

MONTANA LAWYER

State Bar
— of —
Montana

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Rules

It's a new
era for civil
procedure
in Montana

Also inside

IRS Form 1099:

Need-to-know info

America Invents Act:

Changes in patent law

State Bar awards:

Nominations needed

Rule 2. Motions

On filing a motion or within five days thereafter, the moving party shall file a brief. The brief may be accompanied by appropriate supporting documents. Within ten days thereafter, the adverse party shall file a supporting brief which also may be accompanied by appropriate supporting documents. Failure to file a reply brief or other supporting documents may result in summary judgment or summary ruling. Failure to file a summary ruling by the moving party within five days after the adverse party's summary ruling is a failure to file an answer brief by the moving party. Failure to file an answer brief by the moving party within ten days after the adverse party's summary ruling is a failure to file an answer brief by the moving party. Failure to file an answer brief by the moving party within ten days after the adverse party's summary ruling is a failure to file an answer brief by the moving party.

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Coming up in Montana Lawyer (and call-out for articles)

Here are some story ideas we are working on for future editions of The Montana Lawyer. If you would like to contribute stories related to these topics, send your ideas to Pete Nowakowski at pnowakowski@montanabar.org.

Legal needs, particularly in the Native American community. For context, read the Equal Justice Task Force petition to the Supreme Court at montanabar.org. In addition to this topic, we are interested in

spreading the word on the Bar's reduced-fee civil representation program, Modest Means. If you participate in the program, and feel you have insight, and if you like to write, please let us know.

Mental health issues in the legal profession. Lawyers experience higher rates of addiction, depression and suicide. Why is it a problem and what can be done?

Any topic you think needs addressed; we are always open to story contributions.



Time's inexorable advance

The collective age of attorneys nears retirement every day; how will you remain active during your waning years?

"Life should not be a journey to the grave with the intention of arriving safely in a pretty and well preserved body, but rather to skid in broadside in a cloud of smoke, thoroughly used up, totally worn out, and loudly proclaiming 'Wow! What a Ride!'"

~ Hunter S. Thompson

I laid on the floor, reminiscing with my brothers and mother about the life of my recently departed father. My Dad had passed away after battling Type 1 diabetes most of his life. We were sharing stories and laughter to ease our grief.

Unexpectedly, my younger brother, JC, came close to me – I thought he was going to give me a kiss on the cheek. Instead, he grabbed my head with both hands and licked my side burn in a long, exaggerated motion. He looked at me in all seriousness and said, "Gee, so that's what gray tastes like!"

I nearly coughed up a lung laughing so hard. We all convulsed with laughter for several minutes. Despite the humor, I felt all 40 years of my age! (I'm now 43.)

Like you, I wonder about how I'll approach my senior years, and what I will do in a decade, or two, or four (if lucky). Statistically, I'm at the midpoint of my life, and mid-career. But I still haven't decided "what I want to be when I grow up." Some would say that is a mid-life crisis. I say it's keeping my options open.

We all grow and change. I don't know if I'll continue practicing law, at least the way I do now, as the years pass. I relish the interactions with clients and colleagues, and nothing gives me more satisfaction than helping someone avoid problems or resolve them. But after nearly 19 years of practice, I've grown weary of the billable

hour. Few professionals can account for their bathroom breaks, mealtimes or Bar service as well as I can.

Of course, it would be nice to hit the lottery. I'll buy a ticket once every few months just for the thrill it brings. Still, given the odds (and my luck), it isn't a prudent retirement plan.

Though I have many more useful years left and need to develop my nest egg, I have considered what I'll do after retirement. I want to remain useful and active. I suspect I will volunteer at least half-time to keep me occupied and engaged. Because of my unique qualifications in the law, I anticipate a good portion of my volunteer work will be pro bono publico service.

Many of you may not know that the State Bar has a special membership class known as "Emeritus," which has a reduced membership fee. It allows attorneys with at least 10 years of legal practice (in the past 15 years) to provide pro bono or volunteer services to low-income individuals even if the member does not otherwise maintain an active practice. An Emeritus member may not receive compensation of any kind for the legal services provided, and must deliver the legal services in association with a not-for-profit legal aid organization. The required association is to ensure that the pro bono legal services are covered by malpractice insurance.

The thought of serving as an Emeritus attorney excites me. I would have freedom to choose the cases

that interest and stimulate me, while serving economically-disadvantaged people who are desperate for legal help. My service would have an incredible impact in their lives.

I have a wonderful model for such senior pro bono service. Jerry Thane in our office provided representation to victims of abuse through the Crime Victim Advocates in Missoula; he spoke of it as a highlight of his career. Jerry especially enjoyed helping abused and battered women, taking special care of them as only a grandfatherly-person such as Jerry could do. Jerry also would chuckle at the reaction of judges, who often were impressed to have such a distinguished attorney stand up for these victims of abuse. Jerry brought more gray hair to the courtroom than the judge!

The State Bar of Montana will have a growing number of retiring attorneys like Jerry in the next decade or so. Forty-six percent of our attorneys in Montana are 50 years or older. When you add the 40-plus crowd, the number grows to 65 percent. If we could only harness that talent for pro bono and other volunteer service, imagine the good we could do in our communities.

I hope I will remain active in my senior years, and put my accumulated knowledge and experience in the law to work for good. I hope you consider doing so as well. We have so much good to do before we turn in our final brief.

Senators rebut aid-in-dying arguments

EDITOR'S NOTE:

In the November 2011 issue of *Montana Lawyer*, Sen. Jim Shockley and Sen. Anders Blewett wrote opposing views about the state Supreme Court's decision in *Baxter v. State*, and whether that decision legalized aid in dying.

Sen. Shockley, along with Margaret

Dore, argued that "*Baxter* gives doctors who assist a patient's suicide a potential defense to criminal prosecution. *Baxter* does not legalize assisted suicide by giving doctors or anyone else immunity from criminal and civil liability."

Sen. Blewett argued that *Baxter* did legalize aid in dying: "(The Supreme

Court) resolved the case based on statutory construction, determining that a doctor who provides aid in dying is shielded from criminal liability by the statutory defense of consent because aid in dying is not against the public policy of the state of Montana."

Here are their rebuttals:



"Arguments that the Court overlooked statute and case law are flawed"

Sen. Anders Blewett

Senator Shockley and Margaret Dore attempt to cast doubt on *Baxter's* recognition of the legality of aid in dying in Montana, and argue that it is not good public policy.

Their arguments that the Court overlooked statute and case law are flawed and academic at best because the Montana Supreme Court is the final arbiter of questions of state law. A physician who provides aid in dying is not subject to criminal prosecution if the patient is mentally competent and terminally ill, because under those circumstances the Court has now expressly held that the consent defense embodied in Section 45-2-211, MCA is available to him.

As Shockley and Dore suggest, under certain circumstances, a prosecution could be appropriate if there are legitimate questions about whether the physician respected the boundaries recognized by the Court in *Baxter*, e.g., whether the patient was in fact mentally competent, terminally ill, and requested the medication which she could then self-administer.

The same is also true, of course, with respect to all other end-of-life decision-making and almost all other forms of medical treatment as well. Under the Montana Rights of the Terminally Ill Act, many of the protections available to a doctor apply only to a "qualified patient," defined as someone who meets four criteria: 1) is 18 years of age or older; 2) has executed a certain type of declaration; 3) has been determined to be in a terminal condition; and 4) is not pregnant. While a doctor who withholds or withdraws life-sustaining treatment from a "qualified patient" is immune from criminal, civil and administrative sanctions under Section 50-9-204, MCA, consent won't be an effective defense if the patient isn't in fact "qualified" as the legislature has defined that term. A factual inquiry into those defined

Blewett, page 6



"Baxter does not address who has the burden of proof, and the weight of that burden"

Sen. Jim Shockley

Senator Blewett assures doctors that under *Baxter v. State*, 354 Mont.234 (2009), they will not be successfully prosecuted. Under *Baxter* the doctor provides the lethal dose to the patient, but does not administer it and the patient must be: 1) terminally ill (not defined), 2) mentally competent, and 3) must self-administer the lethal dose. *Baxter* at ¶¶ 12, 26, 32, 40, 49 & 50. In addition, the suicide must be at the patient's sole initiative and "private, civil and compassionate." *Id.* at ¶¶ 23, 40 & 44.

Baxter does not address who has the burden of proof, and the weight of that burden. Senator Blewett states that the burden on the physician is based on *State v. Desilva*, 209 Mont. 169 (1984), a bad check case. The physician would at least have to present sufficient evidence on each of the elements of the "defense" to even raise the defense of consent. Anyone who has tried cases, civil or criminal, knows that the outcome is never guaranteed. This would be especially true when there is a factual issue, for example, if the patient's daughter claims that her father was pushed to suicide by his son in order to prevent the father's making a new will. Senator Blewett acknowledges that *Baxter* does not specifically deal with civil liability and professional responsibility; to a physician, these are important considerations.

It is unwise to guarantee a result to a client and this is especially the case when the client's personal liberty is at stake. Yet this is the essence of Senator Blewett's argument that physician-assisted suicide is legal in Montana. When the doctor is not in control of all the facts such an assertion is even riskier. Statutes in Oregon and Washington clearly do make assisted-suicide legal; family, friends, and physicians are protected civilly and criminally, and against professional discipline, if they make a good faith effort to follow the

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terms is always a possibility – like it is in the prosecution of every other type of crime.

Montana doctors can reasonably feel protected – just as in all other cases where they treat people with forms of therapy that hold risks for the patient, doing so at the patient's specific request – if they act carefully and document what they're doing and why.

Shockley and Dore offer only speculation and conjecture to argue against aid in dying as public policy. In regards specifically to the issue of elder abuse, my concern for vulnerable seniors prompted me to introduce Senate Bill 262, crafted with input from advocates charged with their welfare and supported by AARP. I was disappointed that Senator Shockley voted against this bill, which aimed to double penalties for abuse, neglect or exploitation of an elderly or disabled person. Those truly concerned with elder abuse should empower seniors to enforce their legal rights, not take them away.

Shockley

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statutes. (ORS 127.885 s.401; RCW 70.245.190). Indeed, they are granted immunity. *Id.* *Baxter's* holding, by contrast, is limited to a potential defense to a criminal prosecution, for doctors only, with no express protection provided for civil liability or professional discipline. If the prosecution is successful, a doctor or anyone else charged with assisting a suicide could go to prison.

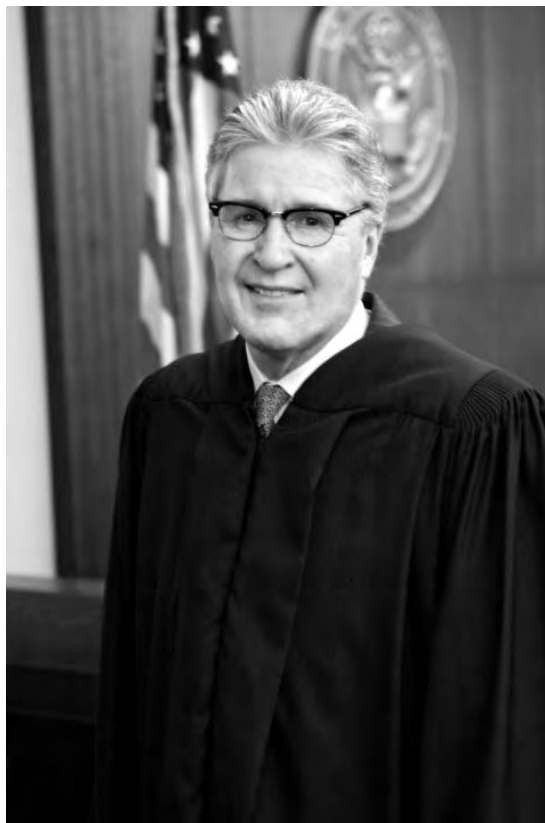
In closing, *Baxter* did not legalize assisted-suicide in Montana. Doctors and anyone else who assist another person's suicide remain subject to criminal and civil liability, and professional discipline. Regardless, the real issue is protecting Montanans from abuse and the other problems of legalization.

