Character and Fitness Commission for incorporation into the Character and Fitness review process for admission to the Montana State Bar. The Character and Fitness Commission would not be required to verify independently the information reported, but would have the discretion to make further inquiry based on the information submitted.

IV. Law School Signature Program.

The Supreme Court should direct the Access to Justice Commission to work in conjunction with the University of Montana School of Law, the Student Bar Association, the State Bar of Montana, the Supreme Court's Pro Bono Coordinator, and legal services providers to develop a signature program to pair Montana attorneys with law students to work on Rule 6.1 pro bono matters that are eligible to be reported as pro bono hours by both the attorney and the student. This program should be developed and in place before any student or bar applicant reporting requirement commences, but the Commission recommends that the reporting requirement begin no later than the July 2017 bar examination.

V. Access to Justice Commission Standing Committee.

To facilitate the accomplishment of the goals and programs described above, the Access to Justice Commission has created a standing committee to work with the law school, law students, legal services providers, and the State Bar of Montana to develop and implement an ongoing program to expand and support pro bono opportunities for students and to recommend to the Commission any needed rules and procedures to suggest to the Court and to the State Bar of Montana. The Commission shall, on a regular basis, evaluate the effectiveness of the program and include its evaluation in the Commission's report to the Court.

IN THE MATTER OF THE COMMISSION ON COURTS OF LIMITED JURISDICTION

From Nov. 6 order AF 06-0263

The President of the Montana Magistrates Association has been designated by Order of this Court as a member of the Commission on Courts of Limited Jurisdiction (COCLJ). For the past several years, Judge Donald Neese has served in that role. The Court has now been informed that the Honorable Jessie Connolly of Big Timber has been elected to succeed Judge Neese on the COCLJ.

THEREFORE, and with the Court's sincere thanks to Judge Neese for his service, IT IS ORDERED that the membership records of the COCLJ shall reflect that the Honorable Jessie Connolly now sits in the seat reserved for the President of the Montana Magistrates Association on the COCLJ.

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IN RE THE APPOINTMENT OF MEMBERS OF THE ACCESS TO JUSTICE COMMISSION

From Nov. 15 order AF 11-0765

On September 18, 2012, this Court appointed 18 individuals, representing a variety of groups and entities, to serve as the initial members of the Access to Justice Commission for staggered three-year terms. On September 30, 2013, six of the initial members' terms expired. Several have indicated their willingness to serve for a new, three-year term. The Court extends its thanks to Sharon Skaggs and Robin Meguire for their year of service.

IT IS ORDERED that the following members are appointed to the Commission for a three-year term ending September 30, 2016: Jackie Schara, representing Clerks of Courts of Limited Jurisdiction; and Michelle Robinson, representing the Montana Justice Foundation. With their consent, Judge Richard Jackson, Alison Paul, Randy Snyder and Andy Huff are reappointed to the Commission , also for a three-year term ending September 30, 2016.

IT IS FURTHER ORDERED that Hillary Wandler shall serve as the University of Montana School of Law's designated member in place of Andrew King-Reis for a period of one year, ending on September 30, 2014.

IT IS FURTHER ORDERED that Justice Beth Baker shall serve as Chair of the ATJC until further order of the Court.

DISCIPLINE

From Oct. 15 order PR 11-0084

On March 7, 2011, a formal disciplinary complaint was filed against Montana attorney Timothy J. Whalen. The disciplinary complaint, which is based upon Whalen's 2011 convictions of negligent vehicular assault and criminal endangerment, may be reviewed by any interested persons in the office of the Clerk of this Court. In March of 2011, this Court also entered an order indefinitely suspending Whalen from the practice of law in Montana, based upon his criminal convictions.

Whalen did not file an answer to the disciplinary complaint. At his request, the disciplinary hearing before the Commission on Practice was continued until all appeals of his criminal convictions were completed.

The Commission held a hearing on the complaint on July 13, 2013, at which hearing Whalen was present and testified on his own behalf. On August 12, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Whalen filed objections thereto, and the Office of Disciplinary Counsel (ODC) filed a brief in response to those objections.

The Commission has concluded that Whalen's failure to file an answer to the disciplinary complaint constituted a default under the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). Further, the Commission noted that this Court has concluded the criminal offenses of which Whalen has been convicted are offenses that affect his ability to practice law. As a result, the only issue remaining for the Commission pursuant to MRLDE 23C was the extent of the final discipline to be imposed. Based on the allegations of the complaint and the evidence produced at the hearing, the Commission recommends that Whalen be disbarred from the practice of law in Montana.

In his written objections, Whalen argues that the hearing on the disciplinary complaint was premature because his appeals of his criminal convictions are not yet completed. He also argues that the punishment of disbarment is extreme under the circumstances. However, our review confirms that the Commission and ODC are correct that the direct appeal process has been completed as to Whalen's criminal convictions. In addition, we agree with the Commission that the severity of Whalen's misconduct is sufficient to warrant disbarment.

Based upon the foregoing,

IT IS HEREBY ORDERED:

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

2. Timothy J. Whalen is hereby disbarred from the practice of law in Montana.

From Nov. 27 order PR 12-0671

On November 7, 2012, a formal disciplinary complaint was filed against Montana attorney Jeffrey Michael. The disciplinary complaint may be reviewed by any interested persons in the office of the Clerk of this Court.

The Commission on Practice held a hearing on the complaint on July 19, 2012, at which hearing Michael was present and testified on his own behalf. On October 7, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Michael did not file any objections within the time allowed.

The Commission has concluded, based on the allegations of the complaint and the evidence produced at the hearing, that Michael violated Rule 8.4(d) of the Montana Rules of Professional Conduct (MRPC), by engaging in conduct that was prejudicial to the administration of justice. The Commission concluded Michael was abusive, disruptive, and threatening to attorney Elizabeth J. Honaker in person at the Billings Municipal Court Clerk's Office in October of 2011, and in a voicemail message he left for her in January of 2012. The Commission concluded that, on both dates, Michael's conduct was an obvious attempt to get Honacker to stop pursuing the legal rights of her client Michael' s former client-to have a criminal conviction overturned and to pursue a complaint of ethical violations against Michael.

The Commission recommends that, as a result of his violations of the MRPC, Michael should be publicly censured by this Court, placed on probation for a year, required to complete a counseling assessment with a focus on anger and to complete all recommendations from that assessment, and ordered to pay the costs of these proceedings.

The Court now having reviewed the record and the Commission's findings, conclusions, and recommendations,

IT IS ORDERED:

1. The Commission's Findings of Fact, Conclusions of Law, and Recommendations are ACCEPTED and ADOPTED.

2. Jeffrey Michael shall appear before this Court for a public censure to be administered in our courtroom at 1:15 o'clock p.m. on January 7, 2014.

ORDERS, from previous page

3. Michael's license to practice law in Montana is placed on probation for one year from the date of this Order.

4. Michael shall pay for and complete a counseling assessment with a focus on anger. The assessing counselor must complete a report which shall be sent to the Office of Disciplinary Counsel (ODC). That report shall assist counseling providers in properly assessing Michael's need for counseling and treatment. Michael shall execute releases so that the counselor conducting the assessment will be authorized to furnish reports, upon request, to ODC to confirm Michael's attendance and successful completion of the assessment.

5. Michael shall pay for and complete all recommendations for counseling, referrals, attendance at psycho educational groups, or treatment made by the counseling provider conducting the counseling assessment. The preliminary assessment and counseling must be:

(i) with a person licensed under Title 37, Chapter 17, 22, or 23, MCA; or

(ii) with a professional person as defined in 53-21-102, MCA.

6. Michael shall execute a release authorizing his counselor to furnish reports, upon request, to ODC to confirm his attendance and successful completion of anger management counseling.

7. Michael shall pay the costs of these proceedings subject to the provisions of Rule 9(A)(8) of the Montana Rules for Lawyer Disciplinary Enforcement, allowing objections to be filed to the statement of costs.

State Bar News

ABA TechShow Conference & Expo - March 27-29, 2014

As a member of the State Bar of Montana, you get a discount on registration --standard cost is $1,050. The discount is good for $155, which brings the total to $895. **If you register before the February 10, 2014 early bird deadline,** you will receive an additional discount of $200 – for a low cost of $675. Be sure to include the State Bar's event promoter discount code, EP1409, when you register. Visit www.techshow.com for up-to-date information on ABA TECHSHOW 2014, the best event for bringing lawyers and technology together.

Continuing Legal Education

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

January, 2014

Jan. 17-19 - CLE & SKI — Big Sky - Yellowstone Conference Center. Sponsored by the CLE Institute. Approved for 10.00 CLE credits, including 3.00 Ethics credits. Earn all your Ethics credits for this reporting period. Other areas covered include important information on health care reform, business law update, law office security tips and a Supreme Court update. Discounted lift tickets ($65) are available to those booking and staying in Big Sky Resort Lodging.

