MONTANA LAWYER
State Bar of Montana
February 2013 | Vol. 38, No. 4

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CLIENT FUNDS

Changes in '13 and what you need to know

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Why do attorneys become successful financial advisors?

Here's a few reasons:

1) Attorneys know how to communicate with clients
2) Attorneys understand what it means to be a fiduciary
3) Attorneys effectively interact with other professionals
4) Attorneys understand the legal undercarriage of financial products and strategies

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Lawyers and legislators do mix

Outside the air is crisp and cold. The snow is glistening on the lawn. Everywhere you go there is excitement and great anticipation of what will be. People are scurrying about. No, this is not a late Christmas message. This is Helena and the Montana legislature has begun its 63rd Legislative Session.

This session, almost three-fourths of the members of the House of Representatives have less than two years of legislative experience. In the Senate, 29 out of 50 members are in their first or second terms. In 2001, the State Bar of Montana in conjunction with the Legislative Services Division and the University of Montana School of Law began "Law School for Legislators" which takes place at the beginning of each legislative session. This program was the brainchild of Past State Bar President, Ed Bartlett.

Only nine members of the current legislature are attorneys. Members of the Senate and House of Representatives come from all walks of life and have varied educational backgrounds. In a few short hours, members of our profession attempt to provide a crash course in the law to the people who are about to create the laws we will be both defending and challenging. More importantly, these laws will govern our personal and professional lives.

This year, the Law School began with Todd Everts, Chief Legal Counsel and Code Commissioner for the Montana Legislature, who gave an overview of the Legislative Legal Services Division. Next, Montana Supreme Court Justice Jim Rice, presented on the role of the courts. Anthony Johnstone, Assistant Professor at the University of Montana School of Law, lectured on separation of powers and constitutional law. Helena attorney, Mike Meloy, spoke on Open Records law. Finally, John North, Chief Legal Counsel for the Montana Department of Environmental Quality, presented on Administrative Law and rule making. All of the attorneys who presented volunteered their time.

The legislators were given written materials by the presenters. The State Bar provided copies of the Montana Constitution and the State Bar Deskbooks. We offered our assistance to the legislators during their session. It was intense few hours and a significant amount of legal education was digested. To say it was a daunting undertaking, would be an understatement. At times, it seemed like the attendees were drinking water out of a fire hose. Many of those who attended offered their thanks and appreciation.

Back at the State Bar, we have begun our watch. In the last session in 2010, we hired attorneys, Ed Bartlett (Past State Bar President) and Bruce Spencer (former State Bar trustee) as our lobbyists. Ed and Bruce are back again. The State Bar staff and our lobbyists keep track on a daily basis of what legislation is in the works. The Executive Committee of the State Bar holds weekly phone conferences with our staff and lobbyists to discuss what action, if any, we need to take on behalf of our profession regarding pending legislation.

As a mandatory bar association, members of the Executive Committee must be mindful of the United States Supreme Court's decision in Keller v. State Bar of California, 496 U.S. 1 (1990). Under Keller, the State Bar is permitted to engage in activities related to the following:

- Regulating the legal profession,
- Improving the quality of legal services,
- Improving the courts, judicial efficacy, and efficiency,
- Increasing the availability of legal services to society, and,
- Promoting the education, ethics, competence, and integrity of the legal profession.

The State Bar is prohibited from engaging in activities having political or ideological coloration not reasonably related to these criteria. Examples of approved lobbying activities would include legislation regarding funding for new judges, salary increases for judicial staff, funding a judicial information system, increasing salaries for government attorneys, funding for new judicial positions and support for programs enhancing access to justice.

In 1974 the Montana Supreme Court issued its Order unifying the Montana State Bar. The Order sets forth its charge to the bar as follows:

"The purposes of the Unified Bar of Montana shall be to aid the courts in maintaining and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high standards of integrity, learning, competence, public service, and conduct; to safeguard proper professional interests of members of the bar; to encourage the formation, maintenance, and activities of local bar associations; to provide a forum for the discussion of and effective action concerning subjects pertaining to the practice of law, the science of jurisprudence and law reform and relations of the bar to the public; and to insure that the responsibilities of the legal profession to the public are more effectively discharged."

With the Supreme Court's directives in mind, members of the Executive Committee, the bar staff, and lobbyists will spend a considerable amount of time keeping watch of what is happening in Helena in the next few months. If you have any concerns regarding pending legislation, please contact the State Bar staff, Executive Committee, or our lobbyists.

The Supreme Court
of
Montana

Justice
James C. Nelson

Justice Building ♦ 215 North Sanders
PO Box 203001 ♦ Helena, MT 59620-3001
Phone (406) 444-5570 ♦ Fax (406) 444-3274

December 11, 2012

The Montana Lawyer
PO Box 577
Helena, MT 59624

To the Bench and Bar:

I have dreaded this moment for some time—having to say goodbye to the best job in the world and to the people who have made it so. Few lawyers have the privilege—and it truly has been a privilege—of serving the people of their state in the capacity that I have for the past almost twenty years. I have taken my job seriously—perhaps too seriously at times—but I've given it my best shot, for better or worse. I look forward to retirement and the new opportunities and challenges that will come with taking that fork in the road.

Serving the people of Montana and defending the U.S. and Montana Constitutions and the law as a member of the Court, has been an experience that likely will not be outdone. After nearly 40 years of involvement in the law, I can confidently state that Montana has an extraordinary practicing Bar and Judiciary, and we should be justly proud.

I especially want to thank the men and women who are and were part of my legal family—my colleagues on the Court, my law partners, my clerks, and my judicial and administrative assistants over the years. I am blessed to have had the opportunity to work with such fine, caring, and competent people. Their friendships are a treasure.

I wish you all my best and, most importantly, offer my heartfelt thanks.

Sincerely,

James C. Nelson
Justice

Beckers joins Karell Dyre Haney

Karell Dyre Haney PLLP is pleased to announce that Billings native Amanda M. Beckers has joined the firm as an associate attorney. She graduated with honors from the University of Montana in 2008, obtaining a BS degree in Business Administration, after which she worked as an auditor and became a CPA. Ms. Beckers has interned with the Yellowstone County Attorney-Civil Division, Rocky Mountain Elk Foundation, and a private law firm. While in Missoula, she was a member of the Student Bar Association, Women's Law Caucus, Native American Law Students Association and the Rural Advocacy League. In 2012, she graduated from the University of Montana School of Law with honors. Her primary practice areas include real estate, estate planning and commercial law. Amanda can be reached at (406) 294-8488 or abeckers@kdhlawfirm.com.


Beckers

Amrine joins Christian, Samson & Jones

Brett Amrine has associated with the Christian, Samson & Jones, PLLC, firm, in Missoula. Brett grew up in Missoula and returned home to practice law and enjoy all of the benefits of Montana. Brett's practice focuses primarily on business law, property transactions, water law and general litigation. Brett is licensed in Montana and Washington. Prior to returning to Missoula, Brett practiced in Wenatchee, Washington.

Brett obtained his J.D. from Gonzaga University School of Law, graduating magna cum laude. Brett received his undergraduate degree from the University of Washington in Civil Engineering. Prior to law school, Brett practiced as a civil engineer and obtained his Washington professional engineering license in 2000.

Travis opens environmental law office


Travis

Samantha Travis is pleased to announce the opening of The Law Office of Samantha Travis PLLC, a Flathead-Valley based firm focusing on serving clients throughout Montana in the areas of environmental and natural resources law. Travis Law is available to represent individual, business and organizational clients throughout Montana in the areas of environmental permitting and regulatory compliance, land use, water law and conservation law. Travis Law also serves local clients in the areas of family law and estate planning.

Prior to opening her own practice, Samantha worked as a Special Assistant Attorney General for the Montana Department of Environmental Quality and in private practice. While with DEQ, Samantha served as legal counsel to Montana's State and Federal Superfund programs, involving cleanup and rehabilitation of contaminated sites throughout Montana. In this capacity, Samantha was the State's primary attorney at 11 Superfund sites and hundreds of contaminated groundwater sites. Samantha has also worked as a litigation associate for the firm f/k/a Christensen, Moore, Cockrell, Cummings & Axelberg, P.C. in Kalispell.

Samantha received her law degree from the University of Montana School of Law, earning a certificate of specialization in Environmental and Natural Resources Law. While in law school, Samantha was the recipient of the Albert W. Stone memorial scholarship from the State Bar's Natural Resources, Energy & Environmental Law Section, served as a graduate teaching assistant in legal research and legal writing, and competed on the National Moot Court team. Prior to practicing law, Samantha has worked as a forest ranger for the U.S. Forest Service and as a river and hiking guide in Glacier National Park. She also holds a B.S. from the School of Forestry at the University of Montana.

Samantha may be reached at: The Law Office of Samantha Travis PLLC, 750 2nd Street West, Suite A, Whitefish, MT 59937. Telephone: (406) 730-1425.
Email: Samantha@samanthatravislaw.com.
Website: www.samanthatravislaw.com.

Probasco appointed to MSLA Board of Trustees

Montana Legal Services Association (MLSA) is pleased to announce attorney Peggy Probasco has accepted an appointment to the MLSA Board of Trustees.


Probasco

Ms. Probasco has been with the Department of Public Health and Human Services, Child Support Enforcement, as a Special Assistant Attorney General since 1991. Active in several State Bar of Montana committees, she serves as Chair of the Professionalism Committee and as a member of the Justice Initiatives Committee. She is a past President of the State Bar and past Chair of the former Access to Justice Committee. She has served on multiple other committees, councils, and boards.

Ms. Probasco received both her undergraduate and law degrees from the University of Montana. A resident of Butte, she loves to travel and experience new cultures and will do so as leader of the State Bar of Montana Delegation to Cuba to research the Cuban legal system in February, 2013.

"Peggy is a long-time advocate for access to justice," says Alison Paul, MLSA Executive Director. "We are fortunate to have her accept appointment as an MLSA Trustee and look forward to the wealth of knowledge and skill she will share in our efforts to protect and enhance the civil legal rights of low-income Montanans."

Flathead Job Service awards Tornow as Employer of Choice

Thomas Tornow recently won the prestigious Flathead Job Service Employer of Choice Award for the 1-24 employee category on December 18. A cake and engraved award was presented to Tom by Roberta Diegel and Terrie Haute, committee members of the Flathead Job Service Employers Council.

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Each completed application had to list pertinent employee benefits; training; initiatives; and community involvement. Employees were also required to list customer service and ethical business practices.

Tom was surrounded by fellow employees, building tenants and friends. Tom's wife, Sue Brown, was 'in on the surprise' and attended the event as well. Tom's name will now be entered into a statewide contest with the results announced in April 2013.

If you would care to congratulate Tom you may send a note to his boutique law firm located at 309 Wisconsin Avenue, Whitefish MT 59937. For more information about Thomas T. Tornow, P.C. and the legal services his office provides, please visit www.tornowlaw.com

To learn more about the award visit https://www.facebook.com/FlatheadJobService

Harman opens new practice

Steve Harman is excited to announce he has opened his own law practice in Billings, Steve Harman Law, PLLC. Steve will continue to focus on medical negligence, personal injury and mediation, with the able help of Claudia Reitz, his paralegal of 32 years.

Contact Steve at Steve Harman Law, PLLC, 2601 Minnesota Ave., Ste. 2, P.O. Box 1815, Billings, MT 59103-1815. Phone: 406-969-4498. Fax: 406-969-4497. Email: steve@steveharmanlaw.com; claudia@steveharmanlaw.com; Website: www.steveharmanlaw.com

Newcomer joins Ugrin, Alexander, Zadick & Higgins as new associate attorney

The law firm of Ugrin, Alexander, Zadick, and Higgins, P.C., is pleased to announce the hiring of Andrew T. Newcomer as an associate attorney. Andrew earned his Juris Doctor from Washburn University School of Law in 2012 graduating summa cum laude (with highest honors). Andrew served as the Articles Editor of the Washburn Law Journal. Andrew was also a member of the Law School's trial advocacy competition team and received the Order of the Barristers Award for excellence in advocacy. He recently completed an internship for the U.S. Attorney's Office for the District of Wyoming at Yellowstone National Park. Andrew previously worked in Great Falls as an anchor and reporter for television station KFBB.


Newcomer

Andrew is admitted to practice law in all Montana State Courts and before the U.S. District Courts for the District of Montana. Andrew is engaged in the firm's litigation practice, providing representation to individuals and businesses in the areas of personal injury, property damage, employment, and insurance defense.

Women's Law Caucus silent auction set for March

The Women's Law Caucus at the University of Montana School of Law is hosting its annual silent auction on March 8 from 6-9 pm at the Missoula Children's Theater. Donations are welcome and tax deductible, and all proceeds go to benefit the Missoula YWCA Pathways domestic violence shelter. Email WLC@umontana.edu for more info.

Wright joins Halverson & Mahlen

Halverson & Mahlen, P.C., is pleased to announce the association of John L. Wright. John was born and raised in Charlotte, North Carolina, and graduated from the University of South Carolina with a degree in English Language and Literature. John graduated from the University of Montana School of Law in 2012 after serving as Publication Editor of the Public Land and Resources Law Review and President of the Federalist Society. As a law student, John had the honor of interning for Hon. Sam E. Haddon of the United States District Court of Montana. John also interned at the Montana Office of the Appellate Defender. John's area of practice will be insurance, litigation, and business law. John and his wife Lauren live in Billings. John will join James R. Halverson, Thomas L. Mahlen, Jr., and Jaclyn Lafeniere in their commitment to providing individuals, businesses, and insurance companies with ethical, efficient and effective legal representation throughout Montana in a wide variety of practice areas, including commercial litigation, construction, insurance, products liability, personal injury, employment law, and fire/arson cases. Please visit the firm's website, www.hglaw.net, and contact the firm at: Halverson & Mahlen, P.C., Creekside Suite 301, 1001 S. 24th Street West, P.O. Box 80470, Billings, MT 59108-0470. Phone: (406) 652-1011. Fax: (406) 652-8102.


Wright

Mattingley joins Kaleva Law Offices

Kaleva Law Offices in Missoula is pleased to announce that David Mattingley has joined the firm. David received a B.S. in economics and a B.S. in finance from the University of Idaho. He then received his juris doctorate from the University of Montana School of Law in May 2012. With David's love of the outdoors, a move to Montana was a perfect fit for him and his wife Katie. Check him out at Kaleva Law Offices http://www.kalevalaw.com.

Fagan earns scholarship to ABA Leadership Institute

Gerry Fagan, President of the Yellowstone Area Bar Association, was awarded a scholarship to attend the American Bar Association Leadership Institute at the mid-year meeting of the ABA in Dallas, Texas, in February. Gerry was one of five recipients nationwide. The scholarship is awarded to exceptional leaders of small bar associations. He was nominated by the State Bar of Montana.

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Loved professors celebrate birthdays

Larry Elison celebrated his 80th birthday recently in November. His friends and family joined him at an open house on Nov. 9.

In January, Duke Crowley celebrated his 90th birthday. Martin Burke and Ed Eck presented Duke a book with more than 200 birthday greetings on Jan. 16. **Pictured above, left:** (left to right) Martin Burke, Larry Elison, Duke Crowley, Robin Ammons. **Right:** (left to right) Tom Huff, Larry Elison, Duke Crowley, Jeff Renz, Martin Burke.

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Chin joins Matrium Law Group

Chin

Matrium Law Group in Missoula is pleased to announce that Janel F. Chin will be working with them to work in the areas of estate planning, family law, elder law and probate.

Janel grew up in Moscow, Idaho and attended both North Idaho College in Couer d' Alene and the University of Idaho in Moscow in pursuit of her collegiate distance running goals. At North Idaho College she served as Senator and President of the associated students and graduated University of Idaho's Outstanding Student of the Year in environmental sciences in 2003 due in part to her work on the Board of Directors for Palouse-Clearwater Environmental Institute. After completing her undergraduate work in environmental sciences Janel worked at the University of Idaho's College of Agriculture in the Department of Rural Sociology. Her work mainly dealt with issues that arise when tribal governments are key players in a community's natural resource disputes.

Janel earned her Juris Doctor from University of Colorado, Boulder where she worked as a Research Assistant to the late Dean David Getches assisting with preparations for his "Water Law In A Nutshell" book revision. Her most extensive research activities were for Professor of Law, Sarah Krakoff who co-authors a leading American Indian law casebook. Janel became well versed in the legal issues surrounding tribal sovereignty and jurisdiction as well as those involved with tribal economic development. Janel's clinical work in law school was in the American Indian Law Clinic on cases involving the American Indian Child Welfare and American Indian Probate Act. She also assisted in tribal code writing projects. Janel's work outside of the law school included research for the Colorado State Public Defender and clerking for the Colorado Department of Law, Natural Resources Division where she researched and wrote about legal questions related to hunting and fishing easements and hazardous wate storage and clean-up. Janel also clerked for the 17th Judicial District's Attorney's office in Broomfield Colorado where she made weekly court appearances and gained experience on traffic, domestic violence and sexual assault cases. Janel also has extensive experience facilitating dispute resolution outside of our court system. She spent several years facilitating restorative justice conferences for the Colorado University Restorative Justice program. After admission to the Colorado bar in 2007, Janel worked as an Outreach Coordinator for the University of Colorado's Institute for Ethical and Civic Engagement developing partnerships betwen community groups, public schools and the University to address issues of retention, success and access to higher education in Boulder County. She also served on the city of Westminster's "Special Permits and Licenses Board."

Janel brings energy and pragmatic insights to the practice of law. For more information on Matrium Law Group, please visit www.matriumlaw.com. Janel can be reached at janel@matriumlaw.com or at (406) 207-6462.

Dunn joins Steven T. Potts and Associates

The law firm of Steven T. Potts and Associates, PLLC in Great Falls is pleased to announce that Mark Dunn has become an associate with the firm. Mark is from Billings and graduated Magna Cum Laude from MSU-Billings in 2007 with a B.A. in History. He attended law school at the University of North Dakota and graduated with distinction in 2010. For the last two years he has had the honor of serving as law clerk to the Honorable Dirk. M. Sandefur in the Montana 8th Judicial District. Mark and his wife Emily have been married for 10 years and have four daughters. He enjoys spending time with his family and serving in his church, Great Falls Christian Center. Mark is an accomplished musician and has produced one vocal and guitar CD. He will focus his practice on civil litigation and business law.

Dunn

First ever meeting of the Access to Justice Commission

On Dec. 15, the new Access to Justice Commission met for the first time. From left to right at the table: Jon Bennion, Judge David Ortley, Robin Meguire, Justice Beth Baker, Melanie Reynolds, Jennifer Brandon, Judge Michele Snowberger, Amy Gmoljez, Senator Rick Ripley, Alison Paul, Andy Huff, Matt Dale, Andrew King-Ries, Rep. Chuck Hunter, Judge Kruger. Members participating by phone were Randy Snyder and Sharon Skaggs.

State Bar News

2013 Legislature watch list

This is the list of bills that the State Bar of Montana is currently following closely during the 2013 Montana Legislature. The bills would affect the practice of law and the operation of Montana's courts. Only bills that the Bar actively follows, opposes or supports are listed here.