Montana and Member News

Montana's newest federal judge

Dana Christensen took the oath of office on Jan. 19 at the Russell Smith Federal Courthouse in Missoula. Sen. Max Baucus, D-Mont., nominated Christensen, and the Senate unanimously confirmed him in December. Christensen is Montana's 17th federal judge. The Missoulian covered the event, read more at <http://bit.ly/x22Wwb>

RIGHT: Freshly robed, US District Judge Dana Christensen appears at the Russell Smith Federal Courthouse in Missoula after his swearing-in ceremony on Jan. 19.



Jamie Lynn Sievers photo, www.jamielynnphtographymt.net

FY2011 Public Defender Commission report available

In mid-December, the Montana Public Defender Commission Fiscal Year 2011 Report to the Governor, Supreme Court and Legislature was finalized. You can read the report at <http://www.publicdefender.mt.gov/2011GovReport/TOC.asp>

McGuinness joins Billings firm

Patten, Peterman, Bekkedahl & Green PLLC, welcomes Michael F. McGuinness. McGuinness was born and raised in Billings,



McGuinness

graduating from Skyview High School. He graduated from Montana State University - Bozeman in 2005, receiving a B.S. in political science with honors.

McGuinness played football for the Bobcats, earning Big Sky Academic All-Conference recognition in 2004. Mike gradu-

ated from California Western School of Law in San Diego in 2010.

His areas of practice include business planning, corporate law, contract litigation,

real estate law, probate, employment law and bankruptcy. The firm further offers legal services including adoptions, civil litigation, collections, commercial litigation, estate and tax planning, trust administration, tax controversy, partnerships and personal injury. You can reach Mike at mmcguinness@ppbglaw.com or (406) 252-8500.

Cossi joins Bozeman law firm

Domenic A. Cossi has joined Western Justice Associates, PLLC, of Bozeman as an associate attorney. Cossi comes to Western Justice after clerking for Hon. N. Randy Smith of the United States Court of Appeals for the Ninth Circuit. Cossi graduated from the University of Montana School of Law with high honors in May of 2010. While in law school, he interned for Garlington, Lohn & Robinson, the Clark Fork Coalition, and performed his clinical externship in the chambers of United States District Judge, Hon. Donald W. Molloy. He was involved in the Environmental Law Group and helped start the nonprofit Environmental Legal Education Network, a nonprofit focused on improving the experience of environmental law students at the University of Montana School of law. He also published an article

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Montana Lawyer updates

You may notice slight changes to the design of The Montana Lawyer. The new editor for the magazine, Peter Nowakowski, has tweaked the design to make it easier to read (and to make the layout easier). It is a work in progress, and you might see slight changes over the next few editions. If you have any suggestions, or concerns, please email pnnowakowski@montanabar.org.

Important ethics opinion online

The latest Bar ethics opinion addresses Montana's unique rule on confidentiality and bankruptcy. Read it at www.montanabar.org under For Our Members tab -> Ethics Opinions.

Annual dues and fees deadlines near

The State Bar of Montana will mail annual dues statements to attorneys on March 1. Payments for all fees are due April 1st and can be made by check or online with a credit card. CLE affidavits will be mailed in April and must be filed by May 15th.

Save the date -- State Bar Annual Meeting is in September

The annual meeting starts a week later this year. The event begins at 8 a.m., Sept. 20-21, at the Crowne Plaza Hotel in Billings. Check The Montana Lawyer and www.montanabar.org for more information as the date nears.

Supplement available for Willey's "Montana Real Estate Transactions"

Charles Willey, adjunct professor at University of Montana School of Law, has released an extensive supplement (82 pages) to his 2010 text. This is a crucial update for anyone who has purchased the original publication; it covers several new subjects, including, but not limited to:

1. An extensive discussion of the law of Ownership of the Beds of Navigable Streams, precipitated by the Montana PPL case on which the U.S. Supreme Court recently granted certiorari
2. A discussion of Fraud, Constructive Fraud, and Negligent Misrepresentation under Montana

Law, including the attorney Potts case
3. The elements of Adverse Possession, Prescriptive Easements, and Reverse Adverse Possession
The supplement is available through the Bar's bookstore at www.montanabar.org

Ford's newest formbook released

Cynthia Ford, professor at University of Montana School of Law, has released the 2012 edition of the "Montana Civil Pleading & Practice Formbook."

The formbook contains Ford's excellent discussion, which is "meant to orient you to the context and policy which the subject implicates." Ford also included "verbatim sections of the Code and Rules which bear on the subject, so that this book can be a one-stop shop."

A CD is included, which contains every form in the book, minus the footnotes, so that you can use them for your own templates. *The formbook is available for purchase through the Bar's bookstore at www.montanabar.org.*

Supreme Court to consider Access to Justice Commission

In December, the Equal Justice Task Force petitioned on behalf of the access to justice community to establish an Access to Justice Commission. The Court has agreed to consider following a 60-day comment period. The petition and appendixes, which include the Montana Legal Needs Survey Final Report, are available at montanabar.org -> Bar Related Groups -> Access to Justice Commission. You can also read the order, on page 10.

Bar seeking award nominations; deadlines have changed

The deadline for all State Bar awards is now May 15. Print nomination forms for the William J. Jameson Award and George L. Bousliman Professionalism Award are on pages 24 and 25. Print forms for the Karla M. Gray Equal Justice Award and the Neil Haight Pro Bono Award will be in the March issue. Copies of the nomination forms for all awards are available in the Montana Lawyer section online at montanabar.org.

Scam alert

Fraudsters target Montana Lawyers

A well-known scam that targets lawyers is making the rounds in Montana. It is of particular concern because the scam email is tailored for different scenarios, in this case it mentions the State Bar's Lawyer Referral and Information Service.

A State Bar member was targeted with an email stating that they heard about the member attorney through the service. This Bar member was not part of the LRIS, so red flags went up.

The "Hamasaki" scam is well documented, and you can read more about it at LAWPRO'S Avoid A Claim blog — <http://bit.ly/xJ53ZD>.

If you are suspicious about referrals through the LRIS, please call the Bar at (406) 449-6577

Here are some additional (and safe) resources for general information on fraud and scams:

www.fbi.gov/scams-safety

<http://doj.mt.gov/consumer>

And for fun, there's always www.snopes.com

State Bar Calendar

For the most up-to-date events, see the calendar at montanabar.org.

Feb. 8: Phone/webinar, Physical & Mental Examination of Persons Under Rule 35, M.R.Civ.P., noon - 1 p.m.

Feb. 10: Executive Committee Meeting, 10 a.m. - 2 p.m.

Feb. 14: Family Law Section Phone CLE, Settlement Conference Dos and Don'ts, noon-1 p.m.

Feb. 16: Access to Justice Committee Meeting. Yellowstone County Courthouse, Room 105, 10 a.m. - 3 p.m.

Feb. 17: Commercial Real Estate Transactions: Fairmont Hot Springs, 8 a.m. - 5 p.m.

Feb. 21: State Bar/Student Bar noon presentation. UM School of Law, Missoula, noon - 1 p.m.

Feb. 27: February 2012 Bar Exam, Great

Northern Hotel, Helena.

Feb. 28: February 2012 Bar Exam, Great Northern Hotel, Helena.

Feb. 29: February 2012 Bar Exam, Great Northern Hotel, Helena.

March 1: Phone CLE, Appellate Practice Tips: Brief Writing and Oral Argument, noon hour

March 2: Executive Committee Meeting, State Bar Office, Helena, 10 a.m. - 2 p.m.

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in the Public Lands and Resources Law Review. Cossi grew up in the North Woods of Minnesota, where he developed a love for the outdoors. He earned his bachelor's degree in journalism from the University of Minnesota, graduating summa cum laude in 2001. Cossi worked in advertising and publishing prior to attending law school.

Clerk of the Supreme Court files for re-election

"It has been my honor to serve the people of Montana as Clerk of the Supreme Court. I have served honestly and efficiently and I am proud of my record protecting Montanans' access to our highest court and judicial information and providing good customer service. During my tenure I have accomplished a great deal, including the modernization of the office, which recently included the establishment of an electronically viewable case docket for the public and an electronic notification system of court documents," Ed Smith said in a press release, "but there is more to do."

"One project I look forward to leading is the implementation of electronic case filing at the Montana Supreme Court, which is slated to begin this fall."

Martin Burke, law professor and former dean of the University of Montana School of Law, will serve as chair of Smith's campaign, along with a statewide steering committee of forty-six members.

Smith has served as President of the National Conference of Appellate Court Clerks. He chairs the E-filing Task Force and is a member of the Court Technology Commission. Smith also serves as a member on the Board of Trustees of the Montana Historical Society.

Great Falls firm opens Bozeman office, hires new associate

The Great Falls law firm of Deschenes and Sullivan; a general practice and litigation firm with emphasis in bankruptcy, contract, and insurance law; announces the opening of an office in Bozeman. The new office is located at 115 West Kagy Blvd, Suite O. Those in need of legal services can contact the Great Falls office at 406-761-6112, while the Bozeman office can be contacted at 406-585-5981.

The Deschenes and Sullivan Law Firm also announces the addition of J. Colleen Herrington as an associate attorney. Herrington is a 2003 graduate of the University of Maryland School of Law and has practiced in Bozeman for the last seven

MLSA highlights free and low-income tax services

Montana Legal Services Association announces two important tax services for Montanans in 2012. MLSA's Low Income Tax Clinic (LITC) provides free legal services to low-income people who have federal tax disputes with the IRS. Applications are available on the MLSA web site at www.mtlsa.org or by calling 1-800-666-6899. Attorneys and accountants with tax experience are encouraged to volunteer with the LITC. The LITC provides malpractice insurance and mentoring. If you are interested in volunteering with the LITC, please contact August Swanson at aswanson@mtlsa.org or (406) 442-9830, ext. 21.

MontanaFreeFile.org is available for Montanans to find information on how and where to file their federal and state taxes. Resources include free tax-filing options. The web site also gives information on where eligible tax filers can get free tax preparation information and assistance. Last year 38,537 Montanans visited the MontanaFreeFile.org web site and thousands of dollars were returned to tax payers using the services provided. MontanaFreeFile.org is a collaborative project of the Montana Credit Unions, Montana Legal Services Association, Montana Department of Revenue, Opportunity Link, Inc., and Rural Dynamics, Inc.

years. She is a JAG Officer with the Montana National Guard and has recently been appointed as the part time Municipal Court Judge in Bozeman. Her emphasis of practice will be in bankruptcy and general litigation.

Another successful institute for State Bar Section on Construction Law

The Montana State Bar Section on Construction Law held its annual Construction Law Institute in Bozeman on Friday, September 30, 2011. Approximately 70 Montana lawyers and construction professionals attended the program, which is in its seventh year.

"Litigation, Arbitration and Experts – Can't Live With 'Em, Can't Live Without 'Em" covered issues from how to effectively manage a construction arbitration to the efficient use of experts in both litigation and alternative dispute resolution.

The section brought in leading construction practitioners from throughout the. The presenters included John H. Guin, Esq., John R. Heisse, Esq., Harry L. ("Buck") Griffin, Esq., Laura J. Stipanowich, Esq., Justice Michael E. Wheat, John E. Bulman, Esq., and Chris C. Whitney, Esq. Additionally, the section presented an update on Montana issues by three of the Section's members: Michael E. Begley, Esq., Greg C. Black, Esq. and Kellie G. Sironi, Esq.

The Construction Law Institute is a result of collaboration among many parties, including the State Bar of Montana Construction Law Section, the State Bar of Montana CLE Institute, Montana State University and the volunteer efforts of its speakers and presenters.

Also, the Institute is strongly supported by its several sponsors, including: Barnard Construction Company, Inc., Martel Construction, Inc., Thomson-West Publishers, Montana Contractors Association,

Milodragovich, Dale, Steinbrenner & Nygren, P.C., Refling Law Office, and Tarlow Stonecipher & Steele, PLLC.