February

Feb. 14 - Annual Real Estate CLE — Fairmont Hot Springs. Approved for 6.00 CLE credits. Special Guest Speaker: Professor Alexandra B. Klass, University of Minnesota Law School, Minneapolis. Professor Klass will be joined by Montana attorneys John Alke, Dennis Lopach and Hertha Lund for a lively discussion of condemnation, takings, transmission lines, easements and Eminent Domain. This is a MUST SEE for Real Estate practitioners, as well as legislators and others who deal with these issues.

Save the date

Jan. 28 — Family Law Section phone/webinar. TBD
Feb 14 — Annual Real Estate CLE, Fairmont Hot Springs.
Feb 25 — Family Law Section phone/webinar. TBD
March 7 — Paralegal Section CLE. Helena.

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New HIPAA rules go into effect

Lawyers need to up their game in protecting private health care information

By Kevin Twidwell & Brianne McClafferty
Garlington, Lohn & Robinson, PLLP

In this age of hackers, laptop computers, and hand-held mobile devices that allow lawyers to work everywhere from their offices to airports, hotel rooms and cafes, the federal government has determined that special nationwide safeguards are necessary to protect the confidentiality of protected health care information. New privacy and security rules went into effect in September, and non-compliance with the rules can prove to be costly (and embarrassing) to lawyers who qualify as "business associates" of clients who are subject to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The breadth of HIPAA and the new rules are expansive, affecting lawyers who need access to protected health information to provide legal services to a client.

BACKGROUND

Since the original HIPAA legislation was enacted, the Act has been amended to broaden the reach of the security and privacy provisions. The Act initially focused on regulating health care organizations, which the Act refers to as "covered entities." As health care and privacy issues evolved, however, covered entities began outsourcing operational functions to third parties, and the U.S. Department of Health and Human Services recognized that the protected health information ("PHI") being disclosed to third parties also needed protection.[2] Therefore, Congress amended HIPAA to make third parties contractually liable for releasing PHI without proper authorization. Third parties who use, receive, transmit and access PHI are referred to as "business associates" and are required under the Act to enter into "Business Associate Agreements" ("BAAs") with covered entities that contractually obligate the business associate to protect the disclosed PHI.[3]

In 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009, which included the Health Information Technology for Economic and Clinical Health Act ("HITECH Act").[4] The HITECH Act was designed to create a national standard of safeguards to protect the confidentiality, integrity, and availability of electronic PHI. Prior to the enactment of this law, the privacy and security rules applied primarily to health plans, health care providers and those who processed health insurance claims. Business associates were only required to implement "reasonable and appropriate security" to protect PHI.[5] But the HITECH Act and its new implementing regulations, adopted on January 25, 2013 and enforceable against business associates as of September 23, 2013 (the "HIPAA omnibus rule"), [6] expands the scope of HIPAA's privacy and security rules and makes them directly applicable to business associates of covered entities who receive, access, transmit and use PHI.[7] These new requirements are much stricter and will require many business associates, including law firms, to change and adopt many of the same policies and practices, security controls, and safeguards that covered entities have been required to follow for years. A business associate's failure to follow the omnibus rule will result in direct liability in the form of monetary penalties. Penalties for non-compliance range depending on whether the breach was intentional or accidental, but can be as high as $50,000 per individual violation and up to a total of $1.5 million per year for multiple violations of a single provision.[8]

WHAT IS A BUSINESS ASSOCIATE?

For law firms, the first step is to determine whether the firm constitutes a business associate. A business associate is any third party who "creates, receives, maintains, or transmits [PHI] for a function or activity . . . including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities . . . billing, benefit management, practice management and re-pricing,"[9] on behalf of a covered entity or a business associate of another covered entity. The omnibus rule expands the definition of "business associates" to include entities that provide data transmission and storage services (such as cloud services like DropBox) and require routine access

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2 See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of U.S.C.)

3 45 C.F.R. § 164.502(e) (Westlaw current through July 25, 2013).

4 See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A, tit. XII, 123 Stat. 226 (codified as amended in scattered sections of U.S.C.)

5 Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 82, 462, 82, 505 (Dec. 28, 2000) (codified as amended at 45 C.F.R. § 164.504(e)(1)(ii)(2009)).

6 45 C.F.R. § 160.400; Modifications to HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules, 78 FR 5566-01.

7 45 C.F.R. § 164.306.

8 45 C.F.R. § 160.404.

9 45 C.F.R. § 160.103.

HIPAA, from previous page

to information such as health information organizations.[10] Business associates also include any third party that provides legal services to a covered entity where PHI will be disclosed as a provision of the service.[11] In other words, if a law firm represents a covered entity or a business associate of a covered entity and needs access to PHI to provide their legal services the firm is likely considered a business associate. As a practical matter, this means that attorneys who represent hospitals, physicians, and medical groups are considered business associates because they will have to use or disclose medical records when providing legal services to the client. Also, attorneys representing health insurance companies, HMOs, health plans in payment disputes or those advising a practice on appropriate medical billing or coding requirements are likely business associates subject to the rules.

HOW CAN LAW FIRMS COMPLY WITH THE HIPAA OMNIBUS RULE?

If a firm has determined that it is a business associate, the next step is to determine what steps it needs to take to comply with the new omnibus rule. There are certain provisions in the HIPAA omnibus rule that are largely inapplicable in a law firm setting, such as regulations related to the sale or use of PHI for marketing purposes (don't do it); however, there are three areas law firms should pay particular attention to as it will likely require internal policy and practice changes.[12] In broad terms, the first step is to analyze how your firm internally handles protected information and identify gaps and potential gaps in your security systems. Next, your firm will need to develop procedures and policies that address and redress these security gaps or issues. This step includes designating one person (likely your office administrator) to be responsible for implementing your firm's policies and procedures, and to periodically review and update the procedures. Finally, you will need to make sure the people working with protected information are properly trained (lawyers, paralegals, secretaries, information technology employees).

1. Privacy Rule

The final omnibus rule makes some provisions of the HIPAA Privacy Rule directly applicable to business associates.[13] As a general matter, the Privacy Rule regulates the use and disclosures of PHI. Under this rule, "when using or disclosing [PHI] or when requesting [PHI] from another covered entity or business associate, a covered entity or business associate must make reasonable efforts to limit [PHI] to the minimum necessary to accomplish the intended purpose of the use, disclosure or request."[14] This requires law firms to change their information access policies to restrict access to PHI to those people in the firm who need the information to "accomplish the intended purpose" of their service. This also limits what PHI a lawyer can request to that which is reasonably required for the lawyer to provide their legal services. This applies to subcontractors as well, meaning that if a law firm hires an expert who will have access to the medical information, it is the law firm's responsibility (as the business associate) to ensure their consultants and other subcontractors adhere to the privacy and security provisions of the Act. HIPAA's omnibus rule now requires that business associates execute business associate agreements with their subcontractors who create, receive, maintain, transmit or access PHI.

2. Security Rule

At its core, the new HIPAA Security Rule increases law firms' responsibilities (and potential exposure) to protect PHI. The general requirements of the rule make business associates responsible to:

> (1) Ensure the confidentiality, integrity, and availability of all electronic [PHI] the covered entity or business associate creates, receives, maintains or transmits. (2) Protect against any reasonably anticipated threats or hazards to the security or integrity of such information. (3) Protect against any reasonably anticipated uses or disclosures of such information that are not permitted or required . . . . (4) Ensure compliance with this subpart by its workforce.[15]

The Security Rule establishes safeguards which can be broken down into three different categories: 1) administrative safeguards; 2) physical safeguards; and 3) technical safeguards. The safeguards include more than 40 standards for compliance and many standards include several implementation specifics.[16] These standards require business associates to conduct a documented risk analysis and designate a security official to help ensure compliance and develop and implement policies to protect PHI.[17] The risk analysis is broad in scope, requiring firms to "conduct an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of electronic protected health information held by the covered entity." Required safeguards also include the implementation of policies to control workforce information access, maintenance and disposal of PHI, and such technical safeguards as access control software.[18]

When conducting a risk analysis, lawyers should identify locations where they keep PHI in physical and electronic form, including existing document management software, backup tapes, email and attachments, electronic faxes, workstation hard drives (desktops and laptops), thumb drives, network drives, smart phones and tablets, external hard drives, terminal servers, CD/DVDs and remote access computers. All of these may contain protected information and firms are required to develop

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10 45 C.F.R. § 160.103. The omnibus rule continues the "conduit exception," which excludes from the business associate definition those entities that are "mere conduits," such as the U.S. Postal Service and Internet services providers (ISPs). However, the exception is inapplicable to those entities that "maintain" or "store" PHI.