- **HB172** Allow Montana state bar attorney member to serve as a judge pro tem — **support**
- **SB50** Eliminate report on expenditures of attorney license tax — **support**
- **SB85** Revise laws related to judge disqualification — **oppose**
- **SB152** Constitutional amendment revising qualifications for Supreme Court justices — **oppose** *(bill has been tabled in committee)*
- **HB186** Require losing party in litigation to pay litigation costs in certain lawsuits — **discussed; no position** *(bill has been tabled in committee)*

Meet your ethics requirement

Most Montana attorneys will be required to obtain 5 Ethics credits, including 1 SAMI credit, by March 31, 2013. The SAMI (Substance Abuse/Mental Impairment) requirement is part of the 3-year Ethics cycle. If you were admitted to the Bar after 2001, you might have a different reporting cycle. Check the upper-right portion of your previous-year CLE affidavit to determine the end of your individual reporting cycle. Check the CLE section of www.montanabar.org for more info.

State Bar ABA Delegate Vacancy

Congratulations to Past President Shane Vannatta on his election to serve as State Bar Delegate to the American Bar Association!

LexisNexis, Bar end partnership

Effective December 10, 2012, the State Bar ended its partnership with LexisNexis member services including research discounts and sponsorships. The Bar is researching other legal research options with a working group to report in late Spring, 2013.

Dues will be mailed March 1

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 separately in April with a filing deadline of May 15th.

Another successful Construction Law Institute

The Montana State Bar Section on

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Free tax preparation, info and legal services available to Montanans

Montana Legal Services Association announces two important tax services for Montanans in 2013. 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. 121.

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 35,042 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.

Ninth Circuit accepting comments on reappointment of bankruptcy judge

The current term of the Honorable Ralph B. Kirscher, U.S. Bankruptcy Judge for the District of Montana, is due to expire in November 2013. The U.S. Court of Appeals for the Ninth Circuit is considering the reappointment of the Judge to a new term of office of 14 years. The Court invites comments from the bar and public about Judge Kirscher's performance as a Bankruptcy Judge. The duties of a Bankruptcy Judge are specified by statute, and include conducting hearings and trials, making final determinations, and entering orders and judgments.

Members of the bar and public are invited to submit comments concerning Judge Kirscher for consideration by the Court of Appeals in determining whether or not to reappoint him. Anonymous responses will not be accepted.

However, respondents who do not wish to have their identities disclosed should so indicate in the response, and such requests will be honored. Comments should be submitted no later than Friday, February 22, 2013, to the following address:

Office of the Circuit Executive
P.O. Box 193939
San Francisco, CA 94119-3939
Attn: Reappointment of U.S. Bankruptcy Judge Kirscher
Fax: (415) 355-8901

BAR NEWS, from previous page

Construction Law held its 8th Annual Construction Law Institute in Bozeman on Friday, October 12, 2012. Approximately 40 Montana lawyers and construction professionals attended the institute. The program, "Current Topics in Construction Law," covered various issues, such as mediation of public construction disputes, how to draft contracts to deal with scheduling and delay, damages arising where green construction is not green enough, blind mediation and the wrongful termination of construction contracts. Justice Mike Wheat gave an overview of recent Supreme Court cases involving construction, real estate and related topics.

The Construction Law Section brought leading construction practitioners from throughout the nation to the program. The presenters included: Arthur D. Brannan, Phil Bruner, Peter C. Halls, Mark Heley, Angela R. Stephens and Hon. Michael E. Wheat. Additionally, the Construction Law Section presented an update on Montana issues by three of the Section's members: Matt Kelly, Tim Geiszler and Bridget leFeber.

Several parties make the the Construction Law Institute possible: 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, Berg, Lilly & Tollefsen P.C., Refling Law Office, and Tarlow Stonecipher & Steele, PLLC.

Sentence Review Commission appointments

Summarized from a Dec. 6 order (AF 06-0185)

The terms of the Hon. Ray Dayton as a member and Chair of the Sentence Review Division of the Montana Supreme Court and the Hon. John Warner as the alternate member of the Sentence Review Division of the Montana Supreme Court expired on Decrmber 31, 2012. The Court thanks Judges Dayton and Warner for their service. Pursuant to § 46-18-901, MCA, the expiration of the terms of Judges Jayton and Warner require the Chief Justice of this Court to appoint new members to the Sentence Review Division. Therefore, and with the consent of the appointees,

IT IS ORDERED that the Hon. Kathy Seeley of the First Judicial District Court is appointed as a member to the Sentence Review Division, effective January 1, 2013, for a term of three years, expiring December 31, 2015. Current Member, the Hon. Loren Tucker, will serve as Chair. IT IS FURTHER ORDERED that the Hon. John Warner is reappointed as the alternate member of the Sentence Review Division effective January 1, 2013, for a term of three years.

CLE Commission comment period for proposed rules amendments

Summarized from a Jan. 9 order (AF 06-0163)

The Montana Commission of Continuing Legal Education has filed a petition asking the Court to amend the Rules for Continuing Legal Education.

IT IS ORDERED that interested persons are granted 60 days from the date of this Order in which to file with the Clerk of this Court any comments they may have regarding the proposed amendments, a copy of which is attached to this Order. Language proposed to be added to the rules is underlined; language proposed to be deleted is interlineated.

A copy of this order and the attached proposed amendments shall be published on the Court's website -- www.courts.mt.gov

Discipline

Summarized from a Dec. 5 order (PR 11-0649)

On November 1, 2011, a formal disciplinary complaint was filed against Montana attomey Brad L. Arndorfer. The disciplinary complaint may be reviewed by any interested persons in the office of the Clerk of this Court.

The Commission on Practice held a hearing on the complaint on July 18, 2012, at which hearing Arndorfer was present with his counsel and testified on his own behalf.

On October 11, 2012, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Arndorfer did not file any objections within the time allowed.

Based on the allegations of the complaint and the evidence produced at the hearing, the Commission has concluded that Arndorfer has violated several provisions of the Montana Rules of Professional Conduct (MRPC). The Commission concluded Arndorfer violated Rules 1.7, 1.8(a) and 2.1, MRPC, by entering into a business transaction with, and creating a concurrent conflict of interest with, his client. The Commission further concluded there is clear and convincing evidence that Arndorfer violated Rule 8A(c), MRPC, by withholding a market analysis of property included in an estate for which his client was a co-personal representative, and thus preventing his client from fulfilling her duty of loyalty and acting in concurrence with her co-personal representative for the estate.

The Commission recommends that, as a result of these violations of the Montana Rules of Professional Conduct, Arndorfer be disciplined by administration of a public censure by this Court. The Commission further recommends that Arndorfer be ordered to pay the costs of these proceedings.

The Court having reviewed the record, and based upon the foregoing, IT IS HEREBY ORDERED:

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

2. Brad L. Arndorfer shall be publically censured by this Court at 1:00 p.m. Jan. 15, 2013, at the courtroom ofthe Montana Supreme Court in Helena, MT.

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

Summarized from a Jan. 23 order (PR 12-0064)

On January 30, 2012, a formal disciplinary complaint was filed against Montana attorney J. Gregory Tomicich. The disciplinary complaint may be reviewed by any interested person in the office of the Clerk of this Court.

Tomicich subsequently tendered to the Commission on Practice a conditional admission and affidavit of consent, pursuant to Rule 26 of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). The Commission held a hearing on the conditional admission and affidavit of consent on October 25, 2012, at which hearing Tomicich and his counsel were present and Tomicich testified on his own behalf. On January 11, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation that Tomicich's conditional admission be accepted.

We approve the findings, conclusions, and recommendation of the Commission on Practice. In his conditional admission, Tomicich has admitted that, from December 2003 through June 2011, he comingled his personal funds with client funds in his office IOLTA trust account, paid office and personal expenses from the account, and failed to maintain the account in accordance with the Trust Account Maintenance and Audit Requirements pursuant to Rule l.18(e)(2) of the Montana Rules of Professional Conduct (MRPC). Tomicich admits to having committed multiple violations of Rules 1.15 and 1.18, MRPC. Tomicich's admission was tendered in exchange for the following discipline: a public censure by this Court, a 5-year term of probation with terms and conditions, and payment of costs.

Based upon the foregoing, IT IS HEREBY ORDERED:

1. The Commission's Recommendation that we accept

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Tomicich's Rule 26 tendered admission is ACCEPTED and ADOPTED.

2. J. Gregory Tomicich shall appear before this Court for a public censure to be administered in our Courtroom, at 1 p.m. Feb. 20,2013.

3. Tomicich's admission to the practice of law in Montana is placed on a probationary status for five years following the date of this Order, subject to the following terms and conditions:

a. Tomicich shall refrain from the use of alcohol.
b. Tomicich shall attend at least three A.A. meetings per week.
c. Tomicich shall obtain and maintain an A.A. sponsor at all times.
d. Tomicich shall attend three Montana Lawyer Assistance Program (LAP) sponsored support meetings per month, if available, in Yellowstone County, unless excused by the LAP.
e. Tomicich shall submit to random alcohol testing (such as urinalysis or hair tests) at the request of either the Office of Disciplinary Counsel (ODC) or the LAP, and shall pay for such testing.
f. Tomicich shall provide the LAP an authorization to disclose any information to ODC.
g. Within 30 days from the date of this Order, Tomicich shall prepare and submit to ODC a written plan setting forth the measures he has taken to comply with Rules 1.15 and 1.18, MRPC, and the Trust Account Maintenance and Audit Requirements.
h. Tomicich shall hire a bookkeeper to either keep track of all financial transactions and do the required recordkeeping, or have a bookkeeper review his recordkeeping on a quarterly basis.
i. Tomicich shall provide the name and contact information of the bookkeeper to ODC and provide an authorization allowing the bookkeeper to disclose any information to ODC.
j. Tomicich shall follow any prescribed treatment recommended by his physician for treatment of any mental condition, and shall send an authorization for disclosure of those physician records, treatment, and recommendations to ODC, the Commission on Practice, and the Montana Supreme Court, as requested.

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

5. Pursuant to Rule 26(D), MRLDE, the Clerk of this Court is directed to file Mr. Tomicich's Conditional Admission and Affidavit of Consent, together with the Commission's findings, conclusions, and recommendation.

Summarized from a Jan. 23 order (PR 12-0059)

On January 26, 2012, a formal disciplinary complaint was filed against Montana attorney Stephen H. Dalby. The disciplinary complaint may be reviewed by any interested persons in the office of the Clerk ofthis Court.

Dalby subsequently tendered to the Commission on Practice a conditional admission and affidavit of consent, pursuant to Rule 26 of the Montana Rules for Lawyer Disciplinary Enforcement. The Commission held a hearing on the conditional admission and affidavit of consent on October 26, 2012, at which hearing Dalby was present and testified on his own behalf. On January 11, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation that Dalby's conditional admission be accepted.

We accept and approve the findings, conclusions, and recommendation of the Commission on Practice. In his conditional admission, Dalby has admitted that, should this matter proceed to a contested hearing, he could not defend himself against charges that: in violation of Rule 1.1 of the Montana Rules of Professional Conduct (MRPC), he failed to provide a client with competent representation; in violation of Rule 1.3, MRPC, he failed to act with reasonable diligence and promptness in representing that client; in violation of Rule 3A(d), MRPC, he failed to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; in violation of Rule lA, MRPC, he did not promptly reply to his client's reasonable requests for information and/or failed to keep her reasonably informed about the status of the matter; and, in violation of Rule 1.5(b), MRPC, he failed to communicate in writing the scope of his representation and the basis or rate of the fees and expenses for which his client would be responsible. Dalby has tendered his admission in exchange for the following discipline: a public censure by this Court, a 5-year term of probation with terms and conditions, and payment of costs.

Based upon the foregoing, IT IS HEREBY ORDERED:

1. The Commission's Recommendation that we accept Dalby's Rule 26 tendered admission is ACCEPTED.

2. Stephen H. Dalby shall appear before this Court for a public censure to be administered in our Courtroom, at 1p.m on Feb. 20, 2013.

3. Dalby's admission to the practice of law in Montana is placed on probationary status for five years following the date of this Order, subject to the following terms and conditions:

a. Dalby shall maintain his caseload at a manageable level.
b. Dalby shall obtain a mentor, subject to the approval of the Office of Disciplinary Counsel (ODC), to monitor his practice and review the state of any cases in litigation.
c. Dalby shall submit quarterly reports to ODC regarding the state of his practice and his communications with his mentor.

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

5. Pursuant to Rule 26(D), MRLDE, the Clerk of this Court is directed to file Mr. Dalby's Conditional Admission and

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Affidavit of Consent, together with the Commission's findings, conclusions, and recommendation.

Summarized from a Jan. 23 order (PR 12-0274)

On May 1, 2012, a formal disciplinary complaint was filed against Montana attorney S. Charles Sprinkle. The disciplinary complaint may be reviewed by any interested persons in the office of the Clerk of this Court.

Sprinkle subsequently tendered to the Commission on Practice a conditional admission and affidavit of consent, pursuant to Rule 26 of the Montana Rules for Lawyer

Disciplinary Enforcement. The Commission held a hearing on Sprinkle's conditional admission and affidavit of consent on October 26, 2012, at which hearing Sprinkle was present and testified on his own behalf. On January 11,2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation that Sprinkle's conditional admission be accepted.

We accept and approve the findings, conclusions, and recommendation of the Commission on Practice. In his conditional admission, Sprinkle has acknowledged violating Rules 1.1 and 1.3 of the Montana Rules of Professional Conduct (MRPC) concerning competence and diligence in his representation of several clients by filing inaccurate or incomplete documents in their bankruptcy proceedings; and Rule 1.4, MRPC, by failing to keep his clients reasonably informed about the status of their bankruptcy proceeding or failing to explain the matter to the extent reasonably necessary to permit them to make informed decisions regarding his representation.

Sprinkle tendered his admission in exchange for the following forms of discipline: a public censure by this Court, a two-year term of probation with terms and conditions, and payment of costs.

Based upon the foregoing, IT IS HEREBY ORDERED:

1. The Commission's Recommendation that we accept S. Charles Sprinkle's Rule 26 tendered admission is ACCEPTED.

2. S. Charles Sprinkle shall appear before this Court for a public censure to be administered in our Courtroom, at 1 p.m. on Feb. 20, 2013.

3. Sprinkle's admission to the practice of law in Montana is placed on a probationary status for two years following the date of this Order, subject to the following terms and conditions:

a. Sprinkle shall not violate any Montana Rules of Professional Conduct during his probation.

b. Sprinkle shall obtain an attorney mentor approved by the Office of Disciplinary Counsel (ODC) to monitor his practice and probation compliance, and to make quarterly status reports to ODC providing a brief narrative of non-confidential information on any current or potential issues of attorney misconduct.

c. Any violations of the probationary terms or the MRPC could result in additional discipline, which may include indefinite suspension or disbarment.

4. Sprinkle shall pay the costs of these proceedings subject to the provisions of

Rule 9(A)(8), MRLDE, allowing him to file objections to the statement of costs.

5. Pursuant to Rule 26(D), MRLDE, the Clerk of this Court is directed to file Mr. Sprinkle's Conditional Admission and Affidavit of Consent, together with the Commission's Findings of Fact, Conclusions of Law, and Recommendations.

Summarized from a Jan. 23 order (PR 13-0025)

The Office of Disciplinary Counsel (ODC) has filed a petition asking us to determine, pursuant to Rule 23 of the Montana Rules for Lawyer Disciplinary Enforcement, whether Montana attorney Christopher J. Lindsey has been convicted of a criminal offense that affects his ability to practice law. Rule 23 provides:

The Court need not give notice to the lawyer, nor shall a hearing be required prior to its determination of whether the criminal offense of which the lawyer was convicted was one which affects the lawyer's ability to practice law, nor shall a hearing be required prior to the Supreme Court's entering an interim order of suspension.

ODC has attached to its petition a certified copy of Lindsey's conviction, upon his entry of a guilty plea in the United States District Court for the District of Montana, of Conspiracy to Maintain Drug-Involved Premises in violation of 21 U.S.C. § 846. The Federal District Court sentenced Lindsey to three months home confinement and five years of probation with certain terms and conditions. Pursuant to Rule 23, ODC asks that, in the event we determine Lindsey 's conviction affects his ability to practice law, we issue an order immediately suspending him from the practice of law pending final disposition of disciplinary proceedings predicated upon that conviction and directing ODC to prepare and file a formal complaint against Lindsey predicated upon his conviction.

We conclude the criminal offense of which Lindsey has been convicted IS an offense that affects his ability to practice law. Therefore,

IT IS ORDERED that Christopher J. Lindsey is suspended from the practice of law in the State of Montana, effective immediately, and pending final disposition of disciplinary proceedings against him.

#

Continuing Legal Education

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

February

Feb. 15 — Annual Real Estate CLE. Fairmont Hot Springs Resort Sponsored by the CLE Institute. 6 CLE credits, including 1.00 ethics.
Feb. 27 — SAMI Phone/Webinar. Sponsored by the CLE Institute. 1 SAMI credit.
Feb. 28 — Hendershot: Practical Implementation Noon-Hour Phone CLE. Sponsored by the Family Law Section. 1.00 CLE credit.

March

March 8 — Secrets to a Successful Trial. Holiday Inn Grand Hotel, Billings. Sponsored by the Paralegal Section. 6.5 credits/1 ethics.
March 15 — All Ethics, Nothing But Ethics CLE. Fairmont Hot Springs Resort. Annual St. Patrick's CLE (formerly in Butte), sponsored by the CLE Institute. —6 Ethics/1 SAMI CLE credits.
March 22 — Natural Resource CLE. Great Northern Town Center, Helena. Sponsored by CLE Institute. Credits pending.

April

April 19 — Annual Bench-Bar Conference. Holiday Inn, Bozeman. Sponsored by the Judicial Relations Committee and CLE Institute. Credits pending.
April 26 — Bankruptcy 101. Hampton Inn, Great Falls. Sponsored by the CLE Institute. Credits pending.

May

May 3 — Family Law Update. In Missoula. Sponsored by the Family Law Section and CLE Institute. Credits pending.
May 10 — Cybersleuth's Guide to the Internet. Back by popular demand, nationally recognized authors and speakers on internet legal research, Carole Levitt and Mark Rosch, return to Montana, having presented at a State Bar CLE in Bozeman, June, 2012. This CLE, with updates, includes Strategies for Discovery, Trial Preparation and how to Successfully Complete Transactions, including Investigative Research Strategies for the Legal Professional.
Approved for 6.00 credits.

June

June 14 — New Lawyers' Workshop and Road Show. In Billings. Sponsored by the Professionalism Committee. Workshop free to new admittees. Approximately 3 ethics.

July

July 25-26 — Annual Bankruptcy Section CLE. Fairmont Hot Springs Resort. Sponsored by the State Bar's Bankruptcy Section, approximately 10 CLE credits.

September

Sept. 19-20 — State Bar's Annual Meeting. Colonial Red Lion Hotel, Helena. Sponsored by the State Bar's Professionalism Committe. Approximately 10 CLE credits.

October

Oct. 4 — Women's Law Section CLE. Chico Hot Springs Spa & Resort. Credits pending.
Oct. 11 — Arbitration. Sponsored by the Dispute Resolution Committee. Credits pending.

Other continuing legal education seminars

Drug Court CLE

The 13th Judicial District Drug Court, Yellowstone County Family Drug Court and the Center for Children & Families is sponsoring a seminar featuring two nationally acclaimed drug court speakers. 5.25 CLE credits. Contact Shelley Thomson to register at *sthomson@mt.gov*. Registration Fee: $10.00

WHEN: February 20, 2013
- Check-in: 8:00 – 8:30 a.m.
- Seminar: 8:30 a.m. to 4:30 p.m.