Attorney General recognizes Assistant US Attorney Suek for work in Indian Country

Assistant U.S. Attorney Lori Harper Suek of the U.S. Attorney's Office in the District of Montana was one of 163 members of the Department of Justice recently recognized by Attorney General Eric Holder and Executive Office for U.S. Attorneys (EOUSA) Director H. Marshall Jarrett at the Director's Awards Ceremony in Washington D.C.

In his prepared remarks, Attorney General Holder told the awardees that they, "represent the very best that this Department has to offer" and that their "work embodies our ongoing commitment - not merely to win cases, but to do justice; to protect our fellow citizens; to empower the most vulnerable among us; and to uphold the rule of law."

Suek grew up in Butte. She obtained her undergraduate degree and her Juris Doctorate from the University of Montana. Upon graduation, she clerked for retired U.S. Magistrate Judge Robert M. Holter.

She then worked for a brief period in private practice before joining the U.S. Attorney's Office for the District of Montana in June of 1995. During her tenure with the U.S. Attorney's Office, Suek has tried over 100 criminal cases - most involving violent crime in Indian Country. She also served as senior litigation counsel to the U.S. Attorney's Office from January 2006 to July 2010. In July of 2010, she was promoted to Deputy Criminal Chief. In her role as Deputy Criminal Chief, she supervises the Indian Country Unit of five AUSAs. Suek also carries a criminal caseload of her own.

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ACLU Montana names Ellingson as legal director

Missoula attorney and former Montana Representative and Senator Jon Ellingson is the new legal director for ACLU Montana, according to a Jan. 17 press release.

Ellingson began his private law practice in Missoula in 1975. From 2004-2010 he worked as an assistant attorney general under Attorney General Mike McGrath and then Attorney General Steve Bullock. He has a bachelor's degree in economics from Harvard University, a master's degree in political science from the University of Montana and his juris doctor degree from the University of California, Hastings College of Law.

He served two terms in the Montana House of Representatives (1994-1998) and then was elected to the state senate where he concluded his legislative career in 2006 serving as majority leader. Term limits prevented him from running for reelection.

During his time in the Montana Legislature, Ellingson was dedicated to protecting the civil liberties of Montanans.

He sponsored bills to extend protections in the Montana Human Rights Act to gay and lesbian, bi-sexual and transgender people and worked hard to protect and expand voting rights, including sponsoring successful legislation for same-day voter registration, according to the release.

Ellingson will now take the helm of the ACLU of Montana's extensive legal program, including the same-sex domestic partnership case, *Donaldson and Guggenheim v. State of Montana*, the Montana Prison Project's work to protect the rights of those incarcerated, the voting rights and independent party candidate case *Kelly v. McCulloch* and our work to challenge the state's lethal injection protocol in the case *Smith v. Ferriter*.

Budewitz publishes book for fiction writers

Leslie Ann Budewitz's first book, "Books, Crooks & Counselors: How to Write Accurately About Criminal Law and Courtroom Procedure," has just been published by Quill Driver Books.

According to a press release, "Books, Crooks, and Counselors" serves as a comprehensive guide to law intended to help writers create more realistic characters and storylines. The book addresses a range of legal issues that arise in fiction, including criminal and civil law, criminal investigation and procedure, how trials are conducted, civil and criminal penalties, legal terminology, adoption, probate, and malpractice, and the daily work lives of lawyers, judges, and their staff.

The book helps writers understand some of the differences in state and federal law, and avoid the mistakes that annoy readers. Budewitz is a practicing lawyer with more than 25 years' experience and a published mystery writer. For an excerpt and more articles for writers, visit www.lawandfiction.com.

The Missoulian, Daily Interlake, and Bigfork Eagle have each run features about the book.

Budewitz is also writing a cozy mystery series, "The Food Lovers' Village Mysteries," which will debut from Berkley Prime Crime in 2013. It's set in Jewel Bay, a fictional lakeside town in NW Montana, on the road to Glacier Park, which calls itself "a food lover's village."

Attorneys provide key work that leads to award

Disability Rights Montana and its client were honored in Baltimore at the annual National Disability Rights Network and Training and Advocacy Support Center annual conference (June 7, 2011) as Advocates of the Year for the work of two of DRM's

senior attorneys, Alexandra Volkerts (Missoula) and Andree Larose (Helena). Volkerts and Larose brought 4 legal actions to obtain medically necessary treatment and educational services for a Montana youth with Autism essential to help him move from living in a state institution to living and working in the community. Alexandra Volkerts was lead attorney in a 10 day fair hearing for medically necessary Medicaid services while Andree Larose was lead attorney in 2 special education claims and in overturning the youth's illegal commitment.

The TASC award recognized the youth's employment success subsequent to his successful medical and behavioral treatment at Kennedy Krieger Institute.

The youth now works two part time jobs and is learning to read after 12 years of inadequate educational services. Settlement of some of the claims provided specialized employment services by Ellen Condon, employment specialist for the Rural Institute at the University of Montana, on the job supports and transportation by AWARE, Inc. staff, and individualized educational services designed for the youth's Autism by Dr. Ann Garfinkle, of the Univ. of Montana, Dept of Education.

Ms. Volkerts accepted the award on behalf of DRM and dedicated it to her sister, Dorothy Morris, a woman who lived almost her entire life with significant disabilities.

Disability Rights Montana is a federally funded, nonprofit law firm which is part of a nationwide system of law firms dedicated to advocating for the human, civil and legal rights of people with disabilities. DRM's main office is in Helena; 1-800-245-4743 or online at www.disabilityrightsmt.org DRM has two branch offices in Missoula and Glasgow.

Every state, the District of Columbia and the trust territories have similar protection and advocacy law firms dedicated to protecting the rights of people with disabilities which operate cooperatively within the National Disability Rights Network. www.napas.org

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In the Matter of Establishing an Appellate Pro Bono Program

The Supreme Court of Montana issued the following order on Jan. 13: Based on the increasing numbers of parties appearing before this Court without attorneys, the Court is considering the creation of an Appellate Pro Bono Program to further access to justice for civil litigants who lack financial means to retain counsel. A description outlining the program is attached to this Order. The program is designed to offer the assistance of appellate counsel to qualified litigants in cases in which the Court has determined that supplemental briefing would be beneficial to the Court. As an incentive to encourage attorneys and law students to offer pro bono assistance to qualified litigants, the Court will offer an opportunity to counsel for both parties for oral argument of cases selected for participation in the program.

The Court will accept public comment on the proposed Appellate Pro Bono Program for a period of sixty days from the date of this Order. All comments should be filed in writing with the Clerk of this Court.

A copy of this Order and the attached program description will be posted on both the Montana Supreme Court website and on the State Bar of Montana website with a request that it be published in the next available issue of *The Montana Lawyer*. In addition, the Clerk is directed to provide copies of this order to the Chairs of the Equal Justice Task Force, the Commission on Self-Represented Litigants, the State Bar's Access to Justice Committee, the Montana Legal Services Association, and the University of Montana School of Law.

Proposed Appellate Pro Bono Program (APBP)

Volunteer counsel: The Montana Supreme Court's Pro Bono Coordinator will develop a volunteer database and registry for attorneys and law students who volunteer to assist pro se litigants in appeals pending before the Supreme Court. Each volunteer will fill out an on-line application which will include, among other information, areas of the attorney's or student's subject matter expertise and interest. Experienced appellate attorneys may volunteer to mentor less experienced volunteer attorneys in supplemental briefing and arguing the appeal. Law students under supervision of the UM Law School also may apply to participate as volunteer counsel in accordance with the Court's student practice protocol.

Program Eligibility: Cases involving at least one self-represented party may be

selected by the Court for participation in the program where the Court determines, after briefing has been completed, that the Court will benefit from additional briefing on one or more issues. The Court's staff and Law Clerks may bring appropriate cases to the Court's attention during the briefing process on appeal or, in original proceedings involving self-represented litigants, during their review of motions or petitions.

Once the Supreme Court identifies an appeal where pro bono assistance may be beneficial to the Court, the Montana Supreme Court's Pro Se Law Clerk (PSLC) will provide the identified self-represented litigant with an application form for participation in the program, which explains eligibility requirements and the scope of representation. Should the litigant choose not to participate in the program, the case will be submitted on the litigant's pro se briefing.

Financial eligibility for the program will be determined in accordance with the criteria used to determine eligibility for services from the Montana Legal Services Association (MLSA). Appointment of pro bono counsel will be coordinated with MLSA's pro bono referral process to ensure proper financial eligibility screening for litigants and provision of malpractice insurance coverage for pro bono counsel who otherwise lack such coverage.

If the litigant applies and is approved for appointment of counsel under the Appellate Pro Bono Program, the Pro Bono Coordinator will circulate a case-specific confidential memorandum to a pool of volunteer attorneys for determination of conflicts of interest. The Pro Bono Coordinator will select an attorney from the qualified pool. The Pro Bono Coordinator will notify the volunteer attorney or student and the litigant of the attorney or student selected.

In the event multiple parties to the appeal are appearing pro se, volunteer counsel will be offered as described above for each qualified self-represented litigant.

Volunteer counsel/student: The volunteer counsel will provide the litigant with an engagement letter and file a notice of appearance (noting the appointment is under the Appellate Pro Bono Program). The Court will set a briefing schedule and the Montana Rules of Appellate Procedure will apply as in all other proceedings.

Supreme Court: Once the supplemental briefing process is complete, the Court will review the supplemental briefs for classification and schedule an oral argument, unless a majority of the Court determines that argument would not be appropriate for the case. The Court shall schedule the oral argument and determine the time

allowed to each party in accordance with its Internal Operating Rules.

Pro Bono Coordinator/Pro Se Law

Clerk: The Pro Bono Coordinator and Pro Se Law Clerk will be cross-trained so that the appointment of counsel is not interrupted due to the temporary unavailability of either. Back-up staff can be trained as needs are identified.

The Pro Bono Coordinator will develop the database and access to attorneys and law student volunteers. A rotation or randomized system of selecting counsel will be established.

The PSLC will prepare the case-specific confidential memorandum for each case with review and oversight by the Court.

The PSLC and Pro Bono Coordinator will develop the forms required to support this program.

In Re the Establishment of an Access to Justice Commission

On December 23, 2011, the Montana Supreme Court Equal Justice Task Force (EJTF), through its co-chairpersons, Andrew King-Ries and Bernadette Franks-Ongoy, and EJTF member Tammy Plubell petitioned the Court to establish an Access to Justice Commission (ATJC). The ATJC, if established, would have the permanent responsibility of coordinating and managing access to justice in Montana on a long-term basis. The Court has agreed to consider this matter at a Public Meeting following a 60-day comment period.

THEREFORE, IT IS ORDERED that public comments will be accepted on the "Petition to Create [an Access to Justice] Commission and Formalize Structure." Such comments shall be filed, in writing, with the Clerk of this Court within sixty (60) days of the date of this Order.

IT IS FURTHER ORDERED that this Order and the copy of the Petition shall be published on the Montana Supreme Court website, and that notice of this Order shall be posted on the website of the State Bar of Montana and in the next available issue of *The Montana Lawyer*.

Orders of Discipline

Summarized from a Jan. 10 order:

The Montana Supreme Court accepted and adopted recommendations from the Commission on Practice stemming from an April 20, 2011, formal complaint against Milton Datsopoulos.

The complaint alleged that Datsopoulos

Orders, next page

Orders, cont.

had violated several of the Montana Rules of Professional Conduct.

On May 26, 2011, Datsopoulos submitted a conditional admission and affidavit of consent to discipline. In September of 2011, an Adjudicatory Panel of the Commission on Practice conducted a hearing on Datsopoulos's conditional admission.

The commission subsequently submitted findings of fact, conclusions of law, and a recommendation that the proposed form of discipline to which Datsopoulos has agreed in his conditional admission be ameliorated.

The commission concluded that Datsopoulos violated Rules 1.15 and 1.18 of the Montana Rules of Professional Conduct by failing to properly receipt and deposit a client's money in his firm's trust account, by failing to have a written acknowledgement from the client that his fee would be paid by a third party, and by failing to keep a record of the funds or provide the client with a full accounting of the funds.