11 45 C.F.R. § 160.103.

12 45 C.F.R. § 164.502(a)(5)(ii).

13 45 C.F.R. § 164.502(a).

14 45 C.F.R. § 164.502(b)(1).

15 45 C.F.R. § 164.306.

16 See 45 C.F.R. § 164.308; 45 C.F.R. § 164.310, 45 C.F.R. § 164.312.

17 See 45 C.F.R. § 164.308; 45 C.F.R. § 164.310.

18 See 45 C.F.R. § 164.312.

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safeguards and policies for accessing the information, and importantly, how to deal with a breach of security. For example, some law firms have their employees sign confidentiality statements, restrict electronic access to certain employees with appropriate security levels and passwords, restrict access to backup tapes and drives, require encryption of all email attachments on outbound mail, and use only encrypted thumb drives. Smart phones should require passcodes and should be equipped with a mobile device manager that will allow the telephone's contents to be erased remotely. Computers should be equipped with complex passwords (not your birthday or your dog's name), and your computer system should be protected by levels of spam, virus, spyware and malware filters. The system also should be designed to notify the appropriate person when attempts to infiltrate the system are detected.

Also, it is important to maintain the physical safeguards of a law firm's workspace, including restricting access to areas where computers or hard copy documents can be accessed. For example, some firms may require client meetings be held in conference rooms instead of individual offices. Others may restrict access to certain rooms or floors of a building through the use of electronic badges, while others may install video surveillance equipment to monitor rooms or areas where PHI is stored. The adoption of new safeguards will need to be accompanied by staff training to ensure that everyone is aware of policies and procedures. A law firm also needs a point person in charge of implementing and monitoring the firm's security procedures and policies. A firm administrator with IT support is usually a good choice.

While the sheer number of standards and specific implications are somewhat overwhelming, the rule does allow for some flexibility. "Covered entities and business associates may use any security measures that allow the covered entity or business associate to reasonably and appropriately implement the standards and implementation specifications."[19] Not all implementation specifications are required; some are noted as "addressable." However, just because a specification may be identified as "addressable," this does not mean that the specification is "optional." Rather, the standard should be implemented if "reasonable and appropriate" after considering various factors.[20] If an addressable standard is not "reasonable and appropriate," the business associate must document why it is not "reasonable and appropriate" and implement an "equivalent alternative measure if reasonable and appropriate."[21] When deciding which security measures to implement a business associate or covered entity must consider the following four factors: "(1) the size complexity, and capabilities of the covered entity or business associate; (2) the covered entity's or the business associate's technical infrastructure, hardware, and software security capabilities; (3) the costs of security measures; (4) the probability and criticality of potential risks to electronic [PHI]."[22]

In addition to physical, administrative and technical safeguards, the Security Rule includes specific organizational requirements, which address requirements for business associate agreements or BAAs.[23] Business associates must give satisfactory assurances that PHI will be appropriately safeguarded before they are permitted to "create, receive, maintain or transmit" electronic PHI. This satisfactory assurance must be in the form of a written contract.[24] The business associate agreement must contain specific provisions, including that the business associate (and its agents and subcontractors) agrees to: (1) comply with the Security and Privacy Rules, (2) report any security incident, and (3) ensure that any subcontractors working with PHI will properly safeguard the information in compliance with HIPAA Security and Privacy Rules.[25] Before the omnibus rule, covered entities already had these business associate agreements in place wither their business associates. After the omnibus rule (and its expanded definition of business associate), business associates must now execute appropriate BAAs with their own subcontractors. Covered entitles and business associates must ensure that their exsiting and future agreements contain all of the components required by the omnibus rule.[26] The Office of Civil Rights ("OCR"), a division of the United States Department of Health and Human Services ("HHS) that is tasked with investigating and enforcing HIPAA violations, has published updated sample business associate agreement language available on its website.[27]

3. Breach Notification

The new HIPAA omnibus rule extends the data breach notification requirements to business associates. A data breach occurs when there is an "acquisition, access, use, or disclosure" of any PHI not permitted by HIPAA's Security and Privacy Rules.[28] A breach is considered discovered the first day the breach is known or should reasonably have been known.[29] Business associates are required to notify the covered entity "without unreasonable delay" of any breach.[30] Under no circumstances can a business associate wait more than 60 calendar days after discovering the breach to report the breach to a covered entity.[31] At a minimum, a business associate must provide the covered entity with the identification of each individual affected by a breach, along with any information regarding how the breach occurred, what type of PHI was involved in the breach, and steps individuals can take to protect themselves from potential harm resulting from the breach.[32] The covered entity is then required to provide this information to the individual within 60 calendar days after the covered entity's discovery of the breach.[33]

In the event of the breach, not only are law firms exposed to

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19 45 C.F.R. § 164.306(4)(b)(1).
20 45 C.F.R. § 164.306(4)(b)(2).
21 45 C.F.R. § 164.306(d)(3).
22 45 C.F.R. § 164.306(b)(2).
23 45 C.F.R. §§ 164.314, 164.504
24 45 C.F.R. § 164.308(b)(1).
25 45 C.F.R. § 164.314(a)(2).
26 See 45 C.F.R. § 164.314(a) and 45 C.F.R. § 164.504(e).
27 See http://www.hhs.gove/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html
28 45 C.F.R. § 165.402
29 45 C.F.R. § 164.402(2).
30 45 C.F.R. § 164.410(b).
31 45 C.F.R. § 164.410(b)
32 45 C.F.R. § 164.410(c); 45 C.F.R. § 164.404(c).
33 45 C.F.R. § 164.404(b).

What to do with Lassie when Timmy dies from falling down the well?

By Garrett Norcott

For some people, pets or working animals are an extension of their family. Animals offer affection, security, therapy, or assistance. In return, the animal's owner reciprocates by providing the animal with praise and security. Given the relationship between animal and owner, many people are starting to include their animals in an estate plan; thereby ensuring the animals will be adequately provided for should the owner become incapacitated or die. Planning for an animal's future is relatively straightforward. Simply include the animal in a traditional estate plan via a power of attorney, will, or trust.

If a pet owner would like to ensure an animal will be adequately cared for should the owner become incapacitated, a power of attorney is a decent tool to use. Drafting a power of attorney is probably the easiest way to provide for an animal's future. Under a power of attorney, a principal grants to an agent the authority to act for the principal should the principal become incapacitated.[2] In the case of an animal, the agent would care for the animal if the principal becomes incapacitated. The agent is legally obligated to act in good faith and in accordance with the principal's reasonable expectations.[3] In addition, the agent must act with the care, competence, and diligence ordinarily exercised by agents.[4]

Given the relationship between animal and owner, many people are starting to include their animals in an estate plan; thereby ensuring the animals will be adequately provided for should the owner become incapacitated or die.

Drafting a power of attorney is relatively quick and no magic legal language is required.[5] Execution of a power of attorney does not require a notary, but notarization is strongly recommended.[6]

Although a power of attorney is quick and easy to execute, it has limitations. A power of attorney automatically terminates at death, thus further estate planning is required, including transferring ownership of the pet.[7] A power of attorney does not allow for the transfer of assets, thus if the owner wishes to provide funding for the agent to use for the care of the animal, the principal must also grant the agent authority to make financial decisions. Last, a power of attorney does not allow for oversight of the agent's conduct.

If a pet owner would like to ensure an animal will be adequately cared for should the owner experience death, a will is a good tool to use. Under a will, a testator may transfer ownership of an animal.[8] In addition, the testator may devise funds to the new owner of the animal with the *hope* that the funds are used for the care and benefit of the animal. Hope is emphasized because once probate of the will has concluded and the estate closes, the personal representative no longer has oversight over the decedent's estate. Thus, the new owner of the animal is free to care for the animal in any manner he or she feels is appropriate.

A will can also be utilized to fund a trust or create a testamentary trust.[9] However, the funding of a trust and creation of the testamentary trust occur during probate. Thus, funds will not be available for the animal's care, nor will a trustee be established until probate is complete. Last, whether the owner utilizes a will, funds a trust or creates a testamentary trust, a will does not take into account incapacity.

In order for an owner to ensure that an animal will be adequately provided for should the owner become incapacitated and/or die, the owner needs to utilize a trust and a will. The trust establishes caregiving duties and the will transfers ownership of the animal. Both documents should be drafted in a manner that incorporates future animals.