WHERE: MSU Billings Seminar Room, Corner of Broadway and 3rd Ave. North, Billings, MT

Speakers sponsored by BJA Technical Assistance and American University:

Leo James Kadehjian, Ph.D. – Harvard, M.I.T. and Stanford educated biomedical consultant. Dr. Kadehjian serves on the faculty of the National Judicial College lecturing on the neurobiology of addiction and drug testing. He provides oversight of the U.S. Federal Courts' onsite drug testing programs. Dr. Kadehjian will speak about the neurobiology of addiction as well as drug testing.

Michael D. Schrunk – Prosecutor from Multnomah County, Oregon (Portland). District Attorney Schrunk has significant prosecution experience from traffic violations to multiple murders as well as criminal defense experience. He will give a prosecutor's view of drug courts.

Red Mass CLE

The Annual Red Mass CLE will be held March 21 at Holy Spirit Church Parish Hall , Great Falls.

Kristen Juras presenting followed by a panel discussion of the subject - "To Die or Not to Die? Ethical and Legal Issues Surrounding Doctor Assisted Suicide" featuring Juris, a local internist, and an ethics professor from the University of Great Falls.

The CLE is open to both lawyers and paralegals. CLE/ethics credit is pending.

Preceding the CLE will be a traditional Red Mass with Great Falls-Billings Diocese Bishop Michael Warfel presiding and likely providing his observations of the issue and debate. The Red Mass was customarily celebrated for the bench and bar commencing in 13th Century Europe. Such masses are held at various places in the United States. The Mass will commence at 2:00 p.m., and is optional.

Same day registrations for the CLE will commence at 2:45 p.m. that day with the CLE following at 3:15. An optional dinner which CLE attendees and their spouses or guests are invited to attend will be shortly after the CLE concludes.

$25 for the CLE and $15 a person for the dinner.

Registrations may be made in advance by mailing them to Holy Spirit Parish, 200 44th St. So., Great Falls, MT 59405 together with the requisite CLE registration fee, and the payment for dinner if the attendee is opting to attend that, also.

The CLE and associated events are sponsored by the Parish and a Committee of Great Falls area attorneys – Mary Matelich, Glenn Tremper, Richard Martin, Karen Reiff, Theresa Diekhans, Anders Berry and Dale Schwanke.

On-Demand and Recorded CLE

This is the most current list of 1-hour CLE available through the Bar's on-demand catalog. Follow the CLE link in the Member Toolbox on ther upper-right side of the homepage at *www.montanabar.org* then go to "On-Demand Catalog." You can also go there directly at this URL: *http://montana.inreachce.com*. The courses are $50 and you can listen or watch them at your computer. You can still order these as CDs if you'd like, just use the form below.

- All Things Google for Lawyers
- Appellate Practice Tips: Brief Writing and Oral Argument
- Appellate Practice Tips: Ground Zero
- Collaborative Tools and Virtual Offices
- Contested Case Procedures Before the Department of Labor and Industry
- Drafting Family Law Briefs to the Montana Supreme Court
- Electronically Stored Information - Montana Rules of Civil Procedure
- Facilitating Co-Parent Communication with OurfamilyWizard.com
- How NOT to Mess Up Children During a Divorce Proceeding
- Online Resources for Lawyers
- Probate Update

Ethics credits info: Most MT attorneys will be required to obtain 5 Ethics credits, including 1 SAMI, by March 31, 2013. The SAMI (Substance Abuse/Mental Impairment) requirement is part of the 3-year Ethics cycle. If you were admitted to the Bar after 2001, you might have a different reporting cycle. For more information check the CLE section at www.montanabar.org.

- Recurring Issues in the Defense of Cities and Counties
- Rules Update - Bankruptcy Court Local Rules
- Rules Update - F ederal Rules of Civil Procedure
- Rules Update - Montana Rules of Civil Procedure Revisions
- Rules Update - New Federal Pleading Standard
- Rules Update - Practicing Under Revised Montana Ru les of Civil Procedure
- Rules Update - Revisions to Rules for lawyer Disciplinary Enforcement
- Rules Update -Water Law Adjudication Update
- Rules Update -Workers' Comp Court
- SAMI - Ethical Duties and the Problem of Attorney Impairment
- SAMI - Dependency Warning Signs
- SAMI - Is It Time to Retire?
- SAMI Smorgasbord
- Settlement Conference Dos and Don'ts
- Social Media Overview
- Social Networking and Family Law

State Bar Legal Publications

To order and pay by credit card, please visit the online bookstore at *www.montanabar.org*.

2012 Annual Meeting Hot Topics
326 pages, limited number of spiral bound notebooks. $35. Updates on current legal hot topics: employment law, criminal law presecution & defense, consumer law, SAMI, patent law and patent troll litigation, federal tax law, tribal law, *Citizens United,* technology issues, civil procedure and electronically stored information, appellate practice tips, immigration law, elder law and Medicaid for the nursing home, legal issues in and around the Bakken, MT Supreme Court summary, family law.

Montana Real Estate Transactions
- 2010, 360 pages, book plus 2011 supplement CD $205.
- 2011 Supplement, 82 pages, $25 for CD.

Montana Civil Pleading & Practice Formbook.
2012, 489 pages, book plus all forms in editable format on CD, $225

Civil Jury Instructions
(MPI – MT Pattern Instructions)
1999 w/2003 Update, 400 pages
Book plus CD $200

Montana Probate Forms
2006, 288 pages
Book plus CD $150

Criminal Jury Instructions
2010 edition
650 pages, on editable CD only $130

Public Discipline Under MT Rules of Professional Conduct
2010, 192 pages annotated
CD $35

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Order Form

To pay by check, please fill out the mail-in form below:

Publications or CLE materials wanted _____

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Mailing address _____

E-mail address or phone_____ Amount enclosed _____

Mail order & check to: State Bar of Montana, PO Box 577, Helena MT 59624

Program seeks lawyers to help Hispanic and women farmers in discrimination claims process

The Farmers' Legal Action Group, Inc. (FLAG) and the National Agricultural Law Center is seeking lawyers to assist Hispanic and women farmers to complete and submit claims forms in a non-judicial process to resolve past claims of discrimination in USDA Farm Loan Programs. The USDA Hispanic and Women Farmers and Ranchers Claims Process (HWFRCP) is described in more detail below. (Claims are based on actions that occurred between 1981 and 1996 or mid-October 1998 and mid-October 2000).

FLAG and the National Agricultural Law Center are helping to develop a network of attorneys to assist claimants in the completion of the official HWFRCP Claim Form. Attorneys who agree to accept referrals of potential claimants will be included on the Legal Assistance Network Referral List which will be publicly available on the National Agricultural Law Center website (www.nationalaglawcenter.org) so that claimants and others can easily access the information and make contact. To be listed in the Legal Assistance Network, attorneys must first view a recorded training video about the HWFRCP. The video is available for online viewing along with written educational materials.

If you are an attorney interested in being listed in the Legal Assistance Network, please send an email to nataglaw@uark.edu that indicates the state(s) in which you are licensed to practice and the corresponding bar number(s) for those states, along with a request for a link to the training video and educational materials.

FLAG and the National Agricultural Law Center will also be available to respond to your questions regarding the Legal Assistance Network, the Claim Form, and the USDA Loan and Loan Servicing Programs that may arise while you are providing assistance to potential claimants. You may contact us with your questions by email at HWFRCP@flaginc.org or nataglaw@uark.edu, or by phone to Lynn Hayes at (651) 223-5400 or Harrison Pittman at (479) 575-7640. **The Period for filing claims is September 24, 2012 through March 25, 2013.**

Providing You Assistance

Lawyers interested in assisting potential claimants will have access to:

- **Free Legal Education Seminar**—in-person or web-based training seminar explaining information needed to assist claimants, including details of this discrimination claims process, the USDA Farm Loan Programs covered by the claims process, and eligibility criteria for claimants.
- **Free Legal Education Materials**—a training manual that includes detailed descriptions of USDA Farm Loan Programs, a sample claim form, tips for completing the claim form, and explanation of the claims procedures and decision framework.
- **Participation in Referral Network for Claimants**—upon completion of the legal education training and with a commitment to participate, lawyers will be included on a referral list available to thousands of potential claimants through the website of the Hispanic and Women Farmers Claims Assistance Network and that will be referenced in hundreds of outreach meetings for potential claimants that will be held throughout the nation.
- **Support During Claims Process**—lawyers with expertise on the USDA Farm Loan Programs and this discrimination claims process will be available throughout the claims filing period to answer questions from lawyers that participated in training and are included on the referral network.

Background

Discrimination Lawsuits and Claims Processes—As part of USDA's efforts to make civil rights matters a top priority, USDA is committed to resolving past claims of discrimination in its farm loan programs. In recent years, USDA entered into settlement agreements in certified class action lawsuits filed on behalf of African American and Native American farmers. Class counsel assisted thousands of farmers to file their individual claims under those settlement agreements.

Lawsuits alleging past discrimination in USDA Farm Loan Programs were also filed on behalf of Hispanic famers and women farmers. However, these cases were not certified as class actions. The United States government established a voluntary claims process to make available $1.33 billion or more to farmers who alleged discrimination by the USDA based on being female, or based on being Hispanic, in making or servicing farm loans during certain periods between 1981 and 2000. This non-adversarial, non-judicial claims process will be administered by the same neutrals that issued decisions in and managed the claims processes for African American and Native American farmers. Lawyers are needed to assist Hispanic and women farmers prepare and file their claims.

Relief: Hispanic and Women Farmers' Claims — The United States government is making available $1.33 billion or more from the Judgment Fund for monetary awards, up to $160 million in debt relief, and, in some instances, tax relief for this claims process.

There are three tiers for payments. Each tier provides for a different payment amount and requires a different amount or type of evidence to prove the claim.

Payment Awards

TIER 1(a): If a claimant is successful under Tier 1(a), he or she will receive:

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- A cash award of up to $50,000, depending on the number of successful claims;
- • Debt forgiveness from USDA for some or all of the claimant's eligible USDA/FSA Farm Loan Program debt; and
- • A tax payment to the Internal Revenue Service (IRS) of 25 percent of the total of the cash award and debt relief.
- TIER 1(b): If a claimant is successful under Tier 1(b), he or she will receive:
- • A cash award for proven actual damages (that is, for the losses documented by a claimant) of up to $250,000; and
- • Debt forgiveness from USDA for some or all of the claimant's eligible USDA/FSA Farm Loan Program debt.
- • The USDA will not make any tax payment to the IRS on a claimant's behalf. Claimants will have to pay the IRS for any taxes due on the award.

TIER 2: If a claimant is successful under Tier 2, he or she will receive:

- A $50,000 cash award;
- Debt forgiveness from USDA for some or all of the claimant's eligible USDA/FSA Farm Loan Program debt; and
- A tax payment to the IRS of 25 percent of the total of the cash award and debt relief.

Additional information about the claims process is currently available at https://www.farmerclaims.gov/ or http://nationalaglawcenter.org/usda-claims/.

Fees for Representation of Claimants

Lawyers representing claimants in the claims process may either provide their services pro bono or negotiate fees with the individual claimant. Claimants will be responsible for paying their attorney fees. Attorney fees will not be paid out directly from the cash award. USDA's Framework for Hispanic and Female Farmers Claims Process provides notice to claimants that reasonable fees for Tier 1(a) or Tier 2 shall not exceed $1,500. For Tier 1(b), which requires a higher level of documentation, the Framework provides notice to claimants that a reasonable fee shall not exceed eight percent (8%) of the Tier 1(b) award.

USDA believes that the attorney fee guidelines in the Program are reasonable because this is a non-judicial, non-adversarial process. USDA and the U.S. Department of Justice endeavored to structure the program so that the bulk of the funds being awarded in the program will go to the farmers. The amounts of cash awards will not be increased for individuals represented by an attorney. Claimants are always free to negotiate fee arrangements that best serve their needs.

Article reprinted from http://nationalaglawcenter.org/assets/usda-claims/recruitmentnotice.pdf

Retiring baby boomers highlight need for legal document clinics

Participants and staff log many miles, despite state's vast distances

By John McCrea

In 2000, Montana ranked fourteenth in the nation in percentage of older residents compared to its total population. By 2025, Montana is projected to rank no less than fifth and could be as high as third in the nation for the residents 65 & older, with one in four people being over the age of 65.

The 2000 U.S. Census indicated that Montana had 162 people over the age of 100. This number is expected to grow over 3,000 by the year 2025.

AARP states in 2011, the first of the baby boom generation will reach what use to be known as the "retirement" age. As this unique cohort grows older, it will likely transform the institutions of aging. Will boomers redefine this life stage or will it redefine them?

PEW Research Center revealed, on January1, 2011 the oldest baby boomers will turn 65. Every day for the next nineteen years, about 10,000 more boomers will cross that threshold. By 2030, when all baby boomers will have turned 65, fully eighteen percent of the nation's population will be at least that age. Today, just 13% of Americans are ages 65 or older.

The Legal Service Developer, at DPHHS, understanding this urgency, has spent the past three years addressing this issue through the legal document clinics. The following is the data collected from our clinics.

SUMMARY OF FFY 2012 LEGAL CLINICS

The following two charts provide overall statistics for the eight legal clinics that the Legal Service Developer Program (Program) conducted during 2012. This is the second year that the Program has coordinated this highly successful and popular program. All 10 Area Agencies on Aging (AAA) have now had at least one legal clinic in their area. The goal of the clinics is to provide free, accessible legal assistance to low income seniors, so they can develop legal documents that provide effective health care and financial planning. Statistics for a legal internship that was conducted during the year are displayed separately.

OVERVIEW OF PEOPLE ATTENDING CLINICS AND NUMBER OF LEGAL DOCUMENTS COMPLETED

Date of clinic	Location of clinic	AAA	Total people	Total surveys	% surveyed	Forms Completed	Ave/ person
Glasgow	April 24	I	11	8	73%	30	2.7
Helena	May 15	IV	68	67	99%	275	4.0
Great Falls	June 21	VIII	85	58	68%	332	3.9
Conrad	July 19	III	19	16	84%	69	3.6
Missoula	August 23	XI	65	53	82%	262	4.0
Plains	September 25	VI	44	38	86%	147	3.3
Miles City	October 15	I	4	4	100%	12	3
Glendive	October 16	I	8	8	100%	35	4.4
Total for FFY 2012 clinics			**304**	**252**	**83%**	**1162**	**3.8**

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OVERVIEW OF TYPES OF LEGAL DOCUMENTS COMPLETED				
Type of legal documents completed	# legal docs completed at clinics	# legal docs completed by internship	Total legal documents completed	Overall % of people completing legal document type
Affidavit of Death	31	5	36	11%
Beneficiary Deed	160	17	177	About 50% [1]
Declaration of Homestead	131	22	153	45%
Declaration of Living Will	223	32	255	75%
Declaration of Living Will Appointment	105	13	118	35%
Durable POA	239	34	273/511 [2]	81% [3]
Revocation of Beneficiary Deed	12	3	15	4%
Revocation of Declaration of Living Will	7	4	11	3%
Simple Will	254	31	285	84%
FFY 2012 CLINIC TOTALS	**1162**	**161**	**1323/1561** [4]	

GEOGRAPHICAL DATA

The data is given to provide information on how far some people traveled to attend a clinic.

GLASGOW: The Glasgow clinic provided services to people in Glasgow, Fort Peck (approximately 24 miles to the southeast), Nashua (approximately 12 miles to the east) and Hinsdale (approximately 30 miles to the northwest).

HELENA: While 47 clients (62%) were from Helena, there were also clients who came from Basin, Belgrade, Boulder, Bozeman, Butte, Clancy, East Helena, Elliston, Montana City, Three Forks, Townsend, and Whitehall. Many of the out of area attendees were from the Foster Grandparent Program. The Whitehall community actually sent a small bus of attendees to the clinic.

GREAT FALLS: Of the 85 people in attendance, 82 people (96.5%) were from Great Falls. This left one attendee from Belt, one from Cascade and one from Helena. While this was a large clinic, it would seem that it did not draw people from nearby towns. Of the three people who were out of town attendees, the person from Helena was referred by the State Office on Aging. The person from Havre was also referred by the State Office and Area X Agency on Aging.

CONRAD: There were 19 attendees at the Conrad Clinic, reaching people from a large geographical area. There were 7 people from Conrad (37%). The other 63% of the attendees were from out of town. The following are the distances that people traveled to attend the clinic: two traveled 7 miles from Brady, one traveled 66 miles from Browning, one traveled 63 miles from Great Falls, one traveled 12 miles from Ledger, one traveled 24 miles from Valier, five people traveled 52 miles from Vaughn and one traveled 250 miles from Malta to attend.

MISSOULA: There were 65 people who attended the Missoula Clinic. There were 10 couples whom attended, so perhaps some of them only completed one survey to cover both of the couple's opinion of the clinic. The majority of the attendees (54 or 85.7 %), were from Missoula. The other 14.5 % were from the surrounding area - Clinton, Florence, Frenchtown, Hamilton, Lolo and Superior. There was one person who traveled 122 miles from East Helena to attend the conference.

PLAINS: Clients attending the Plains Clinic came in significant numbers from surrounding towns. Of the 44 people attending the clinic, 12 (27%) were from the Plains area. The other 73% of the attendees traveled anywhere from 7 miles to 64 miles one way to get to the clinic. There were 9 attendees from Hot Spring who traveled 26 miles; 8 attendees from Trout Creek who traveled 46 miles; one person who traveled 55 miles from Noxon; 6 people who traveled 64 miles from Heron; and 5 people who traveled 26 miles from Thompson Falls.

MILES CITY: Of the four people who attended the Miles City Clinic, two were from the Miles City area, and two of them traveled 47 miles from Forsyth.

GLENDIVE: There were 8 people who attended the Glendive Clinic. Six were from Glendive, one traveled 44 miles one way from Circle to participate and another traveled over 260 miles one way from Harlem.

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CLINICS, from previous page

OVERALL SUCCESS OF 2012 LEGAL CLINICS

The success of the clinics is a result of the joint efforts of Area Agencies on Aging Directors and their personnel and the Program staff who helped to coordinated the clinics; attorneys and paralegals who donated their time and travel to help develop the participants legal documents; and the many volunteers that helped with logistics at each clinic.

STAFFING OF CLINICS

The legal clinics could not be possible without the hard work on the part of the Program staff (including Tammie Lund Fagan, paralegal, and Lou Villemez, attorney); the time and efforts of the Area Agency Directors, their staff and the volunteers they recruited to staff the Clinics; and generous time and travel contributions of attorneys and paralegals who staffed the Clinics.

A total of 41 attorneys and 19 paralegals participated in the Clinics. Many demonstrated their commitment to the philosophy of the Clinics by traveling great distances to participate in multiple clinics. The following provides statistics on participation at individual clinics.

Clinic location	Attorneys	Paralegals	Total
Glasgow	1	1	2
Helena	14	5	19
Great Falls	9	7	16
Conrad	5	5	10
Missoula	14	6	20
Plains	6	7	13
Glendive	1	2	3
Miles City	1	2	3
TOTALS	**51**	**35**	**86**

TWO YEAR TOTALS FOR CLINICS

In 2011, 231 people attended the 5 legal document clinics conducted. With the 339 who attended in 2012, the 2 year total of people served through the 13 clinics is 570. Area I had 3 clinics, Area VI had 2 clinics, while the other 8 AAAs had one each.