Importantly, however, the commission found that the way in which Datsopoulos handled the funds did not result in any loss to his client.

Further, the commission felt that the discipline Datsopoulos agreed to accept in his conditional admission was unwarranted and excessive, given the facts of the case and Datsopoulos's admissions and cooperation. Instead, the commission recommended that Datsopoulos be privately admonished for his admitted breaches of ethical duties, and that he be required to pay the reasonable and necessary costs of the proceeding.

Summarized from a Dec. 7 order:

The Montana Supreme Court accepted and adopted recommendations from the Commission on Practice over a formal disciplinary complaint it filed on Feb. 25, 2010, against Roy W. Johnson Jr.

The Commission on Practice held a hearing on the complaint on July 22 and September 23, 2010. Johnson was present and testified on his own behalf. The commission submitted its Findings of Fact, Conclusions of Law, and Recommendation for discipline to the Montana Supreme Court on Oct. 13, 2011.

Johnson has not objected to the commission's findings and conclusions, but he has filed objections to the recommendation that he be suspended from the practice of law in Montana for 60 days. The Office of Disciplinary Counsel (ODC) filed a memorandum in response.

The commission concluded that Johnson had violated Rules 1.1 and 1.3, MRPC, in that he had failed to provide a client with competent representation, or to act with

A Reminder | Formal disciplinary complaints filed by the Office of Discipline Counsel may be reviewed by any interested persons in the office of the Clerk of the Supreme Court in Helena. Under recent Montana Supreme Court rule revisions, the Court is making the disciplinary process more transparent for the public.

reasonable promptness and diligence in representing her. It concluded that Johnson had violated Rule 1.5, MRPC, in that he had failed to communicate to his client, in writing, the scope of the representation, and the basis or rate for the fees and expenses for which the client was to be responsible.

The commission concluded that Johnson had violated Rule 3.2, MRPC, in that he had failed to make reasonable efforts to expedite litigation consistent with his client's interests. In addition, the commission concluded that, after his client discharged him, Johnson had failed to withdraw or to provide a copy of the client's file or a timely refund of unearned fees, or to protect her interests, in violation of Rule 1.16, MRPC. Finally, the Commission concluded that Johnson had violated Rule 8.1, MRPC, by failing to respond to inquiries from ODC.

The commission recommended that Johnson be suspended from the practice of law in Montana for 60 days. It also recommended that Johnson be ordered to pay the costs of these proceedings.

In his objections to the suspension, Johnson claims his violations of the MRPC do not rise to a level of egregiousness that would justify a 60-day suspension. He stated a suspension will be crippling financially to him and a hardship on his current clients.

In response, ODC observed that all suspensions hurt the affected attorney and inconvenience the suspended attorney's clients. ODC also said that Johnson has a history of repeated disciplinary proceedings, including two public censures and four private admonitions.

Summarized from a Jan. 17 order:

On Jan. 17, the Montana Supreme Court publicly censured attorney Solomon Neuhardt. Here is a summary of the events leading to the censure:

Following a disciplinary complaint and subsequent evidentiary hearing, the Commission on Practice concluded that Neuhardt violated Rules 1.4 and 1.16(d), MRPC, in failing to keep a client reasonably informed of the status of a civil matter, that he did not timely provide the client's files to the client's new lawyer or respond to the client's requests for accounting of the expense advance deposited in Neuhardt's trust account, and that he delayed returning the balance of the retainer for over four months following termination of representation.

The commission also concluded that Neuhardt violated Rules 1.1 (Competence)

and 1.3 (Diligence), MRPC, in relation to a case he handled for another client. The commission concluded that Neuhardt failed to timely file a brief in support of a motion to suppress or dismiss, did not inform the client of the reasons the motions were denied, and filed a petition for writ of supervisory control that lacked reasonable basis to succeed.

Summarized from a Jan. 18 order:

The Montana Supreme Court accepted and adopted recommendations from the Commission on Practice over a formal disciplinary complaint filed against Martin Eveland. Eveland filed an answer in which he admitted the substantive allegations of the complaint.

The commission concluded that Eveland violated Rule 8.1(b) of the Montana Rules of Professional Conduct (MRPC) and Rule 8A(6) of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). Both of these violations relate to Eveland's failure to respond to inquiries or lawful demands for information from the Office of Disciplinary Counsel (ODC) and the commission with respect to two informal complaints filed against him.

The commission recommended that Eveland be placed on probation for two years, subject to conditions. The recommendations are based on the information presented to the commission and the absence of any prior disciplinary history for Eveland.

The Commission proposed the following conditions for Eveland's probation:

(a) that Eveland obtain a mentor to be approved by the Commission;

(b) that Eveland undergo a psychological evaluation at his expense, the result of which shall be reported to ODC, and which shall report whether Eveland has a mental condition adversely affecting his ability to practice law and, if so, the nature of such mental condition and the extent to which it may affect his capacity to practice law;

(c) that Eveland comply with any recommendations made in his psychological evaluation;

(d) that Eveland report at least quarterly to ODC concerning his mentoring, his practice of law (without breach of applicable rules of confidentiality), and his compliance with any recommendations of his psychological evaluation; and

(e) that Eveland be assessed with the costs of these proceedings, subject to his right to object to such costs as provided by Rule 9A(8), MRLDE.

New act brings procedural changes to patent law in the United States

By Toni Tease

At long last, the United States has passed patent law reform legislation. On September 16, 2011, President Obama signed into law the Leahy-Smith America Invents Act. We wrote about prior versions of the legislation in March 2011 and May 2007 (www.teaselaw.com/newsletter.html). Not all of the issues that were addressed in these prior versions were included in the final legislation, however. (For example, the final legislation did not deal with damages for patent infringement.) This article summarizes the key aspects of the final bill.

As an initial matter, it is important to keep in mind that the America Invents Act does not change the standards for patentability. In order for an invention to be patentable, it must be useful, novel and nonobvious, and it must constitute patentable subject matter (for example, principles of nature are not patentable). As is discussed more fully below, the America Invents Act deals primarily with procedural issues, either in the context of patent examination or patent infringement litigation.

For most of our clients, the one aspect of the new legislation that will affect them most directly is the first-inventor-to-file rule. Under this rule, which takes effect March 16, 2013, the first inventor to file will be awarded a patent over another inventor who files second, and the relative dates of invention will be immaterial. Under current law, a second-to-file inventor would trump a first-to-file inventor if the second-to-file inventor could prove that he invented the invention first

(i.e., before the first-to-file inventor). This is where inventors' notebooks came in—they provided a record of the date of invention. The new legislation renders the date of invention irrelevant. All that matters is that you have the earlier filing date and that you are an inventor. (It has never been legal to copy someone else's idea and patent it—you must be the actual inventor to file for a patent.) Thus, the U.S. is not a "first-to-file" jurisdiction but a "first-inventor-to-file" jurisdiction.

Another important area affected by the America Invents Act is the ability of third parties to challenge a patent either pre- or post-issuance. Under current law, a third party may file a protest before publication of a patent application or a Rule 99 submission after publication but prior to issuance. Once a patent issues, the options include reexamination (ex parte or inter partes) or federal court litigation. The new law expands the options

available to third parties for challenging a patent. Interference proceedings, which deal with who invented something first, will be replaced by derivation proceedings, which will deal only with whether someone truly invented the invention at issue. Two new types of post-grant review will be available: post-grant review and inter partes review. Under the former, a third party may challenge a patent on any grounds for a nine-month period after issuance. Once this window closes, then the challenge (called inter partes review) must be based on patents or printed publications only (as is currently the case with Rule 99 submissions and reexaminations).

Inter partes reexamination is abolished effective September 16, 2012. Ex parte reexamination is still available and remains unchanged from prior law. The new standard for inter partes review is arguably more restrictive than the old standard for inter partes reexamination (although it remains to be seen how the Patent Trial and Appeal Board—formerly the Board of Patent Appeals and Interferences—will interpret and apply the new standard). Under the old standard, a third party had to show the existence of a "substantial new question of patentability" in order for the reexamination to move forward. For inter partes review, the third party will need to show that there is a reasonable likelihood that it will prevail with respect to at least one claim. Under the old standard, it was not uncommon for the Board of Patent Appeals and Interferences to find that there was a substantial new question of patentability and then to uphold the validity of all claims. It seems to me that it will be more difficult for the Patent Trial and Appeal Board to allow an inter partes review to go forward (having found a reasonable likelihood that at least one claim would be invalidated) and then to uphold all claims as valid.

As for pre-issuance challenges, they may now include unpublished patent applications in addition to published patent applications, patents and other publications, and the party making the submission may comment on the references submitted (which was not the case for Rule 99 submissions). The pre-issuance challenge must be filed within six months of the publication date of the patent application (or before a first rejection, whichever is later). Under Rule 99, the submission had to be made within two months of publication. Thus, third parties now may not only comment on the references submitted, but they have a longer

Under the (first-inventor-to-file rule), which takes effect March 16, 2013, the first inventor to file will be awarded a patent over another inventor who files second, and the relative dates of invention will be immaterial.

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window in which to challenge a patent prior to issuance.

The America Invents Act allows prioritized examination for applications filed on or after September 26, 2011, but only for those technologies that are deemed important to the national economy or national competitiveness. The number of applications subject to prioritized examination will be limited to 10,000 per year, and final disposition of the application must be reached within 12 months (as compared to the current average of two to four years). A search report and written analysis are not required, but the request for prioritized examination will be subject to a fee (currently \$4800 for large entities). The number of claims is limited, and no multiple dependent claims are allowed.

The America Invents Act also includes certain provisions that will

affect patent infringement litigation. For example, a patent may no longer be invalidated on the grounds that the inventor did not disclose the "best mode" (i.e., preferred embodiment) in the patent application. This is still a requirement, however, in terms of patent examination (so applicants will still need to disclose their preferred embodiments if they want to get a patent). Litigation for false patent markings has been curtailed in that the party bringing a false patent markings suit must have suffered competitive injury, and virtual (online) patent markings are allowed.

One aspect of the new law that should affect patent troll litigation is the requirement that multiple parties may be joined in a single suit only if they are accused of making, using or selling the same product or process and there are questions of fact common to all defendants. (It remains to be seen how stringent these requirements will be in practice when applied by the courts.) In addition, the new law expands the prior

user defense from business methods only to processes or inventions used in manufacturing or other commercial processes. (I suspect that there will be as much debate and litigation over what constitutes a "commercial process" as there was over what constituted a "business method.") For those business methods that involve data processing or other operations used in the practice, administration, or management of a financial product or service, the patent office is directed to issue regulations establishing a special post-grant review process for challenging the validity of such patents. This special review process will not apply to technological innovations.

Finally, the U.S. Patent and Trademark Office website has a section devoted to the America Invents Act. Go to www.uspto.gov/americaninventsact for more information.

Antoinette M. Tease, P.L.L.C., of Tease Law in Billings, is a Registered Patent Attorney.

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IRS FORM 1099 | Ten things every lawyer should know

By Robert W. Wood

Everyone receives IRS Forms 1099 every year. These little forms report interest, dividends, real estate sales proceeds, consulting income, retirement plan distributions, tax refunds, and many other categories of income. They are a major source of information for the IRS. Copies go to state tax authorities too and they are equally useful in collecting state tax revenues.

In fact, these little forms represent the keys to the kingdom, allowing matching of taxpayer identification numbers and dollar amounts. That means there is a stark certainty about them.

If you receive a Form 1099 reporting income but fail to put it on your tax return, you will almost certainly receive a tax notice (or worse).

Because Forms 1099 allow computer matching of Social Security numbers and dollar amounts, the forms have a decided impact on tax compliance and collections. IRS statistics prove this. When a taxpayer receive one of these forms he or she is much more likely to report the payment on a tax return.

The forms also encourage efficiency in tax collections. IRS collection efforts can be streamlined, even mechanized. It takes no effort for the IRS to spew out a bill to a taxpayer who fails to include a payment reported on a Form 1099.