Historically, the creation of a trust required a definite beneficiary.[10] A beneficiary is a person.[11] However, on October 1 of this year, the Montana Uniform Trust Code (MUTC) became effective. The MUTC allows a trust to be created that

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2 Mont. Code Ann. §§ 72-31-302, 309, 340.
3 Mont. Code Ann. § 72-31-319.
4 Mont. Code Ann. § 72-31-319.
5 Mont. Code Ann. S§ 72-31-302, 340.
6 Mont. Code Ann. § 72-31-305.
7 Mont. Code Ann. § 72-31-310.
8 Mont. Code Ann. §§ 72-2-521, 612, §§ 70-1-101, 104.
9 Mont. Code Ann. §§ 72-2-531, 72-38-401.
10 Mont. Code Ann. § 72-33-206 (repealed).
11 Mont. Code Ann. § 72-33-108 (repealed), § 72-38-103.

Blue notes & grace notes

Through persistence, patience and song, commission chairman determined to see water rights compact through to completion

By Kevin Dupzyk

Chris Tweeten might just be one of those charmed people. His law career includes three decades of service to the state of Montana and is littered with titles like "president" and "chairman." He has performed in choirs with prestigious local groups and Grammy-winning conductors. He's been married to the same woman for thirty years. He is by all accounts well respected.

Except charmed people aren't supposed to experience public failure.

Tweeten, chairman of the Montana Reserved Water Rights Compact Commission since 1993, recently suffered an unprecedented setback. After successful ratification of 17 water rights agreements by the Legislature, the commission's 18th and final compact, with the Confederated Salish-Kootenai Tribes, died in the House of Representatives in April 2013.

The defeat added a blue note to Tweeten's harmonious career.

For Tweeten, singing predates just about everything else. As an undergraduate at the University of Montana, in the 1970s, he sang in the choir. Now he's in his second season with Dolce Canto, a choral ensemble in Missoula, and he sings in his church choir as well.

"Point of pride: We're consistently voted the best choir in Missoula in the Independent poll. And—I don't know what the significance of that is. Frankly, I think the Episcopalians stuff the ballot box. It's a very good church choir."

Tweeten, 6 feet 5 inches tall, sings bass.

When he talks about music, he might as well be talking about the law: "It's fun to help be part of a group that makes all of that music come together and turn into something that we hope is pretty close to what the composer intended when the music was written."

This is exactly what the compact commission does. With the CSKT agreement, it failed amidst concerns over scope and accusations of overreach; in essence, Tweeten didn't get close enough. Which is not to say that everyone agreed on the goals.

"For whatever reason," he said, "this negotiation has been politicized."

In Tweeten's ideal practice of law, truth is built as harmony, through the voices of different judges, or as melody, by properly ordering facts.

In politics, truth is built by singing louder.

That isn't to say that Tweeten isn't a capable politician. "He makes sound political judgments; he's very well informed," Dick Barrett (D-Missoula), a Montana state senator on the commission, said. "I think he really understands the lay of the land politically, as well as legally."

But lawyering is Tweeten's great love, something he's been doing for nearly 40 years, starting with his studies at the University of Montana School of Law.

He knew he wanted to be a lawyer in high school, though he admitted he didn't have a great understanding of what a lawyer was. He admired lawyers in the movies. "The whole justice thing sounded pretty cool at the time," he said.

His wife, Jeanne Tweeten, has heard him say many times that the practice of law is built on principles. "You don't get to make stuff up as you go along," she said.

Tweeten's adherence to these principles has at times made him a target. His forthright manner in rebutting opponents has led some people to criticize him. "He's not like the kind of guy who will say, 'Hey that's a good point!'" Barrett said.

"He'll say, 'No, you're wrong.' "

The water rights commission has provided Tweeten an opportunity to innovate within the legal framework, Debby Barrett (R-Dillon), Dick Barrett's Republican counterpart on the commission, said. "Montana is the only place in the world and in this nation that has tried to resolve the water compacts – the reserved water rights, bringing them under state water adjudication – in this manner."

In late 1999, just a few months after the Legislature ratified the agreement the commission negotiated with the Crow Tribe, Tweeten's kidneys failed.

He scheduled dialysis sessions in the evenings so he could keep working.

Even today, after his retirement from the Montana Attorney General's Office in 2011, he pushes the CSKT agreement forward. Gov. Steve Bullock has directed the commission to produce a report addressing the concerns that led to its failure. The report is targeted for release this fall, and Tweeten's work in developing it has not lacked for forthrightness.

Debby Barrett, who cast the only vote on the commission against sending the CSKT agreement to the Legislature, calls it an "incomplete product." "To this day, Mr. Tweeten still thinks the people who are objecting to this compact are doing

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potential civil and criminal penalties, but the breach notification requirements can also expose law firms to bad publicity. For example, if the breach affects more than 500 residents of a state or jurisdiction, the covered entity must notify "prominent media outlets serving the state or jurisdiction."[34]

One of the most serious changes that the omnibus rule exacts is that it has substantially lowered the burden of establishing a data breach. Previously, only those unpermitted disclosures that posed a "significant risk of financial, reputational, or other harm" to an individual had to be reported.[35] The omnibus rule now provides that any "acquisition, access, use or disclosure" of PHI in a manner not allowed by HIPAA's Security or Privacy Rule is *presumed* to be a breach unless the business associate or covered entity can show there is a "low probability" the PHI was compromised.[36] To meet its burden of proof, the covered entity or business associate must conduct a risk assessment of various factors including, the nature and extent of the PHI, to whom the unauthorized disclosure was made, whether the PHI was viewed or acquired, and the extent of risk mitigation.[37] Therefore, firms should implement policies and practices that require documentation of the risk assessment factors so that the firm may defend itself against any presumed data breach.

How to Proceed

The new HIPAA rules may require a significant amount of change within some law firms. Firms should start by revisiting current business associate agreements and amending the agreements to comply with the new HIPAA omnibus rule. A security compliance officer should be designated to develop and implement policies and eventually monitor the firm's compliance efforts. The security officer should start by performing a risk analysis to determine current policies and safeguards in place and what the firm will need to change to comply with the new rules. Going forward, a firm needs to conduct periodic and routine risk analyses to assess and identify weaknesses within the firm's infrastructure to avoid non-compliance. Some firms may weigh the costs of implementing the various physical, administrative and technical safeguards required by the HIPAA omnibus rule, as well as the potential liability(and negative publicity) of data breaches and non-compliance, and determine that the risks outweigh the benefit of taking on cases or clients that involve PHI. Ultimately, any law firm that currently has clients or cases that involve PHI, or is considering that in the future, will want to evaluate its existing policies and procedures and implement new policies to ensure compliance with HIPAA's omnibus rule.

***Brianne McClafferty** is second-year law student at the University of Montana School of Law and a legal intern at Garlington, Lohn & Robinson, PLLP. **Kevin Twidwell** is a litigation partner in the health law department at GLR.*

34 45 C.F.R. § 164.406

35 See Interim Final Rules Breach Notification for Unsecured Protected Health Information, 74 FR 42748 (August 24, 2009).

36 45 C.F.R. § 164.402.

37 45 C.F.R. § 164.402(2)

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provides for the care of an animal alive during the settlor's lifetime.[12] The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.[13] Property of a trust for the care of an animal may be used only for its intended use.[14] A court may determine that the value of the trust property exceeds the amount required for the intended use.[15] Excess property will be returned to the settlor or to the settlor's successors in interest.[16]

Regardless of the legal approach chosen, the following are a few baseline matters to consider: Think of the animal's daily routine; such details will help establish the standard of care. Take into account the life expectancy and size of the animal. For example, birds can live for 50 years and horses require open land. Identify caregivers that are trustworthy and willing to be the new owner of the animal; do not assume that family or friends love the animal as much as the owner. Determine whether certain friends or family members are interested in a specific pet. Essentially, the owner should speak with potential caregivers prior to making a decision.

Planning for the future provides peace of mind for the owner and a comfortable transition for the animal.

***Garrett Norcott** is legal counsel with the Montana Department of Commerce and a member of the State Bar Elder Assistance Committee.*

12 Mont. Code Ann. § 72-38-408.

13 Mont. Code Ann. § 72-38-408.

14 Mont. Code Ann. § 72-38-408.

15 Mont. Code Ann. § 72-38-408.

16 Mont. Code Ann. § 72-38-408.

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so because they don't understand it," she said. "I think some of them understand it very well."

But for Tweeten, things have changed. Having spent three years of Mondays, Wednesdays, and Fridays anchored to a dialysis machine, seeing the CSKT compact through to completion doesn't seem so daunting. "Dealing with the rejection of the Flathead Compact is by far not the worst thing that has ever happened to me," he said.

Eventually, a donor was found and Tweeten had a kidney transplant. He is not the man he once was. His work with the commission can look like legacy building, but as he nears retirement, he has a more nuanced understanding of the place of his work in his life. Through the noise, he hears the grace notes.