THANK YOU TO VOLUNTEERS

The Legal Service Developer Program would like to recognize the following legal volunteers for their participation in the 2012 Legal Document Clinics:

Attorneys: Sharon Anderson , Ellen Bush , Rick Bartos, Russ Cater , Tyra Cicholl , R. Jack Clapp , Kayla Clark , Jack Connors (law student) Terry Cosgrove, Michael Doggett, Nick Domitrovich, Erin Farris, Jeffrey Glovan , Greg Gould, Gale Gustafson , Janet Harrison, Karen Kane, Dale Keil, Thomas Kragh, Hollie Lund, Genet McCann, JoAnne McCormack, Heather McDougall, Ron Nelson, Stephanie Oblander, Rob Olsen, Lonnie Olson, Ann Ostby, Karla Painter, Analicia Pianca, Patrick Quinn, Katie Ranta, Al Smith, Gregg Smith, Michele Snowberger, Scott Swanson, Brian Taylor, Hanna Warhank, Tim Wylder, Alexis Volkerts, Lou Villemez

Paralegals: Stacie Beyrodt, Annabelle Blade, Carol Bronson, Jen Crane, Suzanne Habbe, Tammie Lund Fagan
Sharon Frye, Misty Gaubatz, Leah Noel, Tiffany Nunnally, Kate Palmer , June Rovero, Nancy Silver, Sheri Taylor, Kara Thompson, Suzanne Voss, Lisa Radcliffe Wallace, Janice Warhank, Jamie Widhalm

Technician: Duane Smith

Notaries: Doug Blakley, Shauna Donaldson, Janet Myren, Jerry Sorensen

John McCrea *is the Legal Developer for the Aging Services Bureau at the Montana Department of Public Health and Human Services*

Footnotes

[1] A few people completed more than one beneficiary deed, so this is an estimate of the number of total people that completed a beneficiary deed.

[2] Two separate types of durable powers of attorney (DPOAs) were developed as part of the clinics: a durable power of attorney for health care and one for finances. The 273 number for DPOAs represents the number of people that had at least one type of a DPOA developed. A review of one notary's log of 54 people completing DPOAs shows that 87% of these people completed both documents, 5 completed just a health care DPOA and 2 completed just a financial DPOA. Based on this analysis, about 238 additional DPOAs were completed, for an estimated total of 511 DPOAs. Next year, separate statistics will be collected for both types of DPOAs.

[3] 81% of the participants had at least one DPOA developed.

[4] Using the additional figure of 238 DPOAs developed as noted above, the total legal documents developed for 2012 would be 1561.

Montana Justice Foundation Issues Call for Grant Proposals

The Montana Justice Foundation (MJF) announces its call for grant proposals. The MJF works to achieve equal access to justice for all Montanans through effective funding and leadership. One way in which the MJF strives to fulfill its mission is through its Legal Aid Grants Program. The MJF awards grants to non-profit organizations qualified to carry out the following charitable objectives of the MJF:

Support and encourage the availability of legal services to vulnerable and underserved populations;

Increase public understanding of the law and the legal system through education;

Promote the effective administration of justice; &

Raise public awareness of and access to alternative dispute resolution.

The deadline for submission of grant proposals is Friday, April 5, 2013.

The MJF recently moved to an electronic, paperless grants process. **Organizations interested in applying for a grant will need to contact the MJF by Friday, March 15, 2013 to register for an online account.** For further information on the application process, please contact the MJF at: 406.523.3920.

MONTANA
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Making Justice Accessible to All Montanans

IOLTA on the Brain

Important issues regarding interest on lawyers trust accounts in 2013

By Amy Sings In The Timber
Executive Director, Montana Justice Foundation

If you are like most lawyers in the country you spend relatively little time thinking about your/your firm's Interest on Lawyers Trust Account (IOLTA), and understandably so. However, there is at least one time each year when your IOLTA likely comes to the forefront, or should anyway – reporting time.

In Montana, reporting takes place in the month of November. On or around November 1st the State Bar of Montana mails out a postcard reminder notifying all Montana licensed attorneys about the mandatory reporting process including the deadline, (generally the first week in December), and information about how to certify your trust account status with the State Bar.

For solos and small firms, each attorney likely certifies on their own behalf. In which case, the final step of the online process sends you to the IOLTA page of Montana Justice Foundation's website where you will find information regarding our Leadership Bank Program, how to set-up an IOLTA, and the latest national and local news affecting the IOLTA Program.

But for some, even reporting time can go by unnoticed. Your firm's administrator may be designated to handle the details of certification on behalf of the firm's attorneys. If this is true for you, it is of heightened importance that you read on.

As of the first of the New Year, two federal changes went into effect that have the potential to significantly impact IOLTAs and your client's money.

For the past two years, the Federal Deposit Insurance Corporation (FDIC) has insured an unlimited amount of funds held in IOLTA accounts, but starting January 1, 2013, the FDIC will only insure funds up to $250,000 per client per bank.

Previously, the Dodd-Frank Consumer Protection Act included a provision that allowed for unlimited FDIC coverage for IOLTAs. With the expiration of the provision, IOLTAs are now subject to the same $250,000 cap that other types of bank accounts are.

This means that lawyers need to take extra steps to protect client's money held in trust accounts. Lawyers holding more than $250,000 for a client in an IOLTA need to research the bank to ensure it won't fail or consider depositing the funds in multiple IOLTA accounts held at separate financial institutions.

Lawyers holding more than $250,000 for a client in an IOLTA need to research the bank to ensure it won't fail or consider depositing the funds in multiple IOLTA accounts held at separate financial institutions.

Before passage of the Dodd-Frank Act, the FDIC only

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insured up to $100,000, but the Act increased the cap to $250,000. While more money is still protected, the American Bar Association and the National Association of IOLTA Program's efforts to lobby for a bill that would have kept unlimited coverage were unsuccessful. Our focus now is to educate lawyers about the change and how they can best protect their client's funds.

On a related front, lawyers who accept credit card payments will need to pay special attention to recent changes in the law regarding the reporting of credit card transactions.

Pursuant to the Housing Assistance Tax Act of 2008, credit card processing companies are required to verify and match each merchant's federal tax identification number and their legal name with those found on file with the IRS. An EXACT match is required.

If there is NOT an exact match between the information provided to the credit card processing company and the information on file with the IRS, there are serious consequences. Beginning January 2013, the IRS will impose a 28% withholding penalty on all credit card transactions, including those that lawyers direct to their IOLTA accounts. If client funds that should be in the IOLTA account are withheld due to the lawyer's failure to act and thus are not available to the client on demand, ethical issues are raised.

Credit card processing companies should have received information from the IRS if a mismatch occurred and already notified lawyers of the problem. However, it is not known if all processing companies have provided such notice.

The following are steps lawyers can take now to avoid an ethical violation in 2013:

- Contact your credit card processor to determine that a match occurred; and
- Correct mismatches if informed of one

I hope this information has been helpful and that once you've taken the measures suggested above to best protect your client's funds and avoid potential ethical violations you can go back to thinking about your IOLTAs in the positive way in which those of us who perpetually have IOLTA on the brain do – as a creative way to help fund critical legal services for working-class families who could not otherwise afford them.

As always, if you have any questions regarding your IOLTA, please contact the Montana Justice Foundation at: 406.523.3920. I also want to encourage you to periodically visit the IOLTA page of our website for current information: www.mtjustice.org/IOLTA/

Many thanks for reading and best wishes for the New Year!

Court cases from Nov. 1, 2012 – Dec. 17, 2012

By Beth Brennan

Editor's Note: *Because of space considerations, the case briefs in print for February run through Dec. 17. You can find the briefs in full online at www.montanabar.org in the Montana Lawyer section.*

Case breakdown

The Court issued 45 published decisions between Nov. 1 and Dec. 31, 2012: 15 decisions in November, and 30 in December.

- 29 decisions were 5-0
- 6 were 7-0 (or 6-0)
- 10 were split

The Court decided 31 of the 45 cases as a five-judge panel; all but two of those panels issued unanimous decisions.

- Of the 14 cases decided by the full court (or the full court minus one), six were unanimous and eight were split.
- Of the eight split-panel decisions,
  - one was 6-1 (*Western Tradition Partnership)*,
  - three were 5-2 (*State v. Bishop; Mattson v. MPC; Kluver v. PPL Montana)*,
  - one was 4-2 (*Helena Sand & Gravel, Inc. v. Lewis & Clark County*), and
  - three were 4-3 (*Missoula v. Paffhausen; Donaldson v. State; Big Sky Colony*)
- The difficult issues for the Court (5-2 or 4-3 decisions) were:
  - the extent to which the rape shield statute excludes sexually intimate conversations and nude photos sent via text between the defendant and the victim (*Bishop*);
  - commonality, predominance, and superiority in class certification (*Mattson*);
  - the effect of improperly admitting testimony from a mediation to determine the enforceability of a settlement agreement (*Kluver*);
  - spot zoning and takings (*Helena Sand & Gravel*);
  - the automatism defense to DUI (*Paffhausen*);
  - the justiciability of a challenge to Montana's statutory scheme from same-sex partners claiming constitutional violations (*Donaldson*); and
  - the constitutionality of a statute extending work comp requirements to the Hutterites. (*Big Sky Colony*).

Neither Chief Justice McGrath nor Justice Morris dissented to any cases during this period. Justice Nelson dissented seven times, including his 110-page dissent in *Donaldson*; Justice Cotter dissented five times; Justice Rice dissented four times, Justice Baker dissented three times (twice to the judgment, and once to part of the reasoning); and Justice Wheat dissented twice.

Case briefs ordered chronologically:

***Martin v. Artis*, 2012 MT 249 (Nov. 7, 2012) (5-0) (Rice. J.)**

Issue: (1) Whether a naturally growing tree that blocks a neighbor's views can be a nuisance, and (2) whether the tree's roots can be a trespass.
Short Answer: (1) No, and (2) yes.

Facts: Martin and Artises are neighbors. Artises' property lies immediately below Martin's property, and a fence separates them.
Procedural Posture & Holding: Martin filed a complaint alleging that a tree on Artises' property blocks his views of the valley, city, and mountains, and is a nuisance; that roots from the tree are encroaching onto his property, and constitute trespass; and that Artises acted with actual malice and he is entitled to punitive damages. Artises moved to dismiss, and the district court granted the motion. Martin appeals, and the Supreme Court affirms dismissal of the nuisance claim, but reverses and remands on the trespass claim.
Reasoning: Distinguishing *Tarlton v. Kaufman*, 2008 MT 462, where the Court reversed for improper instructions on whether a 270-foot by 20-foot manmade chain link fence covered in dark material and placed on a newly constructed 6-foot high berm adjacent to the neighbors' property could be a nuisance, the Court holds that a complaint about a naturally growing tree does not state a claim for nuisance under Montana law. However, a complaint that the roots of Artises' tree have entered, remained on, and are damaging Martin's property does state a claim for trespass.

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***State v. Chavez-Villa*, 2012 MT 250 (Nov. 7, 2012) (4-1) (Morris, J., for the majority; Nelson, J. dissents)**

Facts: Responding to a call about a possible drunk driver, MHP Trooper Munson smelled alcohol on Chavez-Villa's breath, noticed his eyes were glassy and watery, and observed that he seemed unstable on his feet. Munson conducted a field sobriety test, the horizontal gaze nystagmus (HGN), and had Chavez-Villa take a preliminary breath test (PBT). Munson's onboard camera recorded the dialogue between the men during the tests, although neither Munson nor Chavez-Villa was visible on the video. Trooper Munson later administered the Intoxilyzer 8000, which registered a BAC of 0.167.

Issue: Whether the results of the horizontal gaze nystagmus and preliminary breath tests could be admitted at trial without expert testimony to establish the tests' reliability.
Short Answer: No, but the error was harmless because there was ample evidence of Chavez-Villa's intoxication.

At trial, the jury watched the video taken in Trooper Munson's car. They heard Munson tell Chavez-Villa that he would be released if he were not over the legal limit, heard Munson conduct the HGN and PBT, then heard him arrest Chavez-Villa for DUI.

Procedural Posture & Holding: Chavez-Villa was convicted of DUI and appeals. The Court affirms.

Reasoning: HGN and PBT test results may be admitted only with the proper foundation, and with expert testimony to explain the results and reliability of the tests. The dialogue in the video was circumstantial evidence of the test results, admitted without expert testimony. However, the cumulative evidence of Chavez-Villa's intoxication makes the error harmless.

Justice Nelson's Dissent: Justice Nelson agrees that the error was harmless. However, the state must prove harmless error, and did not do so.

***State v. Young*, 2012 MT 251 (Nov. 7, 2012) (5-0) (Nelson, J.)**

Facts: Young was charged with DUI, and possession of drugs and paraphernalia. The DUI was charged as a felony because Young was convicted of DUI in Idaho in 1991 and 1997, and in Montana in 2000.

Issue: Whether Idaho's DUI statute is similar enough to Montana's DUI statute to enhance a Montana DUI to a felony.
Short Answer: Yes.

Procedural Posture & Holding: Young moved to dismiss the felony charge, arguing his Idaho convictions should not count because the Idaho DUI statute is not similar to Montana's DUI statute. The District Court disagreed and denied the motion. Young appeals, and the Supreme Court affirms.

Reasoning: MCA § 61-8-734 provides that DUI convictions from other states count for purposes of felony enhancement if they involved "violation of a similar statute or regulation." ¶ 10. Young argues that Montana requires a higher standard of culpability than Idaho, making them dissimilar. The state argues they are similar because they both prohibit driving while under the influence, which means alcohol or drugs that affect a person's ability to drive. The Court determines that the statutes are "nearly identical." ¶ 13.

***State v. Myran*, 2012 MT 252 (Nov. 8, 2012) (5-0) (Wheat. J.; Cotter, J. concurs)**

Facts: After a day of drinking and arguing, Myran shot his roommate in front of his son, rolled her body up in a rug, and moved it onto the porch. The next morning, Myran woke his son and told him to help him put the body into a barrel, where he set it on fire.

Issue: Whether MCA § 45-2-203, which provides that intoxication is not a defense to a criminal offense and may not be taken into consideration in determining mental state, violates a criminal defendant's due process right to present a defense.
Short Answer: No.

Procedural Posture & Holding: Myran was charged with deliberate homicide and tampering with physical evidence. At trial, he asserted he was guilty of negligent homicide because he was intoxicated and acted recklessly with the shotgun. The court instructed the jury in accordance with § 45-2-203, MCA, over Myran's objection that it impermissibly shifted the burden of proof and violated his right to due process. The jury convicted Myran, and the Supreme Court affirms.

Reasoning: The U.S. Supreme Court has held that § 45-2-203 does not violate the federal due process clause of the U.S. Constitution. *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996). The Montana Supreme Court also considered and rejected a similar challenge in *State v. McCaslin*, 2004 MT 212, *rev'd in part on other grounds, State v. Herman,* 2008 MT 187. Myran argues that the "penumbra" of the Montana Constitution offers "enhanced" due process protection other than that found in Art. II, sec. 17, but the Court does not agree. Moreover, Myran was allowed to present evidence of his intoxication and his argument that he was guilty of negligent homicide only. The instruction did not mandate that the jury must find Myran guilty if it found he was intoxicated, and did not relieve the state of its burden of proof.

Justice Cotter's concurrence: Justice Cotter agrees with Justice Nelson's special concurrence in *Egelhoff* that § 45-2-203 relieves or lessens the state's burden to prove each element beyond a reasonable doubt. She does not believe that the statute violates the defendant's right to present a complete defense, which is what he argued on appeal. She therefore concurs.

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***Beehler v. Eastern Radiological Assoc.*, 2012 MT 260 (Nov. 13, 2012) (7-0) (Wheat, J.)**

Facts: In preparation for back surgery, Katherine Beehler-Goodson had a myelogram, a radiological procedure. Dr. Guiliano, the radiologist, performed the procedure without wearing a mask. Katherine developed spinal meningitis within 12 hours and died two days later. The infection was caused by Group B streptococci, and the parties agree the bacteria entered Katherine's cerebrospinal fluid when the myelogram needle was inserted into her spinal column.

Issue: (1) Whether Plaintiffs' expert witness was qualified under § 26-2-601 MCA to testify about the doctor's and hospital's standard of care when he was an infectious disease and quality assurance expert and the doctor was a radiologist. (2) Whether the expert witness was admissible on causation.
Short Answer: (1) Yes. The injury was caused by an infection, and the expert was qualified. (2) Yes. Although the doctor may not have used precise legal terms, his opinion meets the more likely than not standard.

Procedural Posture & Holding: Katherine's family sued Dr. Guiliano, alleging the doctor committed malpractice by failing to wear a mask, and the hospital, alleging it was negligent for failing to require masks to be worn during myelograms. Defendants moved for summary judgment, arguing Plaintiffs' expert witness was not qualified under § 26-2-201, MCA, because he is an infectious disease specialist, not a radiologist. The district court agreed that the expert was not qualified to opine about a radiologist's duty of care or a hospital's standard of care, and granted summary judgment to the Defendants. After oral argument, the Supreme Court reverses and remands for trial.

Reasoning: (1) Section 26-2-601, MCA, enacted in 2005, adds to Rule 702 by creating specific requirements for medical experts. The Court finds the statute is met because Plaintiffs' claim alleges violation of an infection control procedure, not a radiological procedure. Plaintiffs' expert is a physician, and is qualified to offer an opinion about the standards of care for both Defendants. (2) Plaintiffs' expert opined that Dr. Guiliano's failure to wear a mask was the most likely cause of Katherine's meningitis, and also stated that science can only speculate as to how bacteria travels from the oral pharynx into the cerebrospinal fluid. The district court found that this testimony failed to meet Rule 702's requirement for reasonable medical certainty. But the probative force of the opinion should not be defeated by semantics. It was an abuse of discretion for the lower court to find the expert's opinion inadmissible. "Plaintiffs are not required to trace the precise path of the infecting GBS bacterium" to satisfy Rule 702. ¶ 39.

***In the Matter of C.R.*, 2012 MT 258 (Nov. 13, 2012) (5-0) (Baker, J.)**

Facts: CR lived with his brother LR, at LR's home. One day, CR began yelling uncontrollably, and exhibiting bizarre and erratic behavior. LR called the Billings Psychiatric Center, and police took CR to the emergency room. CR became acutely aggressive during his evaluation, leading the psychiatric hospitalist, Dr. Masood, to petition for involuntary commitment. The district court found probable cause of a possible mental disorder, appointed counsel, and ordered CR detained at the Psychiatric Center. The court ordered Dr. Masood to evaluate CR. At the evidentiary hearing, Masood reported that CR was aggressive, hostile, suffered from severe psychosis and schizophrenia, and was an imminent threat to himself. He stated CR should be placed at Warm Springs for 90 days. LR also testified that his brother was not mentally well, appeared to be a risk to himself or others, and was unable to care for himself.

Issue: (1) Whether the district court's involuntary commitment order was supported by the evidence, and (2) whether CR's counsel advocated adequately for CR.
Short Answer: (1) Yes, and (2) yes.

Procedural Posture & Holding: The lower court found that CR suffers from psychosis and schizophrenia, and required commitment. It ordered involuntary commitment up to three months and the administration of involuntary medication if necessary. CR was hospitalized and released eight days alter. He appeals the order, and the Supreme Court affirms.