Forms 1099 should never be ignored and should be opened promptly. There are many more Forms 1099 today than ever before. That means there are also more errors. Many errors can be corrected if you act promptly, so open them upon receipt.

Do not wait until you start to do your taxes.

Kill All the Lawyers?

Lawyers receive and send more Forms 1099 than most people, in part due to tax laws that single them out. Several decades ago the IRS initiated a program called "Project Esquire," which implicitly recognized that lawyers needed particular tax scrutiny.¹ This program was long ago suspended. Nevertheless, some at the IRS still believe lawyers deserve special audits. A recent IRS audit guide instructs IRS agents what to look for when auditing lawyers.²

Lawyers make good audit subjects because they often handle client funds. They also tend to have significant income. Independently, the IRS has long had an interest in the tax treatment of litigation settlements, judgments and attorney fees. These concerns coalesce nicely in reporting issues over attorney fees. For this reason, it should be no surprise that lawyers are singled out for extra Forms 1099.

Following a tradition of naming tax legislation with euphemisms, Congress included a host of tough tax laws in the ironically named "Taxpayer Relief Act of 1997." One provision that captivated attorneys was a seemingly innocuous reporting rule now enshrined in Section 6045(f) of the tax code. That provision requires companies making payments to attorneys for services to report the payments to the IRS on a Form 1099.

On its face, this may not seem like an important provision in the tax law. After all, regardless of whether they receive Forms 1099, lawyers should report all

their fee income. Yet this rule has a significant impact on lawyers as recipients and as issuers of Forms 1099. Lawyers and law firms send as well as receive them.

In fact, these little slips of paper have become ubiquitous in law practice, and their relevance is not confined to once a year at tax time. Even for lawyers who have an accountant or bookkeeper to keep them straight, any lawyer in private practice—whether in a large firm, small firm or solo practice—should know key facts about them. In-house lawyers who deal with settlements of suits against their company also need to know the basics of Form 1099 rules.

Here are ten things every lawyer should know:

1. \$600 or More

The basic reporting rule is that each person engaged in business and making a payment of \$600 or more for services must report it on a Form 1099. The rule is cumulative, so while one payment of \$500 would not trigger the rule, two payments of \$500 to a single payee during the year require a Form 1099 for the full \$1,000. Lawyers must issue Forms 1099 to expert witnesses, jury consultants, investigators and even co-counsel where services are performed and the payment is \$600 or more.

A notable exception from the normal \$600 rule is payments to corporations. Payments made to a corporation for services are generally exempt. But see rule 2 below.

2. Incorporated Lawyers

Although payments to corporations are

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1 The IRS undertook Project Esquire during the 1990s to identify attorneys who failed to file federal income tax returns. Although most were given the opportunity to pay their taxes, some were criminally indicted. See "Attorney Nonfilers Still Targets in Service's Project Esquire," 95 TNT 52-7 (Mar. 16, 1995).

2 See Robert W. Wood, "What Every Lawyer Should Know About IRS Audits," Vol. 83, No. 8, New York State Bar Association Journal (Oct. 2011), p. 36; see also IRS Attorneys Audit Technique Guide (March 2011), available at <http://www.irs.gov/businesses/small/article/0,,id=241098,00.html>.

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exempt from 1099 rules, an exception applies to payments for legal services. Put another way, the rule that payments to lawyers must be the subject of a Form 1099 trumps the rule that payments to corporation need not be. Thus, any payment for services of \$600 or more to a lawyer or law firm must be the subject of a Form 1099. It does not matter if the law firm is a corporation, LLC, LLP or general partnership.

It also does not matter how large or small the law firm. This impacts law firms as issuers of Forms 1099 as well as receiving them. A lawyer or law firm paying fees to co-counsel or a referral fee to a lawyer must issue a Form 1099 regardless of how the lawyer or law firm is organized. Moreover, any client paying a law firm more than \$600 in a year as part of the client's business must issue a Form 1099.

3. Timing.

IRS Forms 1099 are generally issued in January of the year after payment. They must be dispatched to the taxpayer by the last day of January. The IRS copies are not due at the IRS until the end of February (along with a transmittal form summarizing the data).

For that reason, after sending the forms to payees, most businesses wait a few weeks before sending the required copies to the IRS. In part, this is to allow for corrections. If someone receives a Form 1099 and promptly complains to the issuer, the correction can readily be made without needing to file multiple Forms with the IRS to correct the error.

Some businesses and law firms prefer to issue Forms 1099 at the time they issue checks. This practice is perfectly lawful and seems to be growing in popularity.

Example: Suits-R-Us, LLP is disbursing \$1,500 each to thousands of plaintiffs in a consumer class action. Seeking to economize and only prepare one mailing to class members, the firm issues the checks and Forms 1099 to class members simultaneously. In February of the following year it will transmit all the Forms 1099 and summary data to the IRS.

4. Forms 1099 to Clients?

One of the most confusing tax reporting issues for law firms is whether the law firm should issue Forms 1099 to clients. Practice varies considerably, and many firms issue the forms routinely.³ However, most payments to clients do not require the forms.

Settlement Checks to Clients? Many lawyers receive funds which they pass along to their clients. There is rarely a Form 1099 obligation for such payments. Most lawyers receiving a joint settlement check to resolve a client lawsuit are not considered payors. The settling defendant is considered the payor, so it has the obligation to issue the forms, not the lawyer.

Example 1: Larry Lawyer earns a contingent fee by helping Cathy Client sue her bank. The settlement check is payable jointly to Larry and Cathy. If the bank doesn't know the Larry/Cathy split, it must issue two Forms 1099, to both Larry and Cathy, each for the full amount. When Larry cuts Cathy a check for her share, he need not issue a form.

Example 2: Consider the same facts as in Example 1. However, suppose that Larry tells the bank to issue two checks, one to Larry for 40%, and the other to Cathy for 60%. Here again Larry has no obligation to issue a form, because Cathy is getting paid by the bank. The bank will issue Larry a Form 1099 for his 40%. It will issue Cathy a Form 1099 for 100%, including the payment to Larry—even though the bank paid Larry directly. Cathy will have to find a way to deduct the legal fee.

Personal Physical Injury Payments.

One of the many exceptions to the rules for Forms 1099 applies to payments for personal physical injuries or sickness. Because such payments are tax-free to the injured person, no Form 1099 is required.

Example 1: Hal Hurt is in a car crash and receives a \$1 million settlement. Defendant Motors issues a joint check to Hal and his lawyer Sue Suits. Defendant is not

required to issue a Form 1099 to Hal. Defendant must still issue a Form 1099 to Sue for the full \$1 million.

Example 2: Same facts but this time Sue asks for a \$600,000 check issued to Hal (no Form 1099) and a \$400,000 check issued to her (Form 1099 to Sue for \$400,000).

Other Payments to Clients. Refunds of legal fees to clients raise another issue. If the refund is of monies held in the lawyer's trust account, no Form 1099 is required. However, if the law firm was previously paid and is refunding an amount from the law firm's own income, a Form 1099 is needed.

Example: Big Law LLP represents Joe Inventor and is holding \$50,000 of Joe's funds in its trust account. Due to a dispute over the quality of Big Law's services, it agrees to refund \$30,000 of Joe's deposit. No Form 1099 is required, since this was Joe's money. Big Law also agrees to refund \$60,000 of the monies Joe paid for fees over the last three years. Big Law is required to issue a Form 1099 for the \$60,000.

5. Oversight and Management?

The primary area where lawyers must issue the forms to clients is if the lawyer performs significant oversight and management functions. What if the lawyer is not merely receiving the money and dividing the lawyer's and client's shares? Under IRS regulations, if lawyers take on too big a role and exercise management and oversight of client monies, they become payors. As such, they are required to issue Forms 1099 when they disburse funds.

6. Beware Joint Payees

IRS regulations contain extensive provisions governing joint checks. Most of these rules mean that lawyers will be receiving the forms.

Example: Dastardly Defendant settles a case and issues a joint check to Clyde Client and Alice

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3 See Rule 7 about when in doubt, issue the forms.

A new era

THE AMENDED MONTANA RULES OF CIVIL PROCEDURE

By Randy J. Cox | Boone Karlberg, P.C.

Litigation practitioners in Montana work under two sets of rules — the Federal Rules of Civil Procedure govern practice in federal courts and the Montana Rules of Civil Procedure govern proceedings in state courts. Over the years, the Montana Supreme Court has adopted recommendations of its Advisory Commission on Rules of Civil and Appellate Procedure and has generally followed the Federal Rules of Civil Procedure. The Montana Rules, however, fell behind a series of Federal Rule changes. The last significant changes to the Montana Rules occurred in the middle 1980s and in 1990. While the Court adopted numerous amendments to selected rules in the interim, by 2007 it was clear that the Montana Rules of Civil Procedure needed significant reform. Enter the Commission.

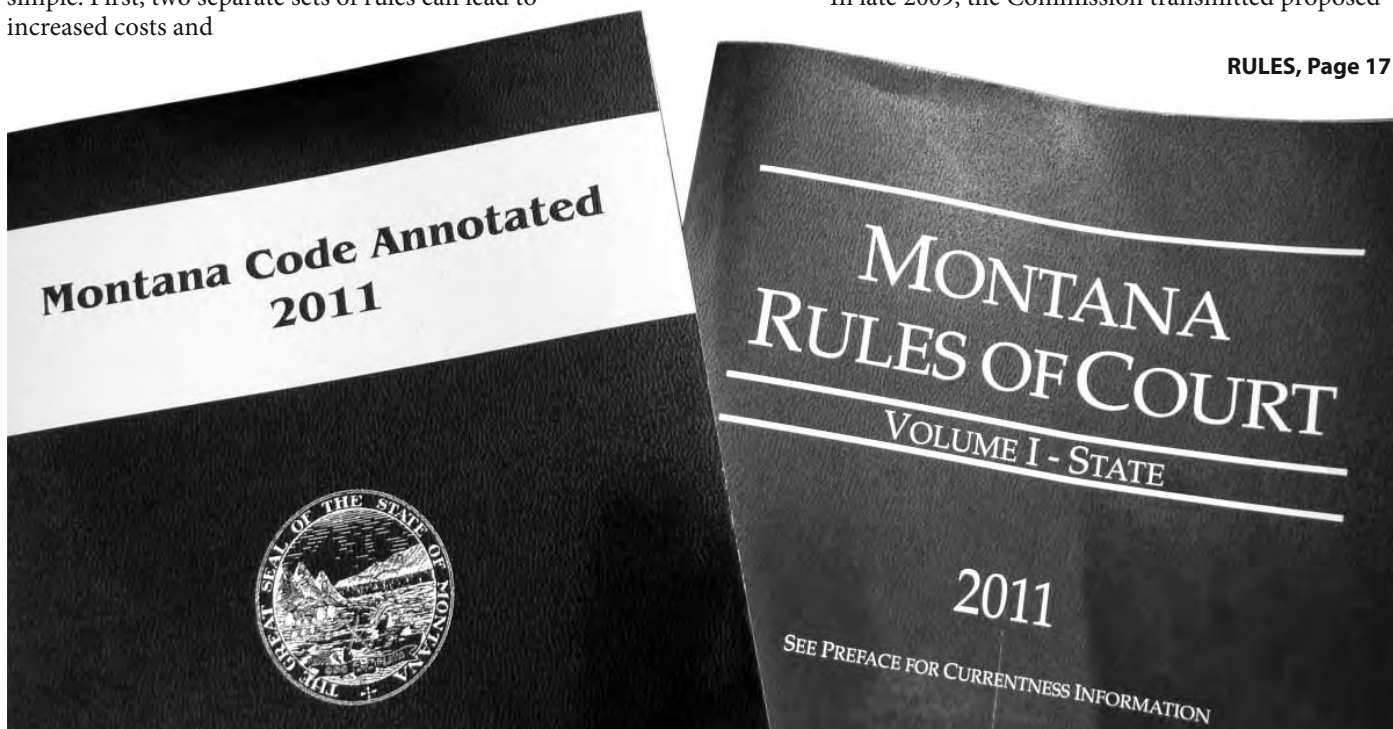
In the spring of 2006, the Commission, under the direction of Commission Chairman Jim Goetz, met to discuss the state of the Montana Rules and to make a decision whether to undertake revision. The Commission chose, at that meeting, to proceed with a complete revision and also chose to adopt a principle that would guide its work over the course of the ensuing four years leading to adoption of the Rules. The principle is that the Commission would recommend adoption of each individual Federal Rule unless there was a significant reason to retain or modify the existing Montana Rule. The reasons are simple. First, two separate sets of rules can lead to increased costs and

the increased possibility of error.