"I've got things pretty well in perspective now," he said.

"I'm never going to stop being a lawyer."

So he's actually one of those people.

***Kevin Dupzyk** is a graduate student in the University of Montana School of Journalism.*

"Santa Baby, just slip a sable under the tree for me[1]"

Or at least a catchall exception to the hearsay rule?

By Cynthia Ford

In previous columns, I have covered the non-hearsay definitions in 801(d). In my Evidence class at UM, I go on from there to look at the specific hearsay exceptions in 803 and 804, discussing the requirements and underlying policy for each. I postpone discussion of the "residual" or "catchall" exceptions until the very end of our hearsay study, because I am afraid that once the students learn about those, they will not see any point in focusing on the articulated specific exceptions. I should (and do) confess here that I began this column as a big skeptic of the residual exceptions.

However, as we are in the holiday season, I decided to devote this article to what seems like an enormous gift if you are struggling to escape from a hearsay objection: the residual exceptions to the hearsay rule. Are they a Black Friday door buster? (A related matter of philosophy: Is it ever worth getting up to go shop in the middle of the night?) Could Santa load Rudolph's sleigh with residual exceptions and still fit down the chimney? Should you bother with a specific exception when there is a catchall? In the process of considering these life-changing questions, a miracle happened: I was converted and now believe the residual exceptions are in fact real, not just a lump of coal in the evidence stocking. Otherwise, why would they be included in the rules? And isn't an extra way around the hearsay rule as good as a '54 Convertible, or "decorations from Tiffany's"?

FEDERAL AND MONTANA RESIDUAL HEARSAY EXCEPTIONS

Both Montana and the federal systems have a safety valve to allow admission of some hearsay even if it does not fit within the specific exceptions. Both systems used to show this by having "residual" exceptions as part of Rules 803 and 804. In 1997, the federal rule makers removed the residual components of Rules 803 and 804, and combined them into new F.R.E. 807, which now reads:

> (a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

(807(b) requires "reasonable notice" of the intent to use this provision, so the opponent has a "fair opportunity" to meet it.) The 1997 Advisory Committee Note to F.R.E. 807 states:

> The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

When Montana adopted the M.R.E., we generally modeled them on the F.R.E., and chose to add this catchall to conform to the F.R.E. The Montana Commission Comment to M.R.E. 803(24) notes:

> There is no equivalent Montana law to this exception. The adoption of this exception changes existing Montana law to the extent that it allows a court to admit hearsay because an equivalent guarantee of trustworthiness exists even though there is no specific exception allowing it.

Montana still retains the two separate versions of the residual exception: M.R.E. 803(24) and 804(b)(5). Rule 803 provides exceptions to the hearsay rule for certain categories of

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1 Eartha Kitt, "Santa Baby."

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hearsay, even if the out-of-court declarant is available to testify:

> **Rule 803. Hearsay exceptions: availability of declarant immaterial.**
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: …
>
> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Rule 804 provides additional exceptions but only if the declarant is unavailable under 804(a). It ends with 804(b)(5):

> **Rule 804. Hearsay exceptions: declarant unavailable. …**
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: …
>
> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

The Montana residual clauses are simpler and less restrictive than the current federal corollary, omitting any need for prior notice. The Montana version is identical to the federal version which was submitted by the federal Advisory Committee; the difference lies in the additions made to the federal rule by Congress. The Montana Evidence Commission Comment to 803(24) intentionally rejected the Congressional amendment and kept the original federal language:

> The Commission believed this exception should allow "room for growth and development of the law of evidence in the area of hearsay" (Advisory Committee's Note, supra 56 F.R.D. at 320) and that the amendments by Congress are too restrictive and contrary to the purpose of the provision. These amendments can be criticized as follows: the requirement that the statement be offered as evidence of a "material" fact is redundant in requiring relevance as defined in Rule 401 and uses outmoded language so indicated in the Commission Comments to that rule. The requirement that the evidence be more probative on the point for which it is offered restricts the use of these types of exceptions by imposing a requirement similar to that of unavailability under Rule 804; this restriction would have the effect of severely limiting the instances in which the exception would be used and be impractical in the sense that a party would generally offer the strongest evidence available regardless of the existence of this requirement. The requirement that the general purposes of these rules and interests of justice will be served is unnecessarily repetitive in view of Rule 102. Finally, the notice requirement is unnecessary because of discovery procedures and the discretion of the court in allowing advance rulings on the admissibility of evidence.

The Montana Commission Comment to 804(b)(5) indicates that the same considerations apply to that version of the residual rule as to 803(24) and that "the Commission Comments to that Rule applies [sic] here."

The Montana Supreme Court has described the difference between the two rules as:

> Rule 804(b)(5), M.R.Evid., provides an exception to the hearsay rule for statements not specifically covered by any of the exceptions enumerated in 804(b)(1) through 804(b)(4), but having "comparable circumstantial guarantees of trustworthiness". Rule 804(b)(5) has been characterized as a "catchall exception" to the hearsay rule. However, it is distinguished from Rule 803(24), M.R.Evid., where the availability of the declarant to testify is immaterial, in that Rule 804(b)(5) comes into play when the declarant is unavailable to testify…
>
> *State v. Mayes*, 251 Mont. 358, 364, 825 P.2d 1196, 1200 (1992).

My review of the cases indicates, though, that the Court uses the same loose analysis in deciding cases under both rules. If your declarant is available to testify, you should proceed under 803(24) alone, but if your declarant is unavailable, try both 803(24 and 804(b)(5).

RECENT MONTANA CASES

My personal view of the residual exceptions was that when you have to use them to surmount a hearsay exception, you are on the ropes and unlikely to succeed. I vastly prefer to use one or more of the specific exceptions or the non-hearsay definitions than to launch upon a vague "circumstantial guarantee of trustworthiness" quest. The Montana Supreme Court also has several times indicated that the residual exceptions are an extraordinary tool:

> the residual exception "should be used sparingly, and only in exceptional circumstances," … *Hocevar,* ¶ 50 (citing *State v. Brown,* 231 Mont. 334, 338, 752 P.2d 204, 207 (1988).
>
> *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, 350 Mont. 538, 547-48, 208 P.3d 836, 845.

However, it turned out that I am too squeamish, and

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"sparingly" is not the same as "never." Montana lawyers have presented residual exception arguments to the Supreme Court since 2000 in 9 cases under 803(24) and 8 cases under 804(b)(5)[2]. (There is some overlap where both were used in a particular case). I discuss some of these below, as illustrative of the Court's approach to these catchalls. Because the Court has treated hearsay by child declarants as a separate category, I do the same.

In *In re Estate of Harmon*, 360 Mont. 150, 253 P.3d 821, 2011 MT 84, the proponents of a holographic will made before the testator executed her written formal will filed affidavits opposing summary judgment for the named heir. The affiants recounted various statements that the testator had allegedly made about being "hoodwinked" into signing the formal will and about her desire to stick with the handwritten version. The Supreme Court observed:

> In sum, the affidavits contain purported statements of the decedent, Cecilia, to show her intent to give property to Waitt and to allow Knudson to purchase his rental home at discount, and about Harmon's allegedly heavy-handed and self-interested treatment of Cecilia….

Thus, the Court found, the statements were hearsay and the affidavits inadmissible unless some hearsay exception applied. The appellant advanced several specific exceptions and both of the catchall exceptions (803(24) and 804(b)(5)) for admissibility; the Supreme Court rejected all of them and found the trial judge did not abuse her discretion in granting summary judgment for the heir.

> ¶ 37 Finally, Waitt claims the statements are admissible under M.R. Evid. 804(b)(5). This rule is a "catch-all" provision when the declarant is unavailable, and allows admission of a statement that has "comparable circumstantial guarantees of trustworthiness" to the four enumerated exceptions in Rule 804(b): former testimony, statements made under belief of impending death, statements against interest, and statements of personal or family history. There are no such circumstantial guarantees of trustworthiness associated with the statements in the affidavits submitted by Waitt. Given the often highly contentious nature of estate distribution, the opposite is true. Montana law has historically been hostile to the admissibility of out-of-court statements made by the testator regarding his or her testamentary intentions when a valid will exists and the testator's mental capacity is not at issue. In re Colbert's Est., 31 Mont. at 472–73, 78 P. at 974–75 (quoting *Throckmorton v. Holt*, 180 U.S. 552, 573–74, 21 S.Ct. 474, 482–83, 45 L.Ed. 663 (1901)). The District Court did not abuse its discretion in concluding that Rule 804(b)(5) was inapplicable.
>
> 253 P.3d at 830.

The Court was briefer but equally clear in rejecting 803(24), the other "catch-all," as an alternative basis for admission.