Reasoning: Involuntary commitment is governed by § 53-21-126, MCA. The Court requires strict adherence to the statute, which requires proof beyond a reasonable doubt for physical facts or evidence and clear and convincing evidence for everything else. CR argues that his lucid testimony during the hearing created a reasonable doubt. The Court finds substantial evidence supports the lower court's findings. CR also argues the court should have appointed a statutory friend, as required by the statute prior to 2009. The statute now mandates such appointment only when the court determines an appropriate person is willing to perform that function. Here, none were presented. A petition for commitment must include the name and address of anyone the county attorney believes may be willing to be a court-appointed friend, but here the petition stated "unknown." CR does not challenge the constitutionality of the amended statute. Finally, CR argues his counsel was ineffective because he did not arrange an independent medical evaluation. The Court concludes counsel was a vigorous advocate based on the record as a whole.

***State v. Bishop*, 2012 MT 259 (Nov. 13, 2012) (5-2) (Morris, J., for the majority; Wheat, J. and Nelson, J., dissenting)**

Facts: Bishop, a 37-year-old man, and TB, a 16-year-old girl, worked together at a music club in Billings. In July 2010, they went to Roberts with their boss to operate a concessions trailer. TB fell asleep one night and woke to find her pants down, her shirt up, and Bishop kissing her stomach. She pushed him away and asked what he was doing. He apologized and left. TB cried,

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felt "sore down there," and called her sister's boyfriend, Raleith, and told him she'd been attacked by a stranger. Raleith immediately drove to Roberts, called TB's sister, Crystal, and notified TB's family and the police. Eventually, TB said Bishop had attacked her in the concessions trailer. The Sexual Abuse Nurse Examiner exam found a hickey on her neck and a small tear inside her vagina. Bishop admitted to kissing her body and pulling down her shorts, but said she had been flirting suggestively.

Issue: Whether conversations, cell phone messages and photos in the days leading up to the sexual assault were properly excluded under the rape shield law and the Rules of Evidence.
Short Answer: Yes.

Procedural Posture & Holding: The state charged Bishop with felony sexual intercourse without consent and alternatively, felony attempted sexual intercourse without consent. Bishop's defense was that TB had consented. He sought to testify about conversations he said he and TB had that were sexual, and to introduce photos of semi-clothed women that TB had captioned and sent him on her cell phone. Arguing irrelevance, the state moved to exclude conversations of a sexual nature, Bishops' impressions of TB's sexual preferences, and similar evidence at trial, arguing the rape shield law supported their exclusion. The court excluded certain conversations between Bishop and TB, but allowed testimony of some conduct between them, and allowed statements made by TB if they fit within a hearsay exception. Both parties testified.

Bishop was convicted of attempted sexual intercourse without consent. He appeals from the judgment, including the court's order granting the state's motion in limine. The Supreme Court affirms.

Reasoning: The rape shield law, § 45-5-511, MCA, generally precludes evidence of the victim's sexual conduct unless it was with the offender, or is used to prove semen, pregnancy, or disease at issue in the prosecution. Bishop testified about the night of the incident, including descriptions of TB's conduct toward him. Bishop argues he should also have been allowed to testify about conversations in the days leading up to the incident; however, the Court holds the conversations are irrelevant to his claim that TB consented to intercourse on the night in question. The district court's exclusion of certain conversations and photos did not violate Bishops' right to due process.

Justice Wheat's Dissent: The rape shield law exception of "the victim's past sexual conduct with the offender" should include sexual conversations and cell phone messages and photos in the days leading up to the incident. Although flirtatious behavior does not constitute "sexual conduct," *State v. Detonancour*, 2001 MT 213, talking about sexually intimate relations and sharing nude photos does. Otherwise, the statutory term "sexual conduct" means only actual physical sex, which is not the intent of the statute.

***Botz v. Bridger Canyon Planning & Zoning Comm'n*, 2012 MT 262 (Nov. 20, 2012) (5-0) (Cotter, J.)**

Facts: Plaintiffs Randy Theken and FPR Properties bought Tract E in the Brass Lantern PUD in Bridger Canyon from Plaintiff Kevin Botz, then hired Botz to build a barn. Botz did not obtain a required permit prior to starting construction. Neighbors complained. Gallatin County informed Plaintiffs that the barn did not comply with zoning regulations or covenants because it was constructed outside the building site designated on the COS, and ordered its removal. Plaintiffs applied to modify Brass Lantern's conditional use permit to bring the location of the barn into compliance. After holding public hearings, the zoning commission affirmed that the barn was in violation, and denied the request to modify the conditional use permit.

Issue: (1) Whether the district court properly affirmed the zoning commission's determination that Plaintiffs' partially constructed barn violated zoning regulations and must be removed; (2) whether the lower court properly affirmed the commission's denial of Plaintiffs' application to modify their conditional use permit.
Short Answer: (1) Yes, and (2) yes.

Procedural Posture & Holding: FPR appealed to the district court, which affirmed. FPR also argued that the rulings amounted to a constitutional taking. The district court dismissed that claim. FPR appeals, and the Supreme Court affirms.

Reasoning: (1) The Court declines to address this as a negative easement case, instead framing the issue as whether the express language of the COS, the covenants, and the warranty deed from Botz to FPR support the commission's ruling. It finds that the language supports the conclusion that the barn had to be built within a specified building site, and that FPR had notice of that. Moreover, FPR's failure to obtain a land use permit before building the barn violated zoning regulations, which authorized the commission to order removal of the noncompliant structure.

(2) The commission declined FPR's application to modify the conditional use permit after concluding it could not find that the proposed modification would not be detrimental to the health, safety, peace, morals, comfort and general welfare of the zoning district. The lower court found the commission did not abuse its discretion in denying FPR's request, as it had based its decision on applicable regulations, the terms and conditions of the PUD, staff reports, exhibits, and public testimony. The commission properly considered the PUD regulation and did not abuse its discretion in finding that the modification would circumvent the purposes of a PUD.

Because FPR did not develop any argument on its takings claim, at either the district court or before this Court, the Court declines to address it.

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***Brown & Brown of MT, Inc. v. Raty*, 2012 MT 264 (Nov. 20, 2012) (5-0) (Cotter, J.)**

Facts: Ratys own Upper Setty and Lower Setty Ranches. The ranches are connected by a primitive road that crosses Brown's land as well as Grabofskys' land and state land. The road existed prior to an initial survey done in 1896. Raty's grandfather bought the parcels from the Settys in 1948, and her father bought the parcels in 1963. She and her husband bought the Lower Ranch and part of the Upper Ranch in 1997, and the remainder of the Upper Ranch in 2004. The original homsetead owners reserved a life estate on one acre of the Upper Setty Ranch and lived there until 1980. The Ratys sometimes use a cabin there.

Issue: (1) Whether Ratys have a prescriptive easement across Brown's land, (2) whether the scope of the easement properly includes residential and recreational uses, and (3) whether the evidence supported limiting the width of the easement to 20 feet.
Short Answer: (1) Yes, (2) yes, and (3) no.

The road was used historically to trail cattle between the ranches. It has also been used for many other purposes. The parties' witnesses disagreed about whether Raty's father would simply notify the Browns when he would be moving cattle, or asked for permission. In 2003 or 2004, Brown installed a locked gate to control access by hunters; Raty asked for a key and was given it, always returning it after he used it.

In 2003, Grabofskys started locking a gate across the road. When Raty was moving cattle and encountered the lock, he cut it. The Ratys sued Grabofksys, alleging a prescriptive easement, and the parties settled in 2008. The settlement agreement specified the uses for the easement, and limited it to a 20-foot easement, while acknowledging cattle would not necessarily stay wihtin that width.

Ratys bought a right-of-way from the state in 2006 for a 20-foot-wide easement to access the residence and outbuildings, and conduct normal farming and ranching activities.

In 2004, Brown called Ratys and insisted they ask permission to use the road as it passes through Brown's land. Ratys said they would not ask for permission, but would notify Brown when they were using it. In 2008, Brown told Ratys they would begin locking gates, which they did. Ratys cut the locks and used the road.

Procedural Posture & Holding: Brown sought a preliminary injunction preventing Ratys from crossing Brown's land without permission, and a declaratory judgment that Ratys do not have a prescriptive easement. Ratys moved for summary judgment on the prescriptive easement. The district court granted judgment to Ratys, holding Ratys have a prescriptive 20-foot-wide easement for trailing cattle and maintaining them and the property, residential use of the Upper Setty cabin, and recreational uses associated with the Upper Setty cabin. Ratys appeal the limitation of the easement to 20 feet. Brown cross-appeals for reversal, arguing a genuine issue of material fact existed as to whether Ratys' use was permissive or a product of neighborly accommodation. Brown also challenges the easement for residential and recreational uses, and disputes the width. The Supreme Court affirms in part, reverses in part, and remands for modification of the final judgment.

Reasoning: (1) Prescriptive easements are based on adverse use, so evidence of permissive use defeats the easement. Implied acquiescence is not the same as permission. Notifying the servient owner of intent to use is not the same as seeking permission. Here, Ratys often notified Brown of when they intended to move cattle, but this was not a request for permission. Brown argues that gates are strong evidence of permissive use. Here, however, the gates are insufficient to create a genuine issue of material fact. Summary judgment on the existence of a prescriptive easement is affirmed.

(2) The undisputed evidence establishes that residential and recreational uses were within the scope of the prescriptive easement.

(3) The width of a prescriptive easement must be limited to the width actually used during the prescriptive period. A court must consider what is reasonably necessary and convenient for the easement's purpose. The evidence showed that Ratys' cattle do not remain within a strict distance from the center of the road. The district court erred in limiting the easement to twenty feet for trailing cattle, and the Court reverses and remands for modification of the judgment.

***Elk Mountain Sports, Inc. v. Montana Dept. of Labor & Indus.*, 2012 MT 261 (Nov. 20, 2012) (5-0) (Morris, J.)**

Facts: Elk Mountain (EM) operates an auto and motor sports business. Timothy Wilson was injured at work in January 2004. EM did not have work comp insurance. Wilson filed a claim with the State Fund, which accepted the claim. The Fund sought indemnity, but struggled to obtain payment. The Fund issued liens on EM's bank account and eventually assigned its claims to collection. In 2009, the parties agreed to an interim payment plan, and the Fund pulled EM's account from collection. The parties abided by this agreement until May 2010, when the Fund sent a letter proposing a new payment agreement, which EM rejected. The Fund sent EM's account back to collection, claiming it could do so because four of EM's payments had been late and EM had made no effort to pursue settlement.

Issue: (1) Whether the State Fund materially breached an interim agreement reached with Elk Mountain, and (2) whether the district court properly determined damages.
Short Answer: (1) Yes, and (2) yes.

Procedural Posture & Holding: EM sued the Fund for breach of contract, and the parties filed cross-motions for summary judgment. The district court granted judgment to EM, and held a bench trial to determine damages. The court awarded $198,749 in consequential damages. The court declined to award EM 10 years of lost profits. The Fund appeals, and the

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Supreme Court affirms.

Reasoning: (1) Who materially breached first? The Fund argues EM did because it failed to turn over financial information; however, no language in the contract required such disclosure. Alternatively, the Fund argues EM's late payments allowed it to terminate the agreement. However, the Fund's acceptance of those payments waives the default. Thus, the district court properly granted summary judgment to EM.

(2) The Fund argues the district court erred in awarding consequential damages. The Court finds the evidence supports a causal connection between the Fund's breach and EM"s damages. It further finds that the Fund should have foreseen that referring a business to collection could create difficulties for the business in obtaining financing. Additionally, EM warned the Fund that doing so would "devastate" EM's business. Damages are affirmed.

(3) The Fund argues that EM did not plead consequential damages, and that the Fund had no notice. However, the Fund failed to object to EM's evidence in support of consequential damages, and therefore waived its right to object on appeal. Additionally, the Fund argues the judgment should be set aside due to a mistake of fact, i.e., that EM was going to lose its Arctic Cat dealership. Mistake generally means a mistake that existed at the time of trial, not a fact that changes due to future events. Arctic Cat had advised EM to wind down its dealership by June 2011. The lower court did not award damages for lost profits from losing the dealership. This is not a mistake that warrants a new trial.

***City of Missoula v. Paffhausen*, 2012 MT 265 (Nov. 20, 2012) (4-3) (Nelson, J., for the majority, joined by McGrath, C.J., Wheat, J., and Morris, J.; Rice, J., dissenting, joined by Cotter, J., and Baker, J.)**

Facts: Paffhausen was stopped for first running a stop sign, then prematurely slamming on the brakes at another. The officer noticed Paffhausen's speech was slow and slurred, and she smelled of alcohol. Paffhausen would not take a field sobriety test, and would not provide a breath sample. The officer arrested her for DUI and other charges. Shortly after she was charged, Paffhausen told police she believed she'd been given a date rape drug that caused her impairment. The city attorney directed the police to investigate and report to the defense.

Issue: Whether involuntary intoxication can be an affirmative defense to DUI.
Short Answer: Yes.

Paffhausen filed notice that she intended to assert involuntary intoxication and necessity as affirmative defenses, and named the Missoula police chief, the officer investigating her allegation of date rape drug, a pharmacist, and a physician's assistant as witnesses. The city moved to prevent her from using involuntary intoxication as a defense, and moved to exclude testimony from the police regarding her defense, arguing DUI is an absolute liability offense, and the defendant's involuntary intoxication is irrelevant. Paffhausen responded that she was asserting involuntary intoxication to show she did not drive voluntarily, as someone drugged her without her knowledge, and she should not be responsible for anything she did as the result (known as the automatism defense).

Procedural Posture & Holding: The Municipal Court granted the city's motion to prevent Paffhausen from claiming involuntary intoxication as a defense, and from calling witnesses about the use of date rape drugs in Missoula. The district court affirmed. Paffhausen appeals, and the Supreme Court reverses and remands.

Reasoning: Paffhausen argues that her physical movements were the nonvolitional result of someone else's act, not her own, set in motion by some independent non-human force. If the defense is not allowed, she argues, the statute is unconstitutional. The state argues that an automatism defense is not available to challenge absolute liability offenses, and that even if it were, Paffhausen did not act involuntarily as defined by statute.

The state must prove that a defendant was (1) driving (2) on the ways of the state open to the public (3) while under the influence of alcohol or drugs. No mental state must be proved. Paffhausen admits the second and third elements, but argues she was not voluntarily driving or in actual physical control of her vehicle. A voluntary act is any act that is not an involuntary act, defined by § 45-2-101(33). Montana already recognizes compulsion as an affirmative defense, and the Court has

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allowed it as a defense to a DUI charge. *State v. Leprowse*, 2009 MT 387.

Paffhausen will have to prove by admissible evidence that she did not act voluntarily when she drove. She may use expert medical or pharmacological evidence, non-expert evidence, or both. She bears the burden of proving her defense. The Court discusses the procedure to be used in asserting this defense.

(2) If Paffhausen is able to lay the proper foundation, she may elicit from the officer who investigated her allegation of date rape drug the results of his investigation. She can also elicit testimony form him about the use of date rape drugs in Missoula if she is able to lay a proper foundation for him as an expert witness.

Justice Rice's Dissent: Justice Rice disagrees that the voluntary act statute, § 45-2-202, MCA, is intended to apply to absolute liability crimes. The Court has never applied it to traffic offenses. The Commission Comments say in two places that a voluntary act is required except in statutes where absolute liability is imposed. ¶ 62. The DUI statute permits involuntary intoxication to be a defense only to the mental state element, not to the act element, which is what Paffhausen is attempting to do. This reading is reflected in *State v. Weller*, 2009 MT 168, ¶ 8. Illinois, the source of our criminal code, does not allow this defense. Even if Paffhausen were involuntarily drugged, "in an intoxicated condition, she climbed into her vehicle, started the engine, and commenced to drive in a dangerous manner." ¶ 70. The majority's comparison to the compulsion defense fails, as that defense excuses illegal behavior done to prevent a harm of greater magnitude rather than negate an element of a crime without regard to public safety.

***State v. Brooks*, 2012 MT 263 (Nov. 20, 2012) (5-0) (Wheat, J.)**

Facts: Brooks was charged with felony arson for setting fire to a car and two dumpsters in Billings.

Issue: Whether the defendant's privacy rights are violated by having to register as a violent offender pursuant to § 46-23-502.
Short Answer: No.

Procedural Posture & Holding: Brooks and the state entered into a plea agreement in which the state agreed to recommend a six-year sentence at the Department of Corrections plus restitution in exchange for Brooks' guilty plea. The district court accepted Brooks' plea and ordered a presentence investigation report, which detailed Brooks' criminal history and his battle with alcoholism. The report recommended several sentencing conditions, including that Brooks register as a violent offender. The court sentenced Brooks to a four-year suspended DOC commitment and ordered him to pay $1600 restitution. It also required Brooks to register as a violent offender. Brooks appeals that condition, arguing it violates his constitutional right to privacy. The Supreme Court affirms.

Reasoning: The Sexual or Violent Offender Registration Act (SVORA) defines an offender as "a person who has been convicted of . . . a sexual or violent offense"; arson is a violent offense under the statute. 46-23-502(10), (13). Brooks will be on probation for the first four years he is required to register, and has a diminished privacy interest during that time. "Even after he finishes serving his four-year probationary sentence, we cannot conclude that his privacy interests will be equal to those of a private citizen." ¶ 15. Because is a convicted felon and a violent offender, "he has a diminished privacy interest in the personal information required at his registration." *Id.* The state has a compelling interest in SVORA, and the registration requirements are closely tailored to disclose only the information necessary to further the statutory purpose. *State v. Mount*, 2003 MT 275. Although *Mount* involved a sexual offender, the analysis applies equally to violent offenders.

***Whitefish Credit Union v. Sherman*, 2012 MT 267 (Nov. 20, 2012) (5-0) (Nelson, J.)**

Facts: Russell Sherman, a sophisticated borrower and real estate developer, borrowed over $1.5 million from the Whitefish Credit Union between Jan. 2007-July 2010. He defaulted. After negotiations failed, WCU gave notice of default by a 10-day demand letter dated Feb. 18, 2011. It filed a complaint for foreclosure on July 1, 2011, and twice asked Shermans' counsel to accept service. Receiving no response, WCU waited 30 days, then asked the sheriff serve the Shermans. Russell was served on Sept. 8, 2011; Joan was not personally served. Russell did not appear, and WCU requested default, which was entered Oct. 7, 2011. Default judgment was entered Nov. 2, 2011.

Issue: (1) Whether failure to serve one party should void default judgment against properly served parties; (2) whether the default judgment should be set aside under Rule 60(b)(1) or (6).
Short Answer: (1) No; (2) no.

Procedural Posture & Holding: Shermans learned of the default judgment on Nov. 5, 2011, and filed a motion to vacate the judgment on Nov. 16, 2011. On Dec. 29, 2011, the district court denied the motion entered against Russell, but granted it as to Joan due to the lack of personal service on her. Russell appeals, and the Supreme Court affirms.

Reasoning: (1) Russell fails to provide any legal authority to support his contention that a judgment void against one party is void against all parties. Because he bears the burden of proof in proving the default judgment was void, the district court did not abuse its discretion. (2) Russell also did not meet the 4-part test for setting aside a default judgment under Rule 60(b)(1). It is not excusable neglect to ignore the command of a summons. The catch-all provision of (6) is not available to him.

***Western Tradition Partnership, Inc. v. Attorney General*, 2012 MT 271 (Nov. 27, 2012) (6-1) (Baker, J., for the majority; Nelson, J., dissenting)**

Facts: Plaintiffs sought a declaratory ruling that § 13-35-227(1), MCA, violated their First Amendment rights to free speech

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by prohibiting political expenditures by corporations in campaigns for public office. The district court granted Plaintiffs summary judgment, declared the statute unconstitutional, and denied Plaintiffs' request for attorneys' fees. This Court reversed the judgment and did not address Plaintiff's cross-appeal on fees. *Western Tradition Partnership, Inc. v. Atty. Gen.,* 2011 MT 328. The U.S. Supreme Court summarily reversed. *American Tradition Partnership v. Bullock*, 567 U.S. ___, 132 S. Ct. 2490 (2012).