Second, the Federal Rules and their recent amendments were created and adopted with evident care and there are significant improvements in language and content. Finally, Montana law has long made it clear that where the federal and state rules are identical, federal law interpretation of the rule is persuasive authority. *USF&G v. Rodgers*, (1994) 882 P.2d 1037, 1039. Because Montana does not have a large body of case law interpreting the Montana Rules, the ability to turn to federal case law for guidance is meaningful to courts and practitioners.

In late 2009, the Commission transmitted proposed

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Notice of Legislative Committee Hearing on new Rules of Civil Procedure

On April 20, 2012, the Law and Justice Interim Committee, a statutory interim committee of the Montana Legislature, will hold a hearing on the new Montana Rules of Civil Procedure.

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

The purpose of the April hearing is to solicit testimony on

whether or not the new rules should be disapproved. At its February meeting, the Committee may also expand the April hearing to include the new Rules of Appellate Procedure.

The hearing on the Rules will be held on April 20, 2012, beginning at 8:00 a.m. in Room 172 of the State Capitol in Helena.

Interested persons may contact the Committee staff, Ms. Sheri Scurr or Mr. David Niss, at (406) 444-3064, with any questions.

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rules revisions to the Court. Following a comment period, Supreme Court hearings and substantial additional work by the Commission, the Court adopted the Rules in April, 2011. The effective date of the new rules was October 1, 2011.

The revision project would not have been completed but for the tireless and extraordinary efforts of Jim Goetz, and Karen Schultz, his assistant. While the work of others, including newly-appointed U.S. District Judge Dana L. Christensen and Anthony Johnstone, are of substantial note, Jim and Karen coordinated the massive effort necessary to complete the revisions. Jim also wrote entirely or did final editing of all Commission Comments to present them in a uniform style. The lawyers of Montana owe a debt of gratitude to Jim Goetz. Likewise, Commission members donated, literally, thousands of unpaid, volunteer hours to the effort.

It is also fair to say that the changes are substantial and significant. For practitioners with active federal court litigation practices, there is little new to learn, merely the application of certain federal rules and practices to state court litigation. For those without that background, however, the change in the routines of practice may be daunting. This article is designed to identify important changes to help the practitioner adapt to a new era of Montana procedural practice.

This article also attempts to capture the major rule changes and to point out major federal provisions that were rejected. Considerations of space preclude even an attempt to capture every change, and the article specifically ignores changes that merely adopted language

of the federal rule but did not invoke substantive change. That having been said, the article turns now to the changes of significance imposed by the revisions to the Montana Rules.

MAJOR CHANGES BY TOPIC

► **Counting Days and Time for Motions — Rule 6:** Calculation of time periods for all manner of actions is unified and simplified and now tracks directly with the Federal Rules. Indeed, the Committee Notes specifically adopt the Federal rationale for changing the time calculation provisions of Rule 6 and set forth verbatim the Federal Commission Comment. Note that the time-computation provisions apply only when a time period must be computed, not when a fixed time to act has been set.

Generally speaking, all time periods are multiples of 7 in order to ease calculations by keeping time in one-week chunks. There is no longer a need to decide whether one must include or exclude weekends and holidays. All days are counted. The result of this change has been to shorten the time period for such things as filing briefs in support of or opposition to motions. The Local Rules will undergo changes to conform with the changes in the Montana Rules and, in fact, by Order November 29, 2011, the Court has amended the Uniform District Court Rules to extend the time period for filing answer and reply briefs from 10 to 14 days and some other less substantive changes. *See Order in Docket No. AF 07-0110.*

Generally speaking, a written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the exception of other time periods set by rule or order or when the motion may be heard ex parte.

Three days are still added for service

by mail. Rule 6(d).

► **Brief Must Be Filed With the Motion — Uniform District Court Rule 2(a):** Effective March 1, 2012, the long-standing Montana practice of filing a motion and having 5 days thereafter to file a brief supporting that motion will come to an end. In its November 29, 2012, Order, the Court amended UDC Rule 2 to require that a brief be filed with the motion.

► **Privacy Protections — Rule 5.2:** Similar to Federal Rule 5.2, the new rule provides instruction regarding protected information and handling of personal information in court filings. While Rule 5.2 has been suspended by Supreme Court order, personal information must still be protected.

► **Disclosure Statement Now Required — Rule 7.1:** As is the case in federal court, the new rules requires filing of corporate disclosure statements.

► **New Procedure for Rule 11 Motions:** Sanctions motions may be served but may not be filed until 21 days after service. Rule 11 motions may not be combined with other motions and do not apply to disclosures, discovery requests, responses, objections and motions under Rules 26 — 37.

► **Third-Party Practice — Rule 14:** The time to serve a third-party complaint without leave of court is reduced from 30 to 14 days.

► **Pretrial Conferences; Scheduling; Management:** The District Court no longer has a mandatory duty to issue a scheduling order 120 days after filing of a complaint. Rather, parties may request a scheduling order be issued within 90 days after such a request. The purpose is

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to allow each party to assess the need for and timing of a scheduling order and to avoid the routine and potentially premature issuance of such orders when the parties agree an order is unnecessary.

Lawyers attending pretrial conference must have the authority to make stipulations and admissions. This is to help make such conferences meaningful.

The new Rule 16 identifies litigation management topics that are non-binding but nevertheless designed to provide opportunities to the parties and the court to structure the litigation to meet the particular needs of the case. The Rule eliminates any debate over the authority of the court to make appropriate orders designed to facilitate settlement or to provide for an efficient and economical course of discovery and trial. These provisions are patterned on Federal Rule 16.

► **Class Action Changes — Rule 23:** Changes adopted reflect an intent to follow the Federal Rules. By Order November 29, 2011, the Court has modified the rule and made it clear an order granting or denying class certification is directly appealable. Likewise, a final order rejecting a class action settlement is appealable. Rules 23(g) and (h) govern appointment of class counsel and payment of fees and costs to class counsel.

► **Discovery — Rule 26:** It is in Rule 26 that the Commission and the Court departed the most from the federal rule. The initial disclosure and pretrial disclosure requirements of Federal Rule 26 were rejected principally based on cost and complexity. Note, however, that the Comment to Rule 26 makes explicit

reference to and approval of a district court choosing to impose detailed disclosure requirements through orders issued following preliminary pretrial conferences.

Other significant changes in Rule 26, either accepting or rejecting Federal Rule 26 provisions are:

- Detailed expert disclosure requirements of the federal rule have been rejected.
- Expert depositions are always allowed.
- Privilege logs are now required under Rule 26(b)(7).
- The federal rule privilege for attorney-expert communication was rejected, notwithstanding strong recommendation by a near-unanimous Commission. The discussion in the Committee Note regarding adoption of an ABA proposal protecting from discovery expert draft reports and communications between counsel and experts is an artifact of the drafting process and has no applicability under the rule as adopted by the Supreme Court.

- -Rule 26(3), contains more detailed requirements regarding the duty to supplement discovery, including expert disclosures.

► **Depositions — Rule 28:**

New subsection (c) was adopted to facilitate interstate depositions and directs the clerk of court to recognize a “foreign subpoena” and issue a Montana subpoena based thereon. Note, also, that 28(d) imposes restrictions on court reporters and prohibits financial incentives to parties. This should preclude out-of-state deposition services from offering price breaks to only one of the parties in the litigation.

► **The Fleet-Footed Defendant:**

The provision allowing a party 45 days for response to discovery served with the summons and complaint has been carried forward in Rules 32, 34 and 36.

► **Adoption of Federal Rule re Electronically-Stored Information — Rule 34:** Rule 34(b)(2)(D) and (E) are taken directly from Federal Rule 34. Federal case law is therefore made directly applicable to

interpretation of the federal rule.

► **Rule 37 — Motions to Compel; Discovery Sanctions:** The following are of particular note:

- Rule 37(a)(1) adopts the federal “confer and certify” requirement.
- If in response to a motion to compel the requested discovery is provided, the court must, after notice and hearing, order payment of reasonable expenses including fees.
- Motions for sanctions are explicitly subject to the “confer and certify” requirements. Rule 37(d)(1)(B).
- Federal rule adopted regarding limitation of court’s ability to impose sanctions due to loss of ESI so long as the loss is the result of good-faith operation of an electronic information system.

► **Rule 50(b) — Renewing Motion for JMOL:** The time period for renewing a motion for judgment as a matter of law (JMOL), which may be

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combined with a motion for new trial, is extended from 10 to 28 days. Such a motion is deemed denied if not ruled upon within 60 days.

► Important Modifications to Rule 56 Summary Judgment Proceedings:

Montana has adopted Federal Rule 56 with these four specific changes:

1. The timing provisions of Rule 56(c)(1) specifically control over any local rule. Thus, the opposition to a summary judgment motion is to be filed within 21 days after the motion is served or a responsive pleading is due, whichever is later, and a reply brief is due 14 days thereafter;
2. A motion for summary judgment may be filed “at any time unless the court orders otherwise.”
3. Absent court order to the contrary, any opposing affidavits must be filed according to the briefing schedule. No longer may opposing affidavits be filed at any time “prior to the day of the hearing.”
4. Rule 56(c)(2) expresses the Montana common law rule that parties are generally entitled to a hearing on a motion for summary judgment but the hearing is waived if not requested within 14 days of the time for filing the reply brief.

► Entry of Judgment — Rule 58:

Rule 58(a) adopts the federal “separate document” requirement and exceptions. Further, Rule 58(b) imposes on the clerk the obligation to prepare, sign and enter a judgment, without court direction, when there is a general jury verdict,

the court awards only costs or a sum certain or the court denies all relief. Practitioners would be wise to provide such a form of judgment to the clerk.

► Deemed Denial is

Retained: Rule 59 and 60 motions are deemed denied if

of various forms of security in the court’s discretion. (N.B.: Any issue involving bond and execution of judgment practice must be considered in conjunction with Rules 22 and 23 of the Appellate Rules.)

► Judge’s Inability to

Proceed — Rule 63. Montana

There is no substitute for reading the former Montana Rules and the newly-adopted Montana Rules side-by-side.

not acted upon by the district court within 60 days, as has been the rule for many years. The federal rules contain no such provisions.

► Automatic Stay Period

Against Execution. Rule 62(a) provides a 14-day automatic stay period against execution, in conformity with the federal rule. Likewise, Rule 62(f)(2) is new and substantive and specifically addresses bond provisions, allowing for provision

has not previously had a counterpart to Federal Rule 63 and that rule has now been adopted with minor modifications.

There are dozens, if not hundreds, of other minor changes — everything from the changes necessary for all time periods, to stylistic and language changes. There is no substitute for reading the former Montana Rules and the

newly-adopted Montana Rules side-by-side. The State Bar of Montana has published an outline prepared by the author of this article from a seminar held prior to the effective date of the Rules. That outline is nearly up to date. (From Feb. 2011 CLE “Rules Update” available at bookstore, www.montanabar.org.)

The changes imposed by the newly-adopted Rules are not overwhelming or difficult, particularly in light of the fact that most of them are based on existing federal rule practice. Nevertheless, the practitioner is advised to spend some time learning the new rules and to never assume that the “old way” of doing things is still correct. Further, all calendaring systems need attention to make certain they take into account new deadlines.

Randy J. Cox is a shareholder in the Missoula firm Boone Karlberg, P.C. He was a member of the Advisory Committee that completed the Rules revision project.