Jordan Larchik was a freshman at Billings Central High School when he suffered a permanent eye injury during a P.E. class on lacrosse. The case went to a jury trial, where the P.E. teacher, Hardenbrook, testified that he was present in the gymnasium during the class. Several defense experts rendered opinions based on this fact. The jury rendered a verdict for the defense.

About six weeks after the trial ended, plaintiff's counsel Liz Halvorsen received a phone call. The caller identified himself as a friend" of the P.E. teacher, and said that Hardenbrook had asked him to call to tell Ms. Halvorsen that he had been pressured to, and did, lie about his presence in the gym at the time of the accident. Ms. Halvorsen immediately notified the trial judge of this call, and subsequently moved for a new trial based on newly discovered evidence. In support of her motion, the plaintiff submitted an affidavit from Ms. Halvorsen as well as phone company records substantiating that a call had been placed from a cell phone belonging to teacher Hardenbrook to Ms. Halvorsen's phone.

On appeal, the Supreme Court held that the lower court abused its discretion when it denied the new trial, and remanded the case for a new trial. It specifically held that Ms. Halvorsen's affidavit was admissible even though it contained hearsay, under 803(24):

> ¶ 31 Furthermore, despite the Diocese's argument to the contrary, the District Court did not err in determining that Halverson's affidavit was admissible even though it contained hearsay. Under the residual exception to the general prohibition on hearsay, a statement is admissible even though it is not specifically covered by the other exceptions on hearsay if it has "comparable circumstantial guarantees of trustworthiness." M.R. Evid. 803(24). This exception "looks to the circumstances surrounding a hearsay statement when it is made—the circumstantial guarantees of trustworthiness that lend reliability to the hearsay statement in lieu of cross-examination." State v. Hocevar, 2000 MT 157, ¶ 50, 300 Mont. 167, 7 P.3d 329. (Internal quotations omitted.) While the residual exception "should be used sparingly, and only in exceptional circumstances," we conclude that Halverson's affidavit was admissible as a trustworthy statement of an officer of Court under M.R. Evid. 803(24). Hocevar, ¶ 50 (citing State v. Brown, 231 Mont. 334, 338, 752 P.2d 204, 207 (1988). Significantly, the Diocese does not necessarily dispute Halverson's description of

2 These counts are from a WestlawNext search using the rule numbers as the search term. Several of the cases, though, when read, merely indicated that a residual exception had been cited by the lawyer, but was not considered by the Court because another specific exception applied.

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> the phone call from "Mr. Peterson" or the phone record which indicates that the call was placed from Hardenbrook's cell phone. (Emphasis added)
>
> *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, 350 Mont. 538, 547-48, 208 P.3d 836, 845.

In *In Re J.J.L.*, 355 Mont. 23, 223 P.3d 921 (2010), a public defender for a father facing termination of his parental rights failed to object to hearsay statements of the children and their mother made to a detective and two counselors. (Neither the children nor the mother testified themselves). The trial court apparently was concerned about the use of this hearsay in his decision, and asked the parties to brief its admissibility. The State filed a brief; the father's attorney did not, and thus the judge deemed an admission by the father that the State's position was well taken. The judge ruled that the hearsay statements were admissible under the residual hearsay exception in Rule 803(24). Based on these statements, the children were adjudicated Youths in Need of Care. Although the Supreme Court did not directly discuss the merits of the application of the residual exception, it did hold that the failure to object to the hearsay and the failure to file a brief on the issue constituted ineffective assistance of counsel. [3]

The defendant in *State v. Hocevar*, 300 Mont. 167, 7 P.3d 329, 2000 MT 157 was the mother of Wesley, who was four years old when he was taken to the hospital for an overdose of Benadryl. The treating physician, who was aware of the prior deaths of two other children, reported her suspicion of Munchausen-by-proxy syndrome. Wesley recovered, but Susan was convicted of criminal endangerment. (The jury could not reach a verdict on the other crimes charged). On appeal, she argued that she should have been allowed to introduce at trial the videotape of Wesley's interviews, which occurred five and twelve days after the overdose. When the prosecution objected on hearsay grounds, the defense cited three hearsay exceptions in 803: 803(1),"present sense impression;" 803(5) "recorded recollection;" and the residual exception in 803(24)[4]. The Supreme Court rejected both specified exceptions, and also held that the trial court was correct in refusing to apply the residual exception:

> The residual exception "look[s] to the circumstances surrounding a hearsay statement when it is made-the 'circumstantial guarantees of trustworthiness' that lend reliability to the hearsay statement in lieu of cross-examination." State v. J.C.E. (1988), 235 Mont. 264, 272, 767 P.2d 309, 314. "Everything that bears on the credibility of the speaker and the accuracy of his statement counts...." Christopher B. Mueller and Laird C. Kirkpatrick, Evidence § 8.65 (1995). We have held that the residual exceptions "should be used sparingly, and only in exceptional circumstances." State v. Brown (1988), 231 Mont. 334, 338, 752 P.2d 204, 207.
>
> *State v. Hocevar*, 2000 MT 157, 300 Mont. 167, 183, 7 P.3d 329, 341.

The Court recited the trial judge's findings about the reliability of the interviews, which he apparently viewed in making his decision, and summarily concluded: "The admission of the videotaped interviews was properly denied under the residual exception because the videotapes did not manifest circumstantial guarantees of trustworthiness." 300 Mont. at 184.

The Supreme Court affirmed the opposite ruling in the same year, obviously on different facts. In *Estate of Silver*, the opponents were the decedent's son and the decedent's estate, which was trying to reclaim approximately $200,000 in cash which the son claimed his father gave him. The son, Jack, had visited his 86 year-old father, Morris, on the eve of surgery, and they agreed both that it would be necessary for the father to have at-home caregivers after he was released, and that the large amount of cash the father kept in his house should be moved somewhere safer. The son and the father's friend/employee arranged for a safe deposit box at a bank, and brought the paperwork home for the father to sign. The box was in the name of the father, but the son was also to be "a signer allowed access," according to the father's written instructions to the bank. The banker had checked the "joint tenant" box on the lease form. A few days before the father died, the son visited the safe deposit box and removed the cash in it, putting it into a separate safe deposit box which was in the son's name only.

The son moved for summary judgment, which the estate opposed. When the trial judge granted summary judgment for the estate, requiring the son to return the money, he appealed and alleged error in the judge's admission of the hearsay statements of the father (who was obviously unavailable under 804(a)) under the residual exception. The Supreme Court affirmed both the evidentiary ruling and the final judgment:

> ¶ 18 Over Jack's objection, the District Court allowed testimony by Kathleen St. John and Carolyn Sauro regarding statements Morris made to them concerning the money in the safe deposit box. Kathleen stated by affidavit that when Morris agreed to put the money in the safe deposit box, he asserted that it was still his. She stated that she never heard him say he intended to make a gift of the money to Jack or that he did not consider it to be his money. Carolyn stated in her affidavit that Morris was most emphatic that the contents of

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3 A 2013 case also discussed failure to object to clear hearsay (again, reports of sexual assault by a child to a trusted adult) as ineffective assistance of counsel. The majority held that it did not, citing possible strategic considerations for not objecting. Justice McKinnon wrote a strong dissent, joined by Justice Cotter. Neither opinion actually considered whether either of the residual exceptions would apply. See, *State v. Aker,* 371 Mont. 491, 310 P.3d 506, 2013 MT 253.

4 Wesley did not appear to testify at trial, although there was no specific finding or argument that he was unavailable. If he in fact was, the defense technically could have also cited the other residual exception, 804(b)(5), but it seems they did not, and it is not at all likely to have changed the ruling at trial or on appeal.

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> the safe deposit box were to remain his. She also attested that at no time did Morris indicate he had made any gift to Jack of the contents of the safe deposit box and once during the summer of 1997 he said he may have to go to the safe deposit box to secure some of his cash.
>
> *In re Estate of Silver*, 2000 MT 127, 299 Mont. 506, 509, 1 P.3d 358, 360.

The Court found that the admission of the affidavits fell within the residual exception of 803(24):

> ¶ 21 Similarly, [to two earlier cases discussed at length] in the present case, the contested testimony is evidence of Morris›s stated intent to retain ownership of the cash which he had placed in the safe deposit box. Rule 803(24), M.R.Evid., provides that statements not covered by the enumerated exceptions to the hearsay rule will be allowed if comparable circumstantial guarantees of trustworthiness exist. Here, the statements put into context Morris›s opening of the safe deposit box and the placement of the cash within the box. We hold that the District Court did not abuse its discretion in admitting the testimony about Morris›s statements of intent concerning the money which he arranged to have placed in the safe deposit box
>
> 2000 MT 127, 299 Mont. at 510-11, 1 P.3d at 361.[5]

Silver was cited by the appellant in *Estate of Harmon*, discussed above, but held inapplicable.