Issue: Whether Plaintiffs should be awarded attorneys' fees under the UDC or the private attorney general doctrine.
Short Answer: No.

Procedural Posture & Reasoning: Plaintiffs move for consideration of their cross-appeal on the lower court's denial of their motion for attorneys' fees of $138,403. This Court affirms.
Reasoning: Plaintiffs moved for attorneys' fees under the Uniform Declaratory Judgments Act and the private attorney general doctrine. A prevailing party may recover fees against the state only if the court finds that the state's position was frivolous or pursued in bad faith. § 25-10-711(1)(b), MCA. This standard also serves as a guidepost in analyzing claims for fees under the private attorney general doctrine. The district court found the state's arguments were made in good faith, and that although the UDC provided authority for fees, they were not "necessary and proper." The Court agrees, and finds the predicate for an award of fees under the private AG doctrine has not been established either.
Justice Nelson's Dissent: Justice Nelson dissents from the denial of fees under the private AG doctrine. First, he criticizes the majority's analysis for merging the private AG doctrine with the UDC analysis rather than analyzing each separately. Second, he asserts that the majority should not have applied § 25-10-711, MCA, which provides an independent basis for attorneys' fees. Plaintiffs did not seek fees under this statute. It is not necessary under the private AG doctrine to show that the state acted frivolously or in bad faith; *Montrust* awarded attorneys' fees under the private AG doctrine in spite of the district court's finding hat the state did not defend frivolously or in bad faith. Justice Nelson applies each of the three *Montrust* factors and finds the Plaintiffs meet each one.

***Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n*, 2012 MT 272 (4-2) (Nov. 30, 2012) (Baker, J., for the majority (Cotter, J., Wheat, J. & Morris, J.); Nelson, J., concurring & dissenting; Rice, J. concurring & dissenting)**
Facts: Helena Sand & Gravel (HSG) owns 421 acres north of East Helena. In June 2008, it obtained a permit from Montana DEQ to mine gravel on 110 acres of its property. Before DEQ granted the permit, a group of citizens submitted a petition to the county seeking to create Special Zoning District Number 43, which encompasses land owned by HSG, to protect single-family dwellings and agricultural uses, preserve the rural character of the area, and enhance aesthetic values and property values. It proposed prohibiting industrial and mining uses, including sand and gravel operations on the remaining 311 acres of HSG's property. About 70% of property owners signed the petition.

Issue: (1) Whether the special zoning district complied with the growth policy; (2) whether it was illegal spot zoning; and (3) whether Helena Sand & Gravel had a constitutionally protected interest in being able to mine the remaining acres of its property.
Short Answer: (1) Yes; (2) no, and (3) no, but it had a protected interest in its real property.

The county commissioners voted to create District 43 in April 2008, and in May 2008 adopted a resolution creating the boundaries of the district. The county planning commission then held a hearing. HSG commented at each meeting, raising legal concerns, and proposed to the planning & zoning commission that sand and gravel mining be allowed under a conditional use permit. After hearings and a report from the county attorney, PZ adopted the regulations. The county commission held a public hearing, and approved the regulations.
Procedural Posture & Holding: Plaintiff HSG challenges Lewis & Clark County's decision to create a zoning district that favors residential use and prohibits mining, alleging the county improperly adopted the regulations, and the zoning constituted a taking of HSG's property. On cross-motions for summary judgment, the district court granted judgment to the county. HSG appeals, and the Supreme Court affirms all but one issue, which it remands.
Reasoning: (1) HSG argues the zoning does not comply with the Growth Policy because the board disregarded the actual use of the land, relying on *Ash Grove Cement v. Jefferson County*, 283 Mont. 486 (1997). The county classified the area as "rural residential" in spite of five gravel pits in and around District 43. The Court finds *Ash Grove* distinguishable, and concludes the county's approval was not clearly unreasonable.

(2) HSG argues District 43 is "reverse spot zoning." The Court applies the 3-part test from *Little v. Bd. Of County Comm'rs*, 193 Mont. 334 (1981), and finds HSG fails to satisfy the first factor.

(3) The district court decided the takings question on the threshold question of whether HSG has a constitutionally protected property interest in its opportunity to mine its remaining acreage. Relying on *Seven Up Pete v. State*, 2005 MT 146, the Court concludes that HSG's lost opportunity to apply for a mining permit is not a compensable property interest. However, HSG has a constitutionally protected interest in 421 acres of real property. The Court remands for application of the *Penn Central* factors to determine whether District 43 constituted a taking of HSG's real property.
Justice Nelson's Concurrence & Dissent: Justice Nelson agrees that HSG is entitled to seek relief for the taking of its property interest in its sand and gravel operations, but disagrees that the zoning was proper and did not constitute illegal spot zoning. He

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believes HSG would have obtained a mining permit, and would hold that HSG established a constitutionally protected property interest in pursuing a permit.

Justice Rice's Concurrence & Dissent: Justice Rice concurs with the judgment on Issue 1, and with Justice Nelson's dissent. He notes that this case differs from *Seven Up Pete Mining* in that HSG owns the gravel outright, has already obtained a permit, and is currently mining. He expresses concern over the Court's takings jurisprudence, noting that all claims made during his tenure have been denied. He reminds citizens that if they believe the government is overstepping its bounds, they can change the law.

***LeProwse v. Garrett*, 2012 MT 275 (Dec. 4, 2012) (5-0) (Cotter, J.)**

Issue: Whether an order granting, amending or dissolving a temporary order of protection is a final or interlocutory judgment.
Short Answer: If the TOP is issued in a stand-alone action, the order is a final judgment. But if it is part of another action, then it is not appealable until a final judgment is issued.

Facts: The parties are parents of TG, a 9-year-old girl. In Sept. 2011, the justice court issued a temporary order of protection against the father, Jason LeProwse. LeProwse moved the TOP to district court, where the parties have a pending parenting plan action.

Procedural Posture & Holding: The district court held a hearing on the TOP. It issued its FOF/COLs dissolving the TOP, and Garrett appeals. The Supreme Court dismisses the appeal without prejudice.

Reasoning: Because the TOP was consolidated with the parenting plan action, it is not appealable until the district court issues a final judgment. *Schiller v. Schiller,* 2002 MT 103, involved a stand-alone TOP; their dissolution was a separate action.

***Shephard v. Widhalm*, 2012 MT 276 (Dec. 4, 2012) (5-0) (Morris, J.)**

Issue: (1) Whether the PR was required to sign a lease of property devised to the surviving spouse, and (2) who breached first.
Short Answer: (1) No, and (2) the PR.

Facts: Paul and Evonne Widhalm owned a farm worth $1.6 million as tenants in common. They executed wills leaving the property first to each other and then to their eight children. They leased the farm to their oldest child, Robert, and his wife, Dianna, in 1998. The first lease ran from 1-1-1999 through 12-31-2003. It included an option to renew for five years, an option to buy for $400,000, and a prohibition against selling the farm without prior written permission from Paul and Evonne. Robert renewed in 2003. Paul died Sept. 19, 2008. Roslyn Shephard, Robert's sister, was appointed PR via the will.

Robert notified Evonne a month after Paul's death that he intended to renew the lease starting 1-1-2009. The parties did not execute the lease until 5-11-2009. It included the same terms. Evonne signed the lease as sole owner and lessor. Robert then attempted to reconstitute the farm to list their neighbor, Wheeler, as operator of the farm, entitling Wheeler to receive government subsidies for the property. It did not take effect because Shephard had not signed the documents as PR.

Evonne died June 10, 2009. Shephard was appointed PR. Shephard terminated Robert's lease on July 22, 2009, without notice, claiming he breached the lease by subletting the farm to Wheeler without permission. Shephard leased the farm to Wheeler a week later; the next day, Robert notified Shephard that he intended to exercise the option to buy for $400,000.

Procedural Posture & Holding: Shephard sued, seeking to invalidate the third lease because she had not signed it, or for an order declaring Robert had breached the lease. Robert counterclaimed for breach, seeking specific performance and money damages. After a four-day bench trial, the court upheld the third lease, determined Shephard breached, granted Robert specific performance and awarded damages for the cost of the 2009 crop inputs. It awarded attorney fees to Robert pursuant to the lease, but did not award damages for lost income or other expenses. Although Robert sought attorney fees of $585,966, the court awarded $98,431, calculated at an hourly rate of $200/hour. Shephard appeals, Robert cross-appeals, and the Supreme Court affirms.

Reasoning: (1) A PR has a qualified right to control property only when necessary to administer the estate. Real property in Montana devolves to a devisee at the moment of the testator's death. Evonne's title to Paul's half of the farm vested immediately upon his death. Nothing in the record suggests Shepard needed to take control of the property to administer the estate. As sole owner, Evonne executed a valid lease with Robert. (2) The district court heard conflicting evidence about whether Robert sublet the farm to Wheeler, and found he did not. Substantial evidence supports that finding. (3) Because Robert did not breach, Shephard's claims that she had no duty to provide notice before termination, nor opportunity to cure, are moot. (4) The lower court properly applied the factors from *Plath v. Schonrock*, 2003 MT 21, in determining the reasonableness of Robert's attorney fees. (5) The district court considered the evidence and determined Robert failed to prove additional damages by a preponderance. The Supreme Court will not second guess that conclusion.

***State v. Peart*, 2012 MT 274 (Dec. 4, 2012 (5-0) (Morris, J.)**

Facts: Peart's 10-year-old stepdaughter alleged sexual abuse. Peart admitted to inappropriate touching, and to having photographed abusive acts. After obtaining a search warrant, law enforcement recovered images from Peart's computer and camera, which revealed his abuse.

Peart was charged with one count of incest. His defense was that he was not the person in the photos. The jury convicted Peart.

Peart refused to cooperate in the preparation of the

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pre-sentence investigation report. He refused to talk to the probation officer who prepared the report, or to the pyschologist who performed a risk assessment, and refused to submit to a psychosexual evaluation. He failed to explain prior criminal offenses, including two prior revocations of suspended sentences due to sentencing violations. At the sentencing hearing, the state presented 3 witnesses – the victim, her mother, and a friend who read a letter from the victim's great-grandmother. Peart's counsel did not cross-examine them, or call any witnesses on Peart's behalf. Peart's counsel did not suggest an alternative to the state's sentencing recommendation. The court imposed a harsher sentence than the state recommended – 100 years in the Montana State Prison, none suspended, and a 50-year parole restriction. The court also designated Peart a sexually violent predator under § 46-23-502(11)(b), MCA.

Issue: Did Peart's counsel provide ineffective assistance at sentencing?
Short Answer: No.

Procedural Posture & Holding: Peart appeals his sentence on the basis of ineffective assistance of counsel at sentencing. The Supreme Court affirms.

Reasoning: Peart asserts his counsel was ineffective because he failed to subject the state's case at sentencing to meaningful adversarial testing. Applying the two prongs of *Strickland*, the Court finds Peart fails to establish that counsel's performance was objectively unreasonable. Peart next contends that trial counsel was ineffective for failing to make a sentencing recommendation. However, the Court finds the district court relied on a number of factors in sentencing Peart, including his history of substance abuse, the calculating nature of the offense, and the extent of the abuse. Peart has failed to persuade the Court that a sentencing recommendation from counsel would have resulted in a less severe sentence.

***In the Matter of SMK-SH*, 2012 MT 281 (Dec. 5, 2012) (5-0) (Baker. J.)**

Facts: In 2009, the state petitioned for a determination that 14-year-old SMK-SH was a delinquent youth or youth in need of intervention, alleging he had committed assault with a weapon by striking a classmate in the head with a bottle, then punching him in the nose. The Youth Court accepted his admission in June 2010. At a dispositional hearing in August 2012, the court declared SMK-SH a delinquent youth, committed him to its jurisdiction, and placed him on probation until his 18th birthday. The court forbade SMK-SH from owning, possessing or being in control of any firearms or other deadly weapons.

Issue: (1) Whether the youth court had jurisdiction to extend a delinquent youth's probation after the youth violated his probation, and (2) whether the extension violated the youth's equal protection rights?
Short Answer: (1) Yes, and (2) no.

When SMK-SH was 16, the state petitioned to revoke SMK-SH's probation and take him into custody because he possessed a handgun. The court revoked his probation. The state recommended committing him to Pine Hills until his 18th birthday, and the youth's counsel agreed. The state did not recommend extending the youth's probation beyond that. The court questioned counsel about that, expressing concern about having him released from all supervision at 18 years of age. The state noted that the court had committed SMK-SH to its jurisdiction only until the youth's 18th birthday, and questioned whether the court had jurisdiction to extend probation after that.

Procedural Posture & Holding: The Youth Court declared SMK-SH a delinquent youth and committed him to Pine Hills until his 18th birthday, and extended his probation until his 21st birthday. He ordered the youth to return to the court upon turning 18 so that the court could establish the terms and conditions of his probation. SMK-SH appeals, and the Supreme Court affirms.

Reasoning: (1) SMK-SH argues the Youth Court was not authorized to impose an additional probationary period extending beyond its original order. The state contends SMK-SH was resentenced, and the Supreme Court agrees. Under the governing statute, if a youth is found to have violated his probation, the youth court "may make any judgment of disposition that could have been made in the original case." § 41-5-1431(3).

(2) SMK-SH argues that the statutes authorizing him to be resentenced violate Article II, sections 4 and 15 of the Montana Constitution. Because offenders in the youth court system are not similarly situated to adults being sentenced for the same offense, the court finds the threshold element for an equal protection challenge is not met. The record shows that the Youth Court's actions were consistent with the goals of the Youth Court Act and the Montana Constitution.

***Brookins v. Mote*, 2012 MT 283 (Dec. 11, 2012) (5-0) (Rice. J.)**

Facts: Ann gave birth to Allen in 1993 at the Superior Hospital. Dr. Mote, Ann's obstetrician, delivered Allen. Allen suffered brain damage as a result of complications at birth. Ann sued Dr. Mote and the hospital in 2005, and settled her claims with Dr. Mote.

Dr. Mote moved to Superior from Oregon in 1992 to work at the hospital. Shortly after, he was charged in Oregon with sexual abuse of a minor and endangering the welfare of a minor. He resigned and returned to Oregon. His legal problems were reported in local newspapers that spring and summer. The hospital wrote an open letter to the community in the newspaper, explaining that the hospital was taking steps to ensure patient safety. In September 1992, the Montana Board of Medical Examiners and Dr. Mote agreed he would keep his medical license subject to a 15-year probationary period and a prohibition on treating minor patients without a third party in the room. He returned to Superior, but the hospital did not to hire him back as an employee. Dr. Mote opened a private practice in his home; eventually, the hospital allowed Dr. Mote hospital privileges. The hospital's chief administrative officer wrote a letter explaining this, and published it in the local paper.

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Issue: (1) Whether the modification of discovery deadlines is governed by a "good cause" standard or an "excusable neglect" standard; (2) whether the plaintiff raised a genuine issue of material fact on agency and joint venture; (3) whether a plaintiff can state a claim against a hospital under the Consumer Protection Act; (4) whether Montana recognizes negligent credentialing as a tort; and (5) whether summary judgment was properly granted to the hospital on the negligent credentialing claim.
Short Answer: (1) Rule 16's good cause standard applies; (2) no; (3) yes; (4) yes; and (5) yes.

Ann hired Dr. Mote as her OB immediately after he returned to Superior in 1992. Ann was aware of his conviction in Oregon. All of her prenatal visits were in his home office; she went to the hospital only for lab procedures.
Procedural Posture & Holding: Ann alleged the hospital was vicariously liable under agency and joint venture theories, and liable under the Consumer Protection Act and for negligent credentialing. After Dr. Mote settled, the hospital and Ann got into a discovery standoff involving expert witnesses. Eventually, the court found both parties' failures to comply with discovery deadlines were excusable neglect, and extended the deadlines. The parties completed discovery, and filed cross-motions for summary judgment. The district court granted summary judgment to the hospital on all claims. Ann appeals, and the Supreme Court affirms.
Reasoning: (1) The hospital argues the court should have applied the "good cause" standard from Rule 16(b)(4) to the discovery deadlines, while Ann argues it should have applied the more stringent "excusable neglect" standard from Rule 6(b). Because Rule 16 is more specific than Rule 6, and the specific statute governs, the "good cause" standard applies.

(2) Dr. Mote was neither an actual nor ostensible agent of the hospital, nor a joint venturer with the hospital.

(3) The Court holds as an issue of first impression that only those acts or practices in the conduct of the entrepreunerial, commercial, or business aspects of running a hospital are actionable under the Consumer Protection Act. Because Ann's claim implicates the actual practice of medicine, not the business aspects of operating a hospital, it is not actionable.

(4) Ann's negligent credentialing claim is also an issue of first impression. The Court recognizes it as a valid cause of action with three elements: 1. applicable standard of care, which requires expert testimony; 2. defendant's breach of that standard, which requires expert testimony; and 3. causation of the plaintiff's damages.

(5) Because Ann's experts did not render an opinion about whether the hospital had breached the standard of care, summary judgment was appropriate.

***State v. Deshaw*, 2012 MT 284 (Dec. 11, 2012) (5-0) (Nelson, J.)**
Facts: Deshaw's neighbors reported to the sheriff that they thought he was engaged in illegal drug activity. The sheriff knew the informants, and considered them reliable, so referred the report to the tri-agency task force. Agent Winfield confirmed that Deshaw was a medical marijuana patient, but not a caregiver. Winfield went to Deshaw's home, identified himself, and said he understood Deshaw was a medical marijuana patient and was growing marijuana in his basement. Deshaw confirmed, and told Winfield he had submitted paperwork to be a caregiver. Winfield asked if he could inspect the operation and Deshaw said yes. After determining Deshaw had more plants than allowed, and could not prove he was a caregiver, Winfield obtained a search warrant. During the search, Winfield seized 23 plants and a few ounces of marijuana.

Issue: Whether the initial and subsequent searches of Deshaw's home were valid.
Short Answer: Yes.

Procedural Posture & Holding: Deshaw was charged with criminal possession with intent to distribute. He moved to suppress and dismiss. The district court denied, and Deshaw pled guilty, reserving his right to appeal the denial of his motion. The district court deferred imposition of Deshaw's sentence for three years, and fined him $4,000. Deshaw appeals, and the Supreme Court affirms.
Reasoning: The Court addresses three components of Deshaw's argument: (1) the informants' reliability, (2) the validity of his consent to search, and (2) the validity of the search warrant. Concerns about the informants' reliability are "largely academic," as Winfield's personal view of Deshaw's marijuana operation gave him all the probable cause he needed for a search warrant. The Court nonetheless applies the three factors to evaluate the reliability of an informant's tip, and finds the neighbors' information was reliable. Warrantless searches are unreasonable unless consent was freely given, and the state bears the burden of proving consent. The facts show Deshaw freely and voluntarily consented to Winfield's inspection of the grow operation. Finally, the search warrant was supported by the informants and Winfield's personal observations.