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 - **March 16, 2012 - Annual St. Patrick's Day CLE, Insurance Update** - War Bonnet Hotel, Butte. Sponsored by the State Bar of Montana CLE Institute. More information to follow.
 - **March 30, 2012 - Litigation Update** - Hampton Inn, Great Falls. Sponsored by the State Bar of Montana CLE Institute. 6.00 CLE credits, including 1.00 ethics.
 - **April 13, 2012 - Family Law Update** - Best Western Great Northern Hotel, Helena. Sponsored by the State Bar of Montana Family Law Section and CLE Institute. More information to follow.
 - **April 20, 2012 - Annual Bench-Bar Conference** - DoubleTree Hotel, Missoula. Sponsored by the State Bar of Montana CLE Institute. 7.00 CLE credits, including 2.00 ethics. *See story next page.*
- NOTE:** 5.0 ethics credits required every 3 years – 1 of them must be a Substance Abuse/Mental Impairment (SAMI) credit.

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- **The annual Red Mass ethics CLE** is scheduled for March 29 at Holy Spirit Church Parish Hall, Great Falls, Martin Burke presenting. The CLE is open to both lawyers and paralegals. Credit is pending, but the CLE will qualify for at least 1.0 ethics credit. Following the CLE, a traditional Red Mass will take place with Great Falls-Billings Diocese Bishop Michael Warfel presiding. The custom of a special mass for the bench and bar arose in 13th Century Europe.
The CLE and associated events are sponsored by the Parish and a committee of Great Falls area attorneys – Mary Matelich, Glenn Tremper, Richard Martin, Dale Schwanke, Karen Reiff, Theresa Diekhans and Anders Berry. The mass, and a dinner, both of which will follow the CLE, are optional, but all CLE attendees and their spouses or guests are invited to attend both. There will be a charge of \$25 for the CLE session and the dinner will be \$15 a person. Registrations may be mailed to Holy Spirit Parish, 200 44th St. So., Great Falls, MT 59405.
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Use What You Know But Forgot; Unacceptable Approaches to the Court, Unacceptable Communication with Counsel and How We Handle It; Ethical Misconduct in Discovery; Electronic Filing, Document Service and Notice Issues in Western Montana and with the Montana Supreme Court – What Lawyers Need to Know and What's on the Horizon; Supreme Court Candidates' Forum; Social Media in Litigation;

Pricing info: For attorneys with 5-plus years practice: \$250 for early registration (by March 30), or \$275. Attorneys with less than 5 years practice and members of the Bar Paralegal Section: \$225 for early registration, or \$250. Full-time law clerks with less than 5 years: 50 percent off of full attorney price. Full-time judges: no charge. **Hotel reservations:** Double Tree by Hilton Missoula — Edgewater, <http://bit.ly/xr1bhf>

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RULES UPDATE – Feb. 4, 2011

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- To Arbitrate or Not to Arbitrate: A Case Study of Arbitrator's Role in Disputes Involving Non-Parties;
- Developing Arbitration Law
- Care and Feeding of Expert Witnesses
- Overview of Montana Supreme Court Cases
- Construction Lien Priority Issues;
- *Markovich Construction v. Chippewa Cree Comm Development and Gram Sage Graves*:
- Discussion of Issues Raised
- Practical and Procedural Considerations: Getting the Right People to the Party

FAMILY LAW I – 3/4/11, Great Falls (\$35)

- Military Retirement in Dissolution and Family Law Matters
- "Guard" vs. "Active Duty"
- Do's and Don'ts of Appearing Before Standing Masters
- Third Party Parental Rights and Limiting the Scope of Representation
- Mediation with Property and Parenting Issues
- Interview Techniques
- Client Control and Ethical Considerations
- Interest-Based Bargaining

FAMILY LAW II – 3/11/11, Billings (\$35)

- Third Party Parental Rights
- Social Security and Family Law
- Child Support Guidelines Update
- QDROs, Tax and Other Issues
- Limited Scope Representation: Pros and Cons and Ethical Considerations
- Fee Agreements and Letters of Engagement

MEDIATION: CURRENT ETHICAL AND OTHER CHALLENGES – 10/7/11, Bozeman (\$35)

- *Hendershott v. Westphal*: Review of Decision
- Four Competencies for Ethical Mediation
- Mediator Ethics Panel
- Types of Mediation
- Appellate Mediation Report to MT Supreme Court and Report on April, 2011 MT

- Mediation Association Conference
- Standards of Conduct and Ethics

MEDICAL MARIJUANA UPDATE – 3/18/11, Butte (\$35)

- Employment Issues
- Legislative Update
- Business Transactions
- View from Montana Department of Justice
- Panel: Ethical Issues Facing Montana Attorneys
- View of the Federal Government and State's View on Employment and other Issues
- Caregiver Issues

NATURAL RESOURCE PERMITTING – 4/8/11, Helena (\$35)

- 310 Permits – Stream Bed Protection
- Alberta's Ordinance on Viewshed
- Corps of Engineers 404 Permits (Wetlands)
- Floodplain Regulations
- Subdivision Review and Natural Resources;
- Gravel Permitting
- Wind Energy Market Dynamics: Translating Resources into Viable Wind Energy

PRACTICAL PRACTICE TIPS – 4/29/11, Missoula (\$35)

- Basic Law Office Management
- Top 10 Malpractice Traps and How to Avoid Them
- Trust Account Maintenance
- Records Retention and Closing Your Practice
- Basic Tech Needs of the Solo or Small Firm

REAL ESTATE UPDATE – 2/18/11, Fairmont Hot Springs (\$35)

- Easement Law: Options and Rights of First Refusal and Community Property Update;
- Best Practices for Drafting Easements
- Successfully Litigating Easement Cases;
- Trustee's Duties in Nonjudicial Foreclosures: *Pomeranky v. Peterson*
- Structuring Effective Loan Workouts
- Receivers and Rents: Issues to Consider

WOMEN'S LAW SECTION CLE – 10-14-11, Chico Hot Springs (\$35)

- Attempting to Control Your Destiny: Legislative Lobbying Update
- Family/Elder Law Update
- Intro to Child Support Enforcement Program
- Specialized Issues Relating to Divorce
- Conservatorships and Guardianships
- Federal Court Practice: Views from the Bench, the Criminal Bar and the Civil Bar
- Peak Performance and Leadership
- Social Media and Legal Ethics: What Lawyers Should Know About Communicating, Advertising and Socializing on the Internet

William J. Jameson Award

This is the highest honor bestowed by the State Bar of Montana. The Past President's Committee will be guided in its selection by the extent to which, in its judgment, the candidate:

- 1 | *Shows ethical and personal conduct, commitment and activities that exemplify the essence of professionalism.*
- 2 | *Works in the profession without losing sight of the essential element of public service and the devotion to the public good.*
- 3 | *Possesses an unwavering regard for the Rules of Professional Conduct, the Creed of Professionalism, the State Bar's Guidelines for Relations Between and Among Lawyers, and the State Bar's Guidelines for Relations Between Lawyers and Clients.*
- 4 | *Assists other attorneys and judges in facing practical and ethical issues.*
- 5 | *Participates in programs designed to promote and ensure competence of lawyers and judges.*
- 6 | *Supports programs designed to improve the discipline process for judges and attorneys.*
- 7 | *Participates in programs that aid the courts in ensuring that the legal system works properly, and continually strives for improvements in the administration of justice.*
- 8 | *Is actively involved with public and governmental entities to promote and support activities in the public interest.*
- 9 | *Actively participates in pro bono activities and other programs to simplify and make less expensive the rendering of legal services.*
- 10 | *Actively participates in programs designed to educate the public about the legal system.*

On a separate sheet of paper, please describe activities you believe qualify your nominee for the Jameson Award. Please attach additional pages as needed, and other supporting documents. Also, attach the nominee's resume. Note: Awards will not be made posthumously and may be given to more than one person.

Nominee: _____

Address: _____

Your signature: _____ Print your name: _____

Your address: _____ Phone: _____

Nominations and supporting documents will not be returned. Send them no later than May 15 to:

Jameson Award
State Bar Past Presidents Committee
P.O. Box 577
Helena MT 59624
or e-mail mailbox@montanabar.org

George L. Bousliman Professionalism Award

The award will recognize lawyers or law firms who have:

- 1 | Established a reputation for and a tradition of professionalism as defined by Dean Roscoe Pound: pursuit of a learned art as a common calling in the spirit of public service; and
- 2 | Within two years prior to the nomination, demonstrated extraordinary professionalism in a least one of the following ways:
 - Contributing time and resources to public service, public education, charitable or pro bono activities.
 - Encouraging respect for the law and our legal system, especially by making the legal system more accessible and responsive, resolving matters expeditiously and without unnecessary expense, and being courteous to the court, clients, opposing counsel, and other parties.
 - Maintaining and developing, and encouraging other lawyers to maintain and develop, their knowledge of the law and proficiency in their practice.
 - Subordinating business concerns to professional concerns.

Nominee/individual or firm _____

Address _____

On a separate sheet of paper, please describe the nominee's activity in your community or in the state, which you believe brings great credit to the legal profession. Please attach additional pages as needed, and other supporting documents. .

Your signature _____ Print your name _____

Your address _____ Phone _____

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Helena MT 59624
or e-mail to *mailbox@montanabar.org*

Lawyer Referral & Information Service

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

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

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

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

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



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

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

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

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

Attorney. Dastardly normally must issue one Form 1099 to Clyde for the full amount and one Form 1099 to Alice also for the full amount. This reality may cause Alice to prefer separate checks. That way she will only receive a Form 1099 for her fees, not also for her client's money.

Example: This time Dastardly Defendant issues a check for 60% of the settlement to Clyde Client and 40% to Alice Attorney. Dastardly issues one Form 1099 to Clyde for 100% and one Form 1099 to Alice for 40%. So that Clyde doesn't pay taxes on the fees paid to Alice for which he received a Form 1099, he will deduct the 40% on his tax return.⁴

Seeking to help their clients avoid receiving Forms 1099, some plaintiff lawyers ask the defendant for one check payable to the "Jones Law Firm Trust Account." Treasury Regulations treat this just like a joint check, so two Forms 1099 each in the full amount are required.

7. Err on the Side of Issuing Forms

Requirements to issue Forms 1099 have existed in the tax code and parallel state law for decades. Still, these requirements have become more rigorous in recent years. Penalty enforcement has also gotten tougher. More and more reporting is now required, and lawyers and law firms face not only the basic rules but the special rules targeting legal fees.

Lawyers are not always required to issue Forms 1099, especially to clients. Nevertheless, the IRS is unlikely to criticize anyone for issuing more of the ubiquitous little forms. In fact, in the IRS' view, the more Forms 1099 the better. Perhaps for that reason, it is becoming common for law firms to issue Forms 1099 to clients even where they are not strictly necessary.

8. Penalties for Failures

However you practice, it pays to review these rules and be careful. The IRS cares a great deal about these forms. Most penalties for non-intentional failures to file are modest—as small as \$50 per form you fail to file.

This penalty for failure to file Form 1099 is aimed primarily at large-scale failures, such as where a bank fails to issue thousands of the forms to account holders. However, law firms should be careful about these rules too. The distribution of the proceeds of a class action, for example, can trigger large-scale issuances of Forms 1099.

In addition to the \$50 per failure penalty, the IRS may also try to deny a deduction for the item that should have been reported on a Form 1099. That means if you fail to issue a Form for a \$100,000 consulting fee, the IRS could claim it is non-deductible. It is usually possible to defeat this kind of draconian

penalty, but the severity of the threat still makes it a potent one.

Another danger is the penalty for intentional violations. A taxpayer who knows that a Form 1099 is required to be issued and nevertheless ignores that obligation is asking for trouble. The IRS can impose a penalty equal to 10% of the amount of the payment.

Example: Larry Lawyer makes a \$400,000 payment to co-counsel but Larry fails to issue a required Form 1099, even though his CPA told him he was required to. In addition to other remedies, the IRS can impose a \$40,000 penalty.

9. Independent Contractor vs. Employee?

The reach of the Form 1099 rules is surprisingly broad. For example, it can impact the worker status arena.