CHILD HEARSAY

The Montana Supreme Court has faced several difficult cases involving child witnesses. The unique nature of these cases led it to carve a subset of "residual" hearsay requirements to determine the admissibility of statements made by the child declarant to an adult who then testifies to prove the matter asserted by the child. The legislature stepped in to codify a special exception to the hearsay rule for criminal cases, but some questions remain undecided about the interpretation and application of that statute, and it does not apply to civil cases.

State v. S.T.M., 317 Mont. 159, 75 P.3d 1257, 2003 MT 221, involved a charge of incest by the defendant with his toddler daughter. Both sides agreed that the girl was incompetent (she was only 35 months old, and described as "shy"), and thus "unavailable" per 804(a), to testify at trial. The trial judge held that the daughter's out-of-court statements to her mother and a social worker were admissible under 804(b)(5). On appeal, the Supreme Court applied an abuse of discretion standard:

> ¶ 14 …Where a court is determining circumstantial guarantees of trustworthiness, we will defer to the court's decision unless an abuse of discretion is clearly shown. J.C.E., 235 Mont. at 275, 767 P.2d at 316 (citing State v. LaPier (1984), 208 Mont. 106, 676 P.2d 210).

The Court then reviewed its prior law on the use of 804(b)(5) for evidence from young victims of sexual abuse:

> The exception permits the admission of out-of-court statements, which would otherwise be excluded as hearsay, if the statements have "comparable circumstantial guarantees of trustworthiness" to the enumerated exceptions to the hearsay rule.
> ¶ 18 In J.C.E., we established a framework to guide district courts in determinations about the admissibility of hearsay testimony from young child victims in sexual assault cases. Before hearsay testimony can be considered under Rule 804(b)(5), we held the district court must make the following preliminary findings:
>
> 1. The victim must be unavailable to testify, whether through incompetency, illness, or some other like reason (e.g., trauma induced by the courtroom setting);
> 2. The proffered hearsay must be evidence of a material fact, and must be more probative than any other evidence available through reasonable means; and
> 3. The party intending to offer the hearsay testimony must give advance notice of that intention. J.C.E., 235 Mont. at 273, 767 P.2d at 315.
>
> The Supreme Court quoted at length from the trial judge's careful finding and conclusions on these factors[6], and stated "¶ 22 Were we to decide this case solely on the basis of the hearsay challenge, we might simply affirm here, and end our analysis."

In fact, the Court went on, saying "However, S.T.M. also challenged the admission of the child's statements in light of his Sixth Amendment right to confront his accusers. As explained below, we will no longer consider these two challenges independently." The Supreme Court ultimately held that a

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5 Justice Trieweiler dissented on the holding that the statements by Morris in the affidavits were hearsay at all; if they were, he disagreed with their admission. However, he took the view that the statements were not offered for the truth of the matter they asserted, but "were offered, instead, to prove that Morris actually made the statement, and, therefore, depended solely on the credibility of Kathleen St. John and Caroline Sauro." In my Evidence class, we call this "offered not to prove the truth of the matter asserted, but to prove the state of mind of the speaker." If this is the reason they were offered, then the out of court statements by Morris do not meet the definition of hearsay under 801(c), and are not barred by 802, so there would be no need to deal with the residual (or any) exception.

6 The defendant had raised a Confrontation Clause objection in addition to his hearsay objection at trial, but the trial judge virtually ignored it in his ruling. The Supreme Court devoted much of its opinion to the constitutional element, but ultimately affirmed admission of the statements over both objections.

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fourth factor which J.C.E. had established, (and which I omitted from the list in the quotation above) existence of corroborating evidence, is no longer to be considered in deciding conjoined Confrontation/804(b)(5) cases.

The Court then assessed the young daughter's hearsay statements without considering whether they were corroborated. It concluded that the circumstantial guarantees of trustworthiness inherent in the statement sufficed to withstand both the hearsay and Confrontation Clause objections:

> ¶ 39 Upon considering the totality of the circumstances surrounding K.M.'s hearsay statements, exclusive of the corroborating evidence, we conclude that her statements were supported by the particularized guarantees of trustworthiness necessary to withstand a Confrontation Clause challenge. In fact, her statements satisfied a number of the factors upon which state and federal courts have historically relied for indicia of reliability. See ¶ 31. Most notably, K.M. made the initial statement to her mother spontaneously. Her statement referenced oral-genital contact, a matter not normally within the contemplation of a toddler under three years old. Further, K.M.'s mother was reluctant to participate in the prosecution of her husband, which makes her a particularly reliable witness to relate the hearsay statement. Moreover, neither she nor K.M. had any reason to fabricate the story.
>
> *State v. S.T.M.*, 2003 MT 221, 317 Mont. 159, 171, 75 P.3d 1257, 1264.

The Court acknowledged more difficulty with the girl's statement to the social worker, which was videotaped and played to the jury, but ultimately held that it, too, was admissible.

S.T.M. was decided before the U.S. Supreme Court rewrote Confrontation Clause jurisprudence in *Crawford v. Washington* in 2004. The Montana Supreme Court acknowledged this in 2007:

> ¶ 33 We note further that the District Court did not discuss the "corroborating evidence" factors in light of our holding in State v. S.T.M. that corroborating evidence could no longer be considered in assessing a hearsay statement's reliability. 2003 MT 221, ¶ 34, 317 Mont. 159, ¶ 34, 75 P.3d 1257, ¶ 34. We decided S.T.M. prior to Crawford and our holding was based on the Supreme Court's decision in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). We removed the corroborating evidence factor because we could not "conceive of a case in which the admission of the hearsay statements of an alleged victim of child sexual abuse would not implicate the Confrontation Clause as well as the rule against hearsay." S.T.M., ¶ 34. The Supreme Court's rulings in Crawford and Davis recently have clarified that the Confrontation Clause only applies to testimonial statements; thus, it is now entirely conceivable that a hearsay statement that fails to implicate the Confrontation Clause may nevertheless be inadmissible hearsay. Davis, 547 U.S. at ––––, 126 S.Ct. at 2274–75. However, the "corroborating evidence" factor does not affect the case before us; the District Court's lack of "corroborating evidence" analysis could only advantage Spencer because the District Court did not consider as evidence S.S.'s and R.S.'s physical

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> injuries discovered by Dr. Gerrity. Thus, we leave for another day an analysis of S.T.M.'s continued vitality. In light of Crawford, however, we note that courts must again consider Confrontation Clause and hearsay challenges independently, contrary to our announcement in S.T.M., ¶ 22.
>
> *State v. Spencer,* 2007 MT 245, 339 Mont. 227, 237, 169 P.3d 384, 392-93.

Even earlier, in *State v. Osborne*, the state was able to introduce the hearsay statements of a 33-month-old child sexual abuse victim made to a sheriff's deputy and a social worker, over the defendant's hearsay exception.

> ¶ 20 There was no evidence, other than the hearsay evidence, implicating Osborne. Therefore it was evidence of a material fact, more probative than any other evidence available through reasonable means. However, the material fact that the State sought to prove through the hearsay evidence was not simply the identity of the rapist, it was that Cassie identified Osborne as the rapist. The fact that she may have identified Heen to the deputy and the social worker is evidence of a different fact, and does not constitute more probative evidence of the same material fact. Accordingly, we conclude that the hearsay evidence of Cassie's statements to Heen and Jamie addressed a material fact and was more probative than any other evidence available through reasonable means. We further conclude that the District Court made adequate preliminary inquiry before it admitted the hearsay statements.
>
> *State v. Osborne,* 1999 MT 149, 295 Mont. 54, 59, 982 P.2d 1045, 1047.

Abuse and neglect cases also involve children who have the primary personal knowledge of their treatment, but may be reluctant or unable to testify at trial. The trial witnesses usually are adults to whom the children have spoken out of court. Although the Confrontation Clause is not implicated, the statements are still hearsay and frequently prompt "residual exception" responses to hearsay objections.

In Re O.A.W., 335 Mont. 304, 153 P.3d 6, 2007 MT 13, was decided the same year as the *Spencer* case cited above. Because *O.A.W.* was an abuse and neglect, not a criminal, case, M.C.A. 46-16-220 (see below) did not apply. The prosecution moved in limine for an order allowing hearsay testimony about the children's statements to be admitted at the adjudicatory hearing at which they were found to be youths in need of care:

> At the hearing, after argument on the matter, the court ruled from the bench that the children were unavailable to testify and that videotaped interviews made by law enforcement officer Lewis Barnett, social worker Shelly Verwolf, and Dr. Cindy Miller, a clinical psychologist, were admissible under M.R. Evid. 804(b)(5).
>
> *In re O.A.W.*, 2007 MT 13, 335 Mont. 304, 306, 153 P.3d 6, 9.