***State v. Patterson*, 2012 MT 282 (Dec. 11, 2012) (5-0) (Nelson, J.)**
Facts: Eleven-year-old AK and her mother were visiting Patterson in his home. All three of them were in his bed, with Patterson in the middle. Patterson pulled up AK's skirt, moved her underwear to the side, and began pushing his hips against her. She felt like something was inside of her. When Patterson stopped and got up to go to the bathroom, AK got her mother's attention and they left. AK's mother called the police and took AK to the hospital, where she was interviewed and examined. AK's shirt had a DNA stain on it, which was not Patterson's.
Procedural Posture & Holding: Patterson was charged with sexual intercourse without consent of AK, as well as of two adult women, and attempted sexual intercourse without consent of AK. The district court excluded evidence of the DNA stain on AK's shirt under Montana's rape shield statute, § 45-5-511(2).

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Issue: (1) Whether the rape shield statute violated Patterson's right to a fair trial by depriving him of a crucial defense, and (2) whether the state proved venue.
Short Answer: (1) No, and (2) yes.

At the close of the state's case, Patterson moved to dismiss all counts on the grounds that the state's witnesses had failed to prove that the offenses occurred in Custer County. The district court denied Patterson's motion. Patterson was convicted, and appeals. The Supreme Court affirms.

Reasoning: (1) Patterson argues that excluding the DNA evidence prejudiced his ability to show that another offender committed the crime against AK, relying on *Chambers v. Mississippi*, 410 U.S. 284 (1973). The rape shield statute's purpose is to prevent the trial from becoming a trial of the victim, and this compelling interest justifies curtailing the defendant's constitutional right to confront witnesses. The statute admits sexual conduct of the victim in only two instances, neither of which exists here. The prosecution did not put the DNA stain at issue. The stain does not reveal how or when it got there. Cross-examining AK on the origin of the stain would simply turn the trial into one of the victim. Patterson was allowed to argue that AK's rape allegation was incredible, and that she fabricated it to get attention from her mother. He also argued that his DNA was not found on her clothing or her person. The Court finds exclusion of the DNA evidence was not an error.

(2) Venue is a jurisdictional fact the state must prove at trial. A criminal charge must be filed in the county in which the offense was committed. Venue can be proven by witnesses' references to a city or city streets. Here, AK testified that Patterson raped her at his house, and KW, an adult victim, testified that he raped her in his bed. Several witnesses testified that his house is in Miles City. The only rational conclusion to be drawn is that the crimes occurred in Custer County.

***Donaldson v. State*, 2012 MT 288 (Dec. 17, 2012) (4-3)**
(McGrath, C.J., for the majority (Baker, J., Morris, J., and Rice, J.); Cotter, J., dissenting (Nelson, J. and Wheat, J.))

Facts: Plaintiffs are in committed same-sex relationships. They sued the state, complaining they are unable to obtain protections and benefits avaialble to similarly situated heterosexual couples who marry. Plaintiffs do not challenge Montana's restriction of marriage to heterosexual couples, nor the opportunity to marry. Instead, they argue the "statutory structure" of Montana law violates their rights under the Montana constitution to equal protection, due process, and the rights to privacy, dignity, and the pursuit of life's necessities.

Procedural Posture & Holding: Plaintiffs seek an injunction prohibiting the state from denying them access to the statutory scheme. The district court denied Plaintiffs' motion for summary judgment and granted the state's motion to dismiss, noting that Plaintiffs do not seek a declaration that any specific statutes are unconstitutional, and concluding that ordering the Legislature to enact a statutory scheme would violate the separation of powers. The district court concluded that the proper way to deal with Plaintiffs' concerns are specific suits directed at specific statutes. Plaintiffs appeal, and a divided Supreme Court affirms in part, reverses in part, and remands for further proceedings.

Issue: Whether Plaintiffs' constitutional challenge to Montana's statutory scheme favoring married couples was properly dismissed.
Short Answer: Yes, as it was not justiciable as alleged.

Reasoning: Plaintiffs' requested relief exceeds the bounds of a justiciable controversy. A broad injunction and declaration not directed at a specific statute would not terminate the uncertainty or controversy giving rise to this proceeding, but would lead to confusion and further litigation. Statutes are presumed constitutional, and broadly determining the constitutionality of a "statutory scheme," which Plaintiffs assert may involve hundreds of statutes, is contrary to established jurisprudence. Plaintiffs should be given the opportunity to amend their complaint and specify the statutes they are challenging.

Justice Rice's concurrence: The district court reasoned that the marriage amendment to Montana's constitution "plays into" the decision to dismiss Plaintiff's complaint. This understates the amendment's significance, as the law's designation of marriage as exclusively between a man and a woman became an expressly constitutional classification. It is not discrimination to treat uniquely that which is unique. Marriage is a public act that serves the public function of procreation. Although modern medicine makes it technologically possible for same-sex couples to have children, human life cannot be sustained without procreative marriage relationships. The deeply rooted fundamentental right to marry does not include the right to marry someone of the same gender. "Indeed, marriage is an obligation given exclusive protections in the law because it provides exclusive protections to society." ¶ 37.

Justice Cotter's dissent (joined by Wheat, J.): Justice Cotter joins Justice Nelson's dissent, but would not liken the majority's approach to cases sanctioning slavery and racial segregation, as he does. Nor does she think the Court is seeking to avoid a divisive issue. She also declines to join the bulk of Part V oF the dissent, which challenges the constitutionality of the marriage amendment. Plaintiffs do not challenge the marriage amendment, and the relief they seek does not offend it.

Justice Nelson's Dissent: Justice Nelson begins his 110-page dissent by observing, "There are some cases where we loook back and can see that the court was clearly on the wrong side of history." ¶ 46. Plaintiffs assert that the government may not single out unpopular groups for disfavored treatment, which the state has done here. Today's decision wrongly deprives an abused minority of its civil rights. Justice Nelson devotes Part II to background and overview, Part III to declaratory judgment laws and the Court's erroneous analyses, Part IV to Plaintiffs' constitutional claim, and Part V to the marriage amendment.

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

ATRA brings sense of confidence

By Justin Bryan and Tony Zammit

The American Taxpayer Relief Act of 2012 (ATRA), enacted January 2, 2013, settled much of the uncertainty tax practitioners had faced in the last decade. The Bush-era income tax cuts were largely made permanent, and Montana's farmers, ranchers and business owners can now take comfort in the estate and gift tax exemptions remaining at — at least for the time being — 2012 levels, indexed annually for inflation. While Congress may choose to enact new laws in the future, the absence of any major sunsetting provisions looming on the horizon means that Montanans can plan with more certainty and make decisions with more confidence.

TITLE I OF ATRA: TRUST, ESTATE AND GST

ATRA made permanent the federal gift, estate and generation-skipping transfer taxes. The gift and estate exemptions will each remain at the 2012 level of $5,000,000 per person. Taking into account the annual adjustment for inflation,[1] the expected 2013 exemption amount is $5,250,000 per person ($10,500,000 for a married couple).[2] The generation-skipping transfer tax exemption will continue to be keyed to the estate and gift exemptions of $5,000,000, adjusted annually for inflation. The tax rate increases from 35% to 40% on estates exceeding the exemption threshold of $5,250,000.[3] The annual gift tax exclusion amount -- the annual amount that an individual can give to another individual tax free -- has been inflation adjusted from $13,000 to $14,000.

With the annual exclusion and the exemption amounts indexed for inflation, the majority of Montanans will continue to be able to make large lifetime and death transfers tax free. However, for persons with assets in excess of the estate tax exemption amounts, the higher 40% estate tax rate[4] exemplifies the need for practitioners to plan accordingly to meet the needs of their clients..

Surprising to some, ATRA was silent on what many estate planning attorneys had coined "the endangered strategies." Grantor trusts - including Intentionally Defective Grantor Trusts (IDGTs) and Irrevocable Life Insurance Trusts (ILITs) - are still available to reduce much or all of a client's estate tax. Discounts are still allowed on non-business interests and for transfers of minority interests. As no ten-year minimum was enacted, the two-year rolling Grantor Retained Annuity Trusts (GRATs) are still available. Dynasty trusts also remain an option, as no 90-year limit was enacted on the GST tax exemption.

The continued, historically-low interest rates have given practitioners the opportunity to effectively utilize certain estate planning tools, such as intra-family loans and selling property to a trust for an installment note. When property is expected to appreciate substantially in the future, a grantor can sell the property to a trust for an installment note in order to "freeze" the value of the property in the grantor's estate. This will shift the future gain from the appreciation of the asset to the beneficiaries of the trust, usually the grantor's children. At the same time, the gain recognized to the grantor/seller is postponed for income tax purposes.[5] The low interest rates result in the grantor/seller experiencing limited interest income on the installment sale. In January, 2013, money can be loaned or property sold for an installment note with 3-9 year rates as low as 0.87%. The § 7520 rate is 1%.

TITLE I OF ATRA: INCOME TAXES

ATRA permanently extended the Bush-era tax cuts for all but higher-income taxpayers.[6] However, because the Act did not extend the payroll tax holiday, the vast majority of Montanans will see a 2% reduction in their take home pay due to the restoration of the 6.2% payroll tax rate. For higher-income households in Montana, there are three different amounts at which tax increases are possible.

First, individuals with an annual income above $400,000 ($450,000 for married filing jointly) will be subject to a 39.6% tax rate and a 20% capital gains rate.[7] For Montanans that do not reach the $400,000 threshold for yearly income ($450,000 for married filing jointly), the income tax brackets and long-term capital gains rates remain unchanged. While Congress made permanent the anti-marriage penalty for taxpayers in the 15% tax bracket (discussed below), ATRA created a new marriage penalty for high income taxpayers. With a top marginal tax rate of 39.6%, two unmarried individuals who each make $399,000 a year would pay significantly less tax than a married couple making $799,998 per year. For taxpayers in

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this situation, there is a strong economic motivation to remain unmarried.

Second, the Personal Exemption Phase-out (PEP) and Pease limits on itemized deductions will come into play for Montanans with an Adjusted Gross Income (AGI) above $250,000 ($300,000 for married filing jointly).[8] These Montanans will lose the per person $3,900 personal exemption (including dependents) at a rate of 2% for every $2,500 ($1,250 for married filing singly) of AGI over the $250,000 threshold ($300,000 for married filing jointly).[9] The $250,000 threshold ($300,000 for married filing jointly) will also impact taxpayers through the changes to the Pease limitation, i.e., for taxpayers with AGI above the thresholds, itemized deductions will be reduced by the lesser of: (1) 80% of the amount of itemized deductions otherwise allowable, or (2) 3% of the excess of AGI over the threshold amounts.[10]

Third, the new 3.8% surtax on investment income and the Medicare payroll surtax will be levied on taxpayers who have an income in excess of $200,000 ($250,000 for married filing jointly).[11] The 3.8% surtax is more complicated than it initially appears. It imposes a tax on the lesser of: (1) investment income, or (2) Modified Adjusted Gross Income (MAGI) in excess of $200,000 ($250,000 for married filing jointly). The MAGI of a taxpayer is the taxpayer's AGI plus their net foreign income exclusion amount. The Medicare payroll surtax is increased by 0.9% for employment income in excess of $200,000 ($250,000 married filing jointly).

For Montana business owners, their choice of entity will become increasingly important. The income splitting possibilities of S corporations and LLCs taxed as S corporations will make these entities increasingly attractive. People who operate a business as a sole proprietorship, partnership, or LLC taxed as a partnership must pay self-employment tax on all income attributed to them from the business. For taxpayers, the self-employment tax rate is 13.3% for the first $200,000 ($ 250,000 married filing jointly), and 14.2% for every dollar of income thereafter. Business owners operating an entity as an S corporation or LLC taxed as an S corporation will experience a significantly lower tax burden by splitting their income from the business between wages (i.e. self-employment income) and profits, hence the term "income splitting." The taxpayer must pay themselves a "reasonable wage,"[12] and all money made by the business in excess of the "reasonable wage" is free of the 13.3% to 14.2% self-employment tax. Furthermore, the amount paid to the taxpayer in excess of their "reasonable wage" will not be included in the definition of "investment income" for purposes of calculating the 3.8% surtax on investment income.

The 3.8% surtax likely will not provide Montanans with sufficient incentive to classify their excess investment income as ordinary income. Taxes collected on investment income remain at a significantly lower rate than taxes on ordinary income. For an individual at the top marginal tax bracket, investment income will be subject to a federal tax at a cumulative rate of 24.592%, while ordinary income will be taxed at the rate of 41.292%.

Trust income will remain an important consideration when drafting trust documents for clients. Income allocated to a trust or estate will reach the highest marginal tax bracket at $11,900.

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Layering of the Rates on Ordinary Income for the Top Marginal Tax Bracket (Earned Income)

	Single	Head of Household	Married Filing Jointly	Married Filing Separately
0.9% Medicare Payroll Surtax	$200,000	$200,000	$250,000	$125,000
Phase Out of Deductions	$250,000	$275,000	$300,000	$150,000
39.6% Income Tax Rate	$400,000	$425,000	$450,000	$225,000
Top Cumulative Marginal Rate	41.292%	41.292%	41.292%	41.292%

Layering of the Rates on Investment Income for the Top Marginal Tax Bracket

	Single	Head of Household	Married Filing Jointly	Married Filing Separately
3.8% Medicare Payroll Surtax	$200,000	$200,000	$250,000	$125,000
Phase Out of Deductions	$250,000	$275,000	$300,000	$150,000
20% Capital Gains Rate	$400,000	$425,000	$450,000	$225,000
Top Cumulative Marginal Rate	24.592%	24.592%	24.592%	24.592%

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"Taxpayers will continue to have the election of itemizing costs of mortgage insurance on a qualified personal residence. The deduction begins to phase out for taxpayers with an AGI over $100,000, and is unavailable for taxpayers with an AGI in excess of $110,000."

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According to the Joint Committee Council, the 39.6% tax rate will apply to trusts and estates. Thus, the 39.6% income tax and 20% capital gain rates apply to what was the entire 35% bracket range (i.e. trusts and estates with income exceeding $11,900).

The following are some of the provisions that Title 1 of the ATRA extended:

- The Act permanently extends the $1,000 child tax amount allowed against regular tax and alternative minimum tax.[13]
- The Act permanently extends the adoption credit and employer provided adoption assistance exclusion.[14]
- The Act permanently extends the dependent care credit for children under 13 and disabled dependents. The dependent care credit gives taxpayers a credit for an applicable percentage of eligible care expenses.[15]
- The Act permanently extends the credit of up to $150,000 per year for constructing, acquiring, rehabilitation, or expanding property used for a child care facility, and for the operation of such facility.[16]
- The Act permanently eliminates the marriage penalty inherent in basic standard deduction for married couples filing jointly and phases out the marriage penalty inherent in the 15-percent bracket.[17] The Act also eliminates the marriage penalty for earned income credit.[18]
- The Act permanently extends the $2,000 allowed annual contribution amount for education expenses and the expanded definition of education expenses (includes elementary and secondary school) for education individual retirement accounts.[19]
- The Act permanently extends the $5,250 exclusion from gross income and employment tax per year of employer-provided education assistance. The covers graduate and undergraduate courses.[20]
- The Act permanently extends the above-the-line deduction for up to $2,500 of interest expenses paid on qualified education loans. The deduction is phased out at $50,000 through $65,000 income levels.[21]
- The American Opportunity Tax Credit of up to $2,500 of tuition costs and related expenses is extended through 2017.[22]
- The Act extends the child tax credit for 5 years. 15% of earnings above $3,000 instead of above $10,000 are allowed as a credit to reduce federal income tax for certain lower income taxpayers who have qualifying children under the age of 17.[23]
- The Act extends for 5 years the increased earned income tax credit of 45% for a working family's first $12,750 of earned income, if the family has three or more children. The Act also increased the beginning point of the phase-out range for all married couples filing a joint return.[24]

TITLE II OF ATRA: INDIVIDUAL TAX EXTENSIONS

ATRA extended several tax relief provisions, some of which impact Montanans more than others. Owners of large tracts of land will continue to benefit from increased contribution limitations and carryover periods of IRC § 170(b)(1)(E) and (b)(2)(B) for charitable contributions of certain qualified conservational easements.[25] Under ATRA, corporate farmers, ranchers, and landowners will continue to benefit from the extended contribution limitation and carryover periods for contributions of conservation property made in taxable years on or before December 31, 2013.

Taxpayers will continue to have the election of itemizing costs of mortgage insurance on a qualified personal residence.[26] The deduction begins to phase out for taxpayers with an AGI over $100,000, and is unavailable for taxpayers with an AGI in excess of $110,000.

Taxpayers who are older than 70 ½ will continue to make tax free distributions to charities from their IRAs and Roth IRAs, up to $100,000 per year per taxpayer.[27] Under Title 9 of ATRA, account rollovers are allowed from a § 401(k), § 403(b), or § 457(b) account to a Roth account.[28] The transfer will be treated as a qualified rollover contribution, and the converted amount will be taxable.[29] Montana taxpayers with these retirement accounts will have the opportunity to optimize the timing of Roth conversions based on changing tax rates, individual circumstances, and anticipated minimum distributions. This will also allow for planning opportunities with standalone retirement trusts.

The following are some of the individual tax

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"Title III of the Act extends many favorable depreciation and cost recovery provisions. Most notable is the extension of increased expensing limitations for § 179 property that was acquired during the tax year."

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extensions in ATRA:

Deduction for certain expenses of Elementary and Secondary school teachers, giving them an above the line deduction of $250 for professional expenses.[30]

The Discharge of Qualified Principal Residence Indebtedness exclusion was extended, which excludes the forgiveness of debt in a foreclosure proceeding and the write down of principal on a mortgage from taxable income.[31]

TITLE III OF ATRA: BUSINESS TAX EXTENDERS

Title III of the Act extends many favorable depreciation and cost recovery provisions. Most notable is the extension of increased expensing limitations for § 179 property that was acquired during the tax year.

Generally, § 179 property is tangible property or computer software used in the taxpayer's trade or business and subject to the allowance for depreciation under § 167.[32] ATRA will continue to allow small businesses to expense up to $500,000 of § 179 property, with a phase out threshold beginning after the acquisition of over $2,000,000 of § 179 property.[33]

ATRA temporarily extends the 100% exclusion of gain on certain small business stock.[34] "Qualified small business stock" is stock from a C corporation that meets a specific active business requirement, and the business has gross assets that do not exceed $50,000,000. Non-corporate taxpayers who hold qualified small business stock are eligible to exclude the greater of $10,000,000 or 10 times the taxpayer's basis in the stock from gain on sale of the stock. The stock must have been held for more than five years prior to sale.

The Act also extends for one additional year the § 168(k) 50% bonus depreciation provision that applied to qualified property acquired during the tax year.[35] The property must be placed in service before January 1, 2015, to be eligible for bonus depreciation.

The following is a list of some of the ATRA business tax extensions:

ATRA extended the § 45A Indian employment credit for employing members of Indian tribes.[36]

Military housing allowances are not considered for purposes of eligibility for the low-income housing credit.[37]

The new markets tax credit national designated investment limitation is extended.[38]

Railroad track and maintenance credit was extended.[39]

Extended 20% credit given for costs spent in training mine rescue team members.[40]

Employer wage credit, if employees are active duty members of the uniformed services.[41]

Work opportunity credit extended.[42]

Extended the 15-year, straight-line cost recovery for qualified retail improvements, qualified leasehold improvements, qualified restaurant buildings and improvements.[43]

Business Property on an Indian reservation will continue to benefit from accelerated depreciation.[44]

Contributions of "apparently wholesome" food from a taxpayer's trade or business will continue to be subject to a special charitable deduction rule under IRC § 170(e)(3)(C).[45]

Extension of election to expense mine safety equipment.[46]

Extended the modification that certain payments made to an exempt organization by a controlled organization shall be treated as business income.[47]

Extends the exemption of certain dividends from the 30% withholding tax imposed on dividends received by foreign individuals.[48]

Extends the inclusion of regulated investment companies inclusion in "qualified investment entity" when determining if a distribution is subject to FIRPTA tax and withholding.[49]

Active financing income will continue to be exempted from current inclusion under the subpart F rules.[50]

S corporation shareholders will continue to receive a basis reduction for charitable contributions of property equal to their pro-rata share of the contributed properties adjusted basis.[51]

The reduction in S corporation recognition period for built-in gains tax has been extended.[52] Built-in gains arise in the S corporation context when there was gain that arose prior to the corporation's conversion from C to S corporation status.