Example: Alvin Advocate fails to issue Forms 1099 to jury consultants and contract lawyers Alvin paid on an independent contractor basis. In addition to other remedies, the IRS can use Alvin's failure to issue them Forms 1099 as evidence that they are really Alvin's employees not independent contractors. This can trigger tax withholding responsibilities and a host of other penalties and liabilities.

10. Supplying Form W-9.

Since Forms 1099 require taxpayer identification numbers, attorneys are commonly asked to supply payors with their own taxpayer identification numbers and those of their clients. Usually such requests come on IRS Form W-9. If an attorney is requested to provide a taxpayer identification number and fails to provide it to a paying party, he or she

is subject to a \$50 penalty for each failure to supply that information. The payments to be made to the attorney may also be subject to back-up withholding.

Moreover, as a practical matter, some defendants may simply refuse to pay over the money without the required taxpayer identification numbers or will seek to pay the money into a court.

Conclusion

No one likes receiving Forms 1099. Most people do not particularly like issuing them either. Still, lawyers need to pay special attention to these rules. More than many other business and professional people, lawyers are commonly sending and receiving Forms 1099. The IRS is watching.

Robert W. Wood is a tax lawyer with a nationwide practice (www.WoodLLP.com). The author of more than 30 books including *Taxation of Damage Awards & Settlement Payments* (4th Ed. 2009 www.taxinstitute.com), he can be reached at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

⁴ Note however, that this deduction may be a miscellaneous itemized deduction and thus may trigger alternative minimum tax. See Robert W. Wood "AMT Problems For Attorney Fees Remain," *Forbes.com* (Dec. 22, 2010), available at http://WoodLLP.com/Publications/Articles/pdf/AMT_Problems.pdf.

Charles Luedke



The Honorable Charles "Chuck" Luedke, retired 13th Judicial District Judge, passed away peacefully on Jan. 6 at the age of 92.

Chuck was born in Saltese, MT and was the 2nd of 4 children born to Charles and Mae Luedke. The family moved to Missoula, MT shortly after he was born. Chuck spent his early years working in the family grocery store, the OK Trading Company, as a stock and delivery boy. His love of woodworking was sparked at an early age through his first wood turning lathe and was a passion he carried throughout his life. After graduation from Missoula High School in 1937 he worked as the morning news announcer at the local Missoula radio station while attending the University of Montana. In June of 1941 he was drafted into the Army where upon completion of basic training he was selected as an Infantry instructor. He later applied for and was accepted into officer training and the Army Air Corps. After graduation from pilot training he was assigned as an aircraft commander in the B-25 with the "Flying Tigers" in the 11th Bomb Squadron of the 14th Air Force in Kweilin, China. During the year and a half with the "Flying Tigers" he flew 58 combat missions and attained the rank of Captain before returning to the States and being discharged at the end of World War II.

After returning home, he put himself through Law School at the University of Montana with the use of the GI Bill and work as a semi-professional magician. He graduated from Law School in 1949 and entered private practice in Missoula. In 1953 he moved to Billings and started a practice in the field of oil and gas.

In early 1957, he was introduced to his future wife, Mary "Robin" Kuhne by a mutual friend. They were married in June of 1957 and had one son, Bret.

Chuck remained active in magic and was the originator and first president of Ring 153 of the International Brotherhood of Magicians in Billings. He was active in the civic community as a long time member of the Billings Elks Club and as the President of the Billings Chamber of Commerce in 1961.

In 1967, he was appointed by Governor Tim Babcock to the bench as a Judge of The District Court in the Thirteenth Judicial District of the State of Montana. He served on the bench for nearly 20 years, retiring in 1986. Upon retirement, he was honored by the Yellowstone County Bar Association "For his fairness, integrity and commitment to the highest standards of judicial decision making."

He remained active in retirement volunteering at the Parmly Billings Library as a bookbinder for the next 18 years. He was an avid fan and supporter of the Billings Mustangs and could often be found in his box seat behind home plate cheering them on. He continued to pursue and foster interests as a clock maker, clock repairman, metal worker and vegetable gardener (much to the delight of his neighbors).

Charles was a loving father who taught by example and believed if something was worth doing, then it was worth doing it right. He was not one to seek help, but was always willing to give it. He touched many people during his professional and personal life and he will be greatly missed.

A special thank you is given to the caring staffs at The Vista and St. Johns Transitional Care Cottage for their excellent care and compassion.

He is survived by his son Bret, daughter-in-law Ruth, granddaughter Heather and sisters June Webb and Virginia Even. Cremation has taken place.

At his request, no funeral or memorial service will be held. Donations may be made on-line to the Juvenile Diabetes Research Foundation (JDRF) at www.jdrf.org, select "Get Involved", select "Ways to Donate" and select "Make a Memorial Donation" or call JDRF at 1-800-533-2873.

Stewart Pearce II

Stewart A. Pearce II, 72, died Jan. 16, 2012 at his home in Ryderwood, Wash.

He was born Aug. 30, 1939 in Carmi, the son of Stewart A. and Evelyn Moser Pearce.

He attended Carmi schools, graduating from Carmi Township High School in 1957. He served in the U.S. Army Reserves, attended Southern Illinois University and graduated from the

University of Tulsa Law School. He practiced law in Missoula from 1975 to 1990, working first as a deputy Missoula County attorney and later in private practice.

He was preceded in death by his father, his mother, his stepmother, Doris E. Pearce, and his sister, Jan Ellen Pearce.

He is survived by his wife, Cheryl, of the home, and a daughter, Katherine Anne (Katie) Kimberling, of Norman, Okla. He is also survived by his brother, Rick Loewenherz, of Tulsa, Okla., and sisters, Lucy Anne Pearce Pigott of Rio Rancho, N.M., and Rose Ann Pearce, Fayetteville, Ark.

According to his wishes, he was cremated and no service is planned.

Curtis Cook

Curtis C. Cook, 95, of Hamilton passed away Monday, Dec. 5, 2011, at home. He was born June 28, 1916, in Hamilton, the son of Albert Levi Cook and Ina Louise Abbey Cook.

His family moved to Missoula in 1919. Curtis attended schools in Missoula, elementary through law school. He was in the Army Air Force during World War II as a radar operator. He finished law school after coming back from the war and became a practicing member of the Montana Bar Association in 1947. He was the oldest practicing attorney in the state of Montana at the time of his death.

On Dec. 27, 1947 Curtis married Mary Lou Rasmussen. They moved to Helena in June 1948 where Curtis was Assistant Attorney General. From Helena, they moved to Hamilton in September, 1948 where they built their home and raised their family.

Curtis and Mary Lou enjoyed traveling taking trips to Alaska, Mexico, Canada and much of the U.S. Curtis and Lualyce took trips to visit friends the last couple years.

— *Ravalli Republic*: <http://bit.ly/AiJeVg>

Other deaths

Dorothy Smith Farlan of Helena, mother of Clerk of Supreme Court Ed Smith and mother in-law and grandmother of Bozeman attorneys Don White, Bridget and Jeremy LeFeber passed way October 24, 2011 at age 96.

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ATTORNEY POSITIONS

ASSOCIATE ATTORNEY: Kasting, Kauffman & Mersen, P.C. of Bozeman seeks an associate attorney to assist in the firm's practice areas. Practice areas include business, real estate, commercial litigation and family law. Must have at least 2-3 years of experience practicing law. Please send resumes with writing sample and references to Hiring Partner, Kasting, Kauffman & Mersen, P.C. 716 South 20th Ave., Suite 101, Bozeman, MT 59718. (406) 586-4383. www.kkmlaw.net

ATTORNEY: Missoula law firm is seeking an attorney with at least 3-5 years civil litigation experience. Please send or email a letter of application, resume and references to: Datsopoulos, MacDonald & Lind PC, Attn: Office Administrator, 201 W. Main, Suite 201, Missoula MT 59802; cwekkin@dmllaw.com. All inquiries strictly confidential.

ATTORNEY: Four-attorney law firm located in Kalispell seeks an attorney to replace a retiring partner. Firm emphasizes litigation but will consider all practices and backgrounds. Contact Todd Hammer or Angela Jacobs at (406) 755-2225 or send a resume and letter of interest to toddhammer@attorneymontana.com or angelajacobs@attorneymontana.com.

OIL & GAS ATTORNEY: Rapidly growing Houston, Texas-based oil and gas law firm is seeking Montana licensed attorneys willing to relocate to its Houston office. The ideal candidate will have experience with oil and gas title work. Candidates with experience in real estate or probate will also be considered. Attorneys with less than two years of desired experience must have graduated in the top 25 percent of their law school class. Sadler Law Firm, 1900 West Loop South, Suite 700, Houston TX 77027; aschauman@sadlerlaw.com; (713) 877-8254.

MLSA STAFF ATTORNEY: Montana Legal Services Association seeks a full-time domestic violence attorney in Helena. This position will provide poverty law services to domestic violence victims. Areas of law include family law, consumer law, housing law, employment law, public benefits, probate and other civil matters. Services provided will range from brief counsel and advice, to more extended representation on core legal issues affecting MLSA clients. Requires travel within Montana. Salary: \$42,000. MLSA offers an attractive benefits package, including health, dental, vision, and life insurance, retirement and educational loan repayment assistance. To apply, send a letter of interest, 3 professional references, a writing sample, and resume electronically to hiring@mtlsa.org.

MLSA CIRCUIT RIDING ATTORNEY: Montana Legal Services Association is seeking a full-time domestic violence circuit-riding attorney to provide poverty law services to domestic violence victims on the Fort Belknap reservation, on other reservations in the north Central part of Montana and in the surrounding region. Areas of law include family law, consumer law, housing law, employment law, public benefits, probate and other civil matters. Services provided will range from brief counsel and advice, to more extended representation on core legal issues affecting MLSA clients. Requires travel within Montana. This position will handle all aspects of legal representation including client contact, pleading preparation, research, file maintenance, working with support staff, and hearing and trial work. The staff attorney will also participate in MLSA's statewide initiatives, implement grant and contract requirements through casework and foster pro bono involvement with the private bar. Salary: \$42,000. MLSA offers an attractive benefits package, including health, dental, vision, and life insurance, retirement and educational loan repayment assistance. To apply, send a letter of interest, 3 professional references, a writing sample, and resume electronically to hiring@mtlsa.org

PATENT ATTORNEY: The intellectual-property law firm of Wells St. John PS in Spokane is seeking highly qualified candidates for a position that ultimately leads to ownership. Candidates having 4-plus years of experience in all aspects of IP practice including litigation, transactional, preparation and prosecution of applications, and all technical disciplines will be considered. Candidates with portables will be considered subject to conflict checks. Interested candidates may submit resumes to the attention of D. Brent Kenady at: bkenady@wellsstjohn.com.

DEPUTY DISCIPLINARY COUNSEL: Salary up to \$80,000, depending on experience, plus benefits. Send resume to: Office of Disciplinary Counsel, PO Box 1099, Helena MT 59624-1099. Closes March 1, 2012.

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ACLU STAFF ATTORNEY: The American Civil Liberties Union of Montana invites applications for a full-time staff attorney based in Missoula. Reporting directly to the legal director, the attorney will have a variety of responsibilities including reviewing, investigating and responding to complaints and requests for legal representation. The attorney will also have opportunities to be engaged in ACLU litigation. The primary area of responsibility is in the Montana Prison Project of the ACLU. The successful candidate must have a Juris Doctor degree from an accredited law school and be admitted to the Bar Association of the State of Montana (out of state applicants will be considered but a plan to take the Bar exam will be required); a familiarity with the working and operation of state and local government. Extensive knowledge of state and federal constitutional law is preferred; two years or the equivalent of progressively responsible legal experience, with an emphasis in civil rights or constitutional law (extraordinary candidates with less experience but strong interest in these areas may be considered); Litigation experience, including appellate experience, is preferred. Knowledge and familiarity with the criminal justice system is preferred. To apply, email a letter of application and resume to Katy Heitstuman [katyh@aclumontana.org]. Applications will be accepted until March 1, 2012 or until the position is filled. To read the full job description, go to <http://bit.ly/wPVVqi>, or visit ACLU Montana online at www.aclumontana.org.

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Continued, next page

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