Later, the state petitioned for permanent termination of parental rights and, after another hearing, the Court granted the petition. The parents both appealed, arguing, inter alia, that the Court erred in allowing witnesses to present the children's out of court statements under 804(b)(5). The Supreme Court affirmed both the finding that the trauma to the children from testifying in court against their parents[7] made them "unavailable" and the holding that the hearsay was trustworthy enough for 804(b)(5) to apply at the adjudicatory hearing:

¶ 35 The court further found that the statements of the children were trustworthy, pursuant to M.R. Evid. 804(b)(5) and its "residual exception,":

> And having viewed the tapes, I believe that the two interviews in question, in particular, were well-documented and would give the trier of fact in this case the ability to assess the contents of what they're saying for accuracy without the need for cross-examination, and I don't do that lightly, but I think weighing all those factors, I think the truth here could be discerned without subjecting these children to cross-examination or the trauma of facing their parents in court. So I'll find that the children are unavailable as witnesses for this hearing.
>
> ¶ 36 The District Court›s finding on this issue was supported by the testimony of Dr. Ruggiero and Dr. Miller. This finding was not arbitrary and was made with conscientious judgment. …
>
> 335 Mont. at 311, 153 P.3d at 12.

(The Supreme Court also affirmed admission of the children's hearsay through their treating therapist at the final termination hearing, although that appeared to be under 803(4) and 703 rather than the residual exception.)

STATUTORY TREATMENT OF CHILD VICTIM HEARSAY

In 2003, the Montana legislature enacted M.C.A. 46-16-220, entitled "Child Hearsay Exception—Criminal Proceedings." It basically incorporates the criteria announced by the Supreme Court in the *S.T.M.* case, discussed above. This statute creates an additional hearsay exception for out-of-court statements by child[8] (under 15) victims or witnesses in sexual assault

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7 There was considerable expert testimony on this point.

8 The statute defines "child" as "a person under 15 years of age." It does not specify whether the relevant age is that at the time of the crime, the time of the statement, or the time of trial. I expect that this ambiguity will come up, and be resolved judicially, in short order, because of the flood of cases implicating this kind of evidence.

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and abuse cases: "Otherwise inadmissible hearsay may be admissible in evidence in a criminal proceeding, if…" (One of the requirements is that the child victim be unavailable at trial, so if this exception were reflected in the Rules of Evidence, it should be part of 804 rather than 803.) Although *S.T.M.* found that the existence of corroborating evidence was not to be used in deciding the admissibility of child victim hearsay statements, this factor is included in the statute. Further, the statute contains two procedural requirements: the proponent must give detailed notice of intent to introduce the evidence and the judge must file written findings and conclusions on the admissibility of the child's testimony.

State v. Spencer, supra, is the only reported case to discuss M.C.A. 46-16-220 at length. There, the trial judge issued a 12-page order admitting the hearsay statements offered by the State with the requisite notice. On appeal, among other things, defendant argued that the trial judge violated the statute by failing to delineate portions of his decision "Findings of Fact" and "Conclusions of Law." The Supreme Court held that the trial judge "adequately complied" with the statute and affirmed the admission of the victim's statements through her foster mother and a counselor. [9] (It also found that the statements were "non-testimonial" under *Crawford* so that the Confrontation Clause objection did not bar admission either).

The statute is ambiguous as to the time at which the declarant's age is to be measured. Perhaps more importantly, it does not indicate whether it supplants the residual exceptions for child-victim hearsay. Before the statute, Montana cases had resorted to the residual exceptions for this special form of hearsay. The unresolved question is whether a party who wants to introduce a child-victim's statements through an adult witness must meet the requirements of M.C.A. 46-16-220, or if the proponent is still free to argue for admission also under 803(24) and/or 804(b)(5).

The only pronouncement on this subject is a single sentence in *Spencer*:

> Section 46–16–220, MCA, sets forth the requirements for admitting child hearsay in Montana criminal proceedings.
>
> *State v. Spencer*, 2007 MT 245, 339 Mont. 227, 234, 169 P.3d 384, 390.

However, it does not appear that the State in that case actually presented the issue of the continued applicability of the residual hearsay exceptions, nor did the Supreme Court directly address the question. Thus, an advocate might consider invoking all three bases for admission of the hearsay statements of child witnesses in criminal cases. In civil cases, the statute does not apply, so the residual exceptions are still the only law at play.

NUMERICAL ANALYSIS

As I read through the significant cases, I kept a running tally of the rulings of the trial judges on residual exception claims and the results on appeal. Under 803(24), I considered five cases. In two, the trial judges admitted the hearsay and in two, the trial judges refused the hearsay. The Supreme Court upheld all four rulings, finding no error. Under 804(b)(5), three cases admitted the hearsay and one refused it. Again, the Supreme Court found no error in any of the rulings.

CONCLUSION

Montana has two rule-based "catchall" or "residual" hearsay exceptions, and a statutory exception which applies only to child declarants in criminal cases. The purpose of the residual exceptions is to make "room for growth and development of the law of evidence in the area of hearsay.[10]"

Although Montana cases express the general policy that these exceptions are to be used sparingly, cases do affirm this route to admissibility when the enumerated hearsay exceptions do not apply.

Accordingly, I recommend that proponents of hearsay evidence first try to fit their hearsay into one or more of the specific exceptions of 803 and 804. (I am a big believer in skinning the cat in as many ways as possible). If the outcome is doubtful, deploy the wild card residual exception(s): if your declarant is available to testify, you should proceed under 803(24) alone, but if your declarant is unavailable, try both 803(24 and 804(b)(5). In either case, be prepared to identify the circumstances about the declarant, the witness, the subject matter, and the statement which constitute "circumstantial guarantees of trustworthiness" comparable to those in the rest of the rule (803, 804, or both) which contains the residual exception(s). If you are able to convince the trial court to use this safety valve, chances are the Supreme Court will affirm.[11]

As we say at my house, "Santa only comes to those who believe in him." If you believe in the residual exceptions, they might come true for you and your client. Better than a fur coat?

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

9 Obviously, it is better for the judge to actually label the portions of her written order on the admissibility of evidence under this statute as "Findings of Fact" and "Conclusions of Law" to avoid the technical challenge that the court failed to comply with the statute. Lawyers presenting proposed orders to judges should be sure to do so.

10 Montana Commission Comment to 803(24), citing the federal Advisory Committee Note and rejecting the more restrictive federal provisions.

11 Better not use Eartha Kitt's argument: "Think of all the fun I've missed/Think of all the 'fellas that I haven't kissed/ Next year I could be just as good/ If you'll check off my Christmas list [or at least allow the hearsay]."

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James R. Hintz

James R. Hintz, 58, of Billings, passed away unexpectedly on Oct. 7, 2013. Originally from Michigan's Upper Peninsula, Jim was born on Aug. 22, 1955, in Marquette, Mich., to James and Ruth (Hanninen) Hintz. He was a 1973 graduate of Ishpeming High School. He graduated from Northern Michigan University with his B.A. and M.A. He received his J.D. from the University of Montana in 1999. Jim married Joan E. Groom on June 1, 1984.

Jim was a partner in the Law Firm of Crowley/Fleck since graduation. Previous employment included Jim working as dude wrangler in Colorado. Jim worked for many years in the building trade; his craftsmanship was exceptional.

Jim had many passions in life including fishing, hiking and being in the outdoors. His hobbies reflected his passion for fishing by his handcrafted fishing poles, lures and flies. He co-hosted a radio program featuring a variety of outdoor topics. He was an avid sports fan and was born a "Green Bay Packer Backer." Jim enjoyed spending time with his wife, Joan and daughter, Jasmine, enjoying many vacations in Florida and Michigan's Upper Peninsula. He was a compassionate and positive man and enjoyed life to its fullest. He will be missed by everyone who knew him.

Jim is survived by his wife, Joan E. Groom of Billings; daughter Jasmine Hintz of Billings; sister, Ruth Hintz of Marquette, Mich; sister Susan (John) Rader of Ishpeming, Mich; brother, Martin Hintz of Gwinn, Mich; one aunt, Theresa (Robert) Olds of Ishpeming; several nieces, nephews and many cousins. He was preceded in death by his parents.

A memorial was held on Monday, Oct. 14, at Dahl Funeral Chapel, 10 Yellowstone Ave., Billings, MT 59101. In lieu of flowers memorials may be made to the Ronald McDonald House, 1144 N 30th St., Billings, MT 59101, of which he was a board member. Memories and condolences may be shared with the family at www.dahlfuneralchapel.com

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