TITLE IV OF ATRA: ENERGY TAX EXTENDERS

ATRA extended a number of energy credits. The majority of the extensions of the energy tax provisions are now due to sunset at the end of 2013 instead of 2012. The following is a partial list of the energy provisions of ATRA:

The extension of the credit for energy-efficient existing homes allows an individual to claim a credit for qualified energy efficiency improvements installed during the year and for the amount of the residential energy property expenditures incurred by the taxpayer.[53]

The credit for alternative fuel vehicle refueling properties was extended.[54]

The production tax credit for qualified wind and open-loop biomass production facilities was extended for one year to January 1, 2014.[55]

The credit for electric scooters and 3-wheeled vehicles was extended for taxpayers purchasing a qualifying vehicle before January 1, 2014.[56]

The production credit for Indian coal facilities was extended by one year for facilities that were placed in service before 2009. The credit remains at 2012 level of $2.00 per ton produced.[57]

The credit available for energy-efficient new homes was extended by year to include qualifying homes acquired in 2012 as well as those homes acquired by December 31, 2013.[58]

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Energy-efficient appliance manufacturers will enjoy a credit for qualifying appliances produced in 2012 and 2013.[59]

A special depreciation allowance for cellulosic biofuel plant property was extended by one year.[60]

The definition of a "qualifying electric transmission transaction" was extended for qualified electric utilities through 2013.[61]

Alternative fuels excise tax credits was extended by the Act for qualifying fuels sold or used before December 31, 2013.[62]

CONCLUSION

Ultimately, ATRA works to preserve most of the tax laws from 2012. With the exception of the expiration of the 2% payroll tax cut and tax increases for high income Montanans, the majority of people in our state will see very little change from their 2012 tax situation. The good news for practitioners is that tax planning strategies which have been developed and used in recent years will, for the most part, continue to be available to meet the needs of clients. With a more certain playing field, new strategies can be developed. However, the possibility always exists that new legislation will alter the current tax structure, and taxes will always be a central point of discussion with clients. For the time being, however, there does not appear to be much change on the horizon…at least until we find ourselves looking over the edge of another fiscal cliff.

Tony Zammit and Justin M. Bryan *graduated from the University of Montana School of law in 2011. Both received an LL.M in Taxation from the University of Florida in July of 2012. Tony now works for the Montana Department of Revenue and Justin works in Bozeman for the Bryan Law Firm, P.C.*

1 Title 1 – General Explanation of the AmericanTaxpayer Relief Act of 2012.
2 http://www.bloomberg.com/news/2013-01-11/irs-increases-exemption-from-estate-tax-to-5-25-million.html
3 Title 1 – General Extensions of the American Taxpayer Relief Act of 2012.
4 IRC §§ 2001, 2010
5 IRC § 453
6 IRC § 1 and Title 1 of the American Taxpayer Relief Act of 2012
7 Id.
8 IRC §§ 68, 151 and Title 1 section 101 – GeneralExtensions of the American Taxpayer Relief Act of 2012.
9 IRC § 151
10 IRC § 68
11 This surtax was enacted as part of the Health Care and Education Reconciliation Act of 2010.
12 The Tax Court noted that the traditional standards used under §162(a)(1) in determining reasonable compensation in the C corporation context also apply to S corporations. Some of the factors to determine "reasonable compensation" are the shareholder-employee's qualifications, the services actually performed by the shareholder-employee, the prevailing compensation rates in the corporation's industry, and the size of the business. See, e.g., Mayson Mfg. Co. v. Comr., 178 F.2d 115, 119 (6th Cir. 1949); Rocco v. Comr., 57 T.C. 826, 831 (1972) (acq.); Roob v. Comr., 50 T.C. 891, 898 (1968).
13 IRC § 24
14 IRC §§ 23, 36C, 137
15 IRC § 21
16 IRC § 45F
17 IRC §§ 63, 1
18 IRC § 32
19 IRC § 530
20 IRC § 127
21 IRC § 221
22 IRC § 25A
23 IRC § 24
24 IRC § 32
25 IRC § 170 and Section 206 of the American Taxpayer Relief Act of 2012.
26 IRC § 163 and Section 201 of the American Taxpayer Relief Act of 2012.
27 IRC § 408 and Section 208 of the American Taxpayer Relief Act of 2012.
28 IRC § 402A and Section 902 of the American Taxpayer Relief Act of 2012.
29 Id.
30 IRC § 62 and Section 201 of the American Taxpayer Relief Act of 2012.
31 IRC § 108 and Section 202 of American Taxpayer Relief Act of 2012.
32 IRC § 179(d)
33 IRC § 179 and Section 315 of the American Taxpayer Relief Act of 2012.
34 IRC § 1202 and Section 324 of the American Taxpayer Relief Act of 2012.
35 IRC § 168 and Section 331 of the American Taxpayer Relief Act of 2012.
36 IRC § 45A and Section 304 of the American Taxpayer Relief Act of 2012.
37 IRC § 142 and Section 303 of the American Taxpayer Relief Act of 2012.
38 IRC § 45D and Section 305 of the American Taxpayer Relief Act of 2012.
39 IRC § 45G and Section 306 of the American Taxpayer Relief Act of 2012.
40 IRC § 45N and Section 307 of the American Taxpayer Relief Act of 2012.
41 IRC § 45P and Section 308 of the American Taxpayer Relief Act of 2012.
42 IRC § 51 and Section 309 of the American Taxpayer Relief Act of 2012.
43 IRC § 168 and Section 311 of the American Taxpayer Relief Act of 2012.
44 IRC § 168 and Section 313 of the American Taxpayer Relief Act of 2012.
45 IRC § 170 and Section 314 of the American Taxpayer Relief Act of 2012.
46 IRC § 179 and Section 316 of the American Taxpayer Relief Act.
47 IRC § 512 and Section 319 of the American Taxpayer Relief Act.
48 IRC § 871 and Section 320 of the American Taxpayer Relief Act.
49 IRC §§ 897, 1445 and Section 321 of the American Taxpayer Relief Act.
50 IRC §§ 953, 954 and Section 322 of the American Taxpayer Relief Act.
51 IRC § 1367 and Section 325 of the American Taxpayer Relief Act.
52 IRC § 1374 and Section 326 of the American Taxpayer Relief Act.
53 IRC § 25C and Section 401 of the American Taxpayer Relief Act of 2012.
54 IRC § 30C and Section 402 of the American Taxpayer Relief Act of 2012.
55 IRC § 45 and Section 407 of the American Taxpayer Relief Act of 2012.
56 IRC § 30D and Section 403 of the American Taxpayer Relief Act of 2012.
57 IRC § 45 and Section 406 of the American Taxpayer Relief Act of 2012.
58 IRC § 45L and Section 408 of the American Taxpayer Relief Act of 2012.
59 IRC § 45M and Section 409 of the American Taxpayer Relief Act of 2012.
60 IRC § 168 and Section 410 of the American Taxpayer Relief Act of 2012.
61 IRC § 451 and Section 411 of the American Taxpayer Relief Act of 2012.
62 IRC §§ 6426, 6427 and Section 412 of the American Taxpayer Relief Act of 2012.

A refresher: MT evidence law sources and research

By Cynthia Ford

Evidence Law Sources[1]

Montana evidence law stems from three primary sources. The obvious source is the Montana Rules of Evidence ("MRE"), which were promulgated by the Montana Supreme Court for use in all trials beginning in July 1, 1977. (See December 2012/ January 2013 issue of The Montana Lawyer for a more complete history of the MRE). The statutorily-enacted (as opposed to promulgated rule) evidence law is more often forgotten: Title 26 of the Montana Code Annotated is entitled "Evidence" and contains 3 substantive chapters in addition to the Montana Rules of Evidence.[2] Chapter 1 of Title 26 is "Statutory Provisions on Evidence"; Chapter 2 is "Subpoenas and Witnesses"; Chapter 3 is "Effect of Former Judgments and Orders."[3]

These non-rule evidence statutes may significantly impact your case. For instance, nothing in the MRE discusses admission of altered writings, but there is a statute specifically on point which might be dispositive in a particular case. M.C.A. §26-1-106, "Explanation of alterations in a writing," provides:

> The party producing a writing as genuine that has been altered or appears to have been altered after its execution in a part material to the question in dispute shall account for the appearance or alteration. The party may show that the alteration was made by another without the party›s concurrence, was made with the consent of the parties affected by the alteration, or was otherwise properly or innocently made or that the alteration did not change the meaning or language of the instrument. If the party does that, the party may give the writing in evidence, but not otherwise.

Knowing that there is such a statute, and its effect, could be key in a case centering on the admission or preclusion of a contract, deed, will, business record or medical chart. Another very important provision found in the statutes rather than the rules is M.C.A. 26-2-601, "Medical malpractice expert witness qualifications." Enacted in 2005, it sets a very specific list of criteria for expert witnesses on the standard of care in medical malpractice cases. Again, this could make or break a medical malpractice case, but there is nothing in MRE 702 or 703 which would alert you to these requirements.

The M.C.A. also contains "stealth" evidence provisions scattered throughout the Code, in various sections dealing with particular subject matters, best found by perusing the Index to the MCA. A familiar example is the "parol evidence rule" which partakes both of substantive contract law and the law of evidence[4]. In Montana, it is enacted as M.C.A. 30-2-202:

> Final written expression -- parol or extrinsic evidence. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
>
> (a) by course of dealing or usage of trade (30-1-205) or by course of performance (30-2-208); and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The U.S. Supreme Court noted, in the criminal arena, another Montana statute which governs admissibility of evidence but which is located outside Title 26 in the M.C.A.: "Section 45-2-203 does not appear in the portion of Montana›s Code containing evidentiary rules (Title 26), the expected placement of a provision regulating solely the admissibility of evidence at trial…." Montana v. Egelhoff, 518 U.S. 37, 57 (1996) (Ginsburg, J., concurring). Bottom line: you don't want to be surprised at trial because your

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1 Copyright Cynthia Ford.

2 The MRE are printed as Chapter 10, even though they technically are rules rather than legislative enactments, for ease of reference.

3 Chapters 4-9 are reserved.

4 But "The parol evidence rule, as it appears in the law of contract and in the Uniform Commercial Code, is actually a principle of substantive law and not a procedural rule of evidence. …Thus, the admissibility of any evidence is ultimately subject to the provisions of the Montana Rules of Evidence. (Citations omitted). Norwest Bank Billings v. Murnion, 210 Mont. 417, 424, 684 P.2d 1067, 1071 (1984).

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opponent did, and you did not, consult the M.C.A. as well as the M.R.E.

A third source of evidence law applies mostly in criminal cases: the federal and Montana constitutions. For example, a current hotbed of activity by the U.S. Supreme Court concerns the application of the Sixth Amendment's Confrontation Clause to evidence against criminal defendants. Ignoring this constitutional requirement in a criminal case would amount to professional negligence. The danger is highest for those who only occasionally appear in criminal cases[5]; all prosecutors and specialized criminal defense lawyers are keenly aware of the most recent pronouncements from the U.S. and Montana Supreme Courts on the right of confrontation.

This leads us to another well-known source of evidence law: court interpretation of the statutes and rules governing admission of evidence. The Montana Supreme Court has the final say on the application of the M.C.A. and the M.R.E.; these are matters of state law (except where a state evidence provision allegedly abridges a federal right). The Montana Supreme Court deals regularly[6] with appeals claiming that the trial court erred in admitting or refusing evidence. The constitutions, statutes and M.R.E. comprise the skeleton of the body of evidence law in Montana. The Supreme Court opinions interpreting and applying the bones in specific circumstances serve as the meat, and are essential to an accurate understanding of evidence law in Montana.

Beehler v. Eastern Radiological Associates, 2012 MT 260, is a recent example of a case filling out the bare bones of an evidence statute. As I mentioned above, the legislature enacted M.C.A. §26-2-601, setting required qualifications for experts in medical malpractice cases. The trial court in Beehler found that the plaintiff's only expert did not meet that statutory standard, excluded his testimony, and therefore granted summary judgment for the defendants. On appeal, the Supreme Court reversed and remanded, holding that the plaintiff's expert did in fact comply with the statute's requirements, and that the District Court had incorrectly applied the statute and in so doing, abused its discretion. The Supreme Court acknowledged that it had not previously decided a case construing this statute, ¶24, and provided a road map for trial judges in future cases to use in applying the statute:

> When the specifics of Dr. Joseph›s deposition and experience are applied to the requirements of § 26–2–601, MCA, and the subject of Plaintiffs' claim, it is clear that Dr. Joseph qualifies as an expert. Specifically, Dr. Joseph is licensed to practice in California, treats bacterial meningitis, and provides the type of treatment at issue, infection prevention during a myelogram, satisfying Subsection 1(a). Moreover, Dr. Joseph is board certified in infection prevention, investigates and treats nosocomial infections, has investigated post-myelogram meningitis infections, and has developed infection control procedures that require radiologists to wear masks during myelograms. Recognizing that the wearing of a mask during the myelogram is the "act or omission that is the subject matter of the malpractice claim," it is clear that Dr. Joseph satisfied Subsection 1(b). Similarly, as Dr. Joseph is a physician testifying about a physician, he satisfied Subsection 2.

¶25. Thus, to have a complete taste of Montana law on the qualification of medical experts in malpractice cases, you have to integrate the M.C.A., the M.R.E., and the Montana Supreme Court cases applying the relevant provisions.

Researching Evidence Law: Step-by-Step[7]

1. Montana Statutes. The official Montana state website is easy and free: http://data.opi.mt.gov/bills/mca_toc/index.htm

a. Title 26 "Evidence" contains both specific statutes and reprints as Chapter 10 the Montana Rules of Evidence (see below)

b. index or subject search of the rest of the MCA, to locate special evidence provisions for your specific type of case

c. Montana Constitution, available as part of the MCA website above.

2. Montana Rules of Evidence (M.R.E.)

a. The Rules themselves, available in numerous sources on- and off- line, including the free Montana state website, where they are printed as Chapter 10 of Title 26: http://data.opi.mt.gov/bills/mca_toc/26

b. The Montana Commission Comments

These were written at the time the original M.R.E. were drafted, and are very helpful in explaining the intent of each rule. The November 3, 1976 letter from the Evidence Commission to the Montana Supreme Court conveying the proposed M.R.E. stated:

> The official comments cover a comparison of the Montana Rules with their Federal counterparts, the reasons for the adoption of each Rule, the Rules' effect upon the existing Montana law of evidence, and citation of leading Montana case law authorities. The Commission believes that the comments provide significant guidelines for interpretation and application of the Rules in practice.

Where the proposed (and adopted; they all were) M.R.E. differs from the then-current corresponding Federal Rule of Evi-

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5 I myself am on very thin ice here. I have never practiced criminal law, so that all my information on this subject comes from what I have had to learn in teaching Evidence, both from written sources and from colleagues who dedicate their practices to prosecution or criminal defense and have generously shared their insights.

6 In the twelve months between December 1, 2011 and December 1, 2012, WestlawNext found 17 cases involving "admission of evidence."

7 The Jameson Law Library at the University of Montana School of Law, in particular Cynthia Condit and Stacey Gordon, have been very helpful in all parts of my research, but particularly in making sure this chapter is complete and correct. Because they are lawyers as well as librarians, they asked me to add "to the best of their knowledge." In my experience, the best of their knowledge is the best around.

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dence, the Comment explains why Montana chose a different path on that issue.

Sadly, it is not as easy to locate the Commission Comments as the M.R.E. themselves. Offline, the hard copy of the Montana Code Annotated published by West does have the Commission Comments at the start of the annotation section for each rule, which is probably the best way to access them if you have access to a physical law library which includes this set.

Online, the Comments are available for a fee on both WestlawNext and LexisAdvance[8], but I have not found any free online source. The Comments are not included as part of the M.C.A. on the state website. As a public service, to facilitate access to and use of the original Commission Comments[9], I have attached them to my faculty webpage in pdf [10] format, in the bottom section of the webpage, entitled "Helpful Research Links": http://umt.edu/law/about/faculty/people/ford.php

3. Montana Supreme Court cases interpreting the MCA or Montana constitutional provision(s) you found. These are available widely, including through the online subscription services of WestlawNext and LexisAdvance. For free, there are:

a. The Montana Supreme Court website: does allow searching by phrase, in addition to party name. Go to Opinions/Brief tab > select Advanced Search. The format of how the rules are written in the opinion may vary, but probably should be something like "703 M.R. Evid." Thus, a search for "M.R.E. 703" may not return anything. The key is to come up with a search that will catch at least part of what you are looking for. http://searchcourts.mt.gov/

b. Google Scholar: http://scholar.google.com/schhp?hl=en&as_sdt=4,27

c. Findlaw.com (the professional site – which is accessible to all) has access to Montana Supreme Court opinions with an option to do a free text search (current Montana coverage is 1980-current): http://www.findlaw.com/casecode/montana.html

d. Justia.com has access to Montana Supreme Court opinions, text searchable (current Montana coverage is 1972-current): http://law.justia.com/montana/

4. Federal evidence law: this is not binding, but can be highly persuasive if the M.R.E. in question follows the corresponding F.R.E.

a. Read the corresponding FRE, and compare it to the M.R.E. in question yourself.

b. Reread the M.R.E. Commission Comment (see above) for its insight into the comparability of the M.R.E. to the 1977 version of the F.R.E.

If you conclude that the Montana approach is similar to the federal approach, continue; federal evidence law will be useful. If Montana chose a different path, stop now, because the federal materials will not be helpful.

c. If the M.R.E. was meant to mirror the F.R.E., read the original Federal Advisory Committee Note ("ACN"). These are easier to find online than the Montana Commission Comments, including in both WestlawNext and LexisAdvance. There are two good free sources:

The Cornell Legal Information Institute includes the original ACNs (and the ACN for each amendment), right after the appropriate rule: http://www.law.cornell.edu/rules/fre

The federal government printing office website also has the original and amendment ACNs, listed after each rule: http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/html/USCODE-2009-title28-app-federalru-dup2.htm

CAVEAT: the Advisory Committee Notes were submitted by the Committee to the U.S. Supreme Court with the Committee's

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8 WestlawNext has the Commission Comments. LexisAdvance has even more information about the rules adoption process and also includes the original Commission Comments to each rule. However, neither WestlawNext nor LexisAdvance has a comment to the 2007 amendment to Rule 407, which is the only amendment of the MRE since their original adoption, because there was no Comment to the amended version.

9 Note that this document is entitled "Complete Proposed Comments" and dates from November 8, 1976, but my research shows that the Court adopted these in toto as part of its adoption of the Commission's proposed MRE, so this version became the official Comments. (See "History of MRE").

10 Note also, that there is no guarantee of format, so you should proofread carefully if you elect to block and copy any part of a Comment from my webpage to a legal document.

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proposed rules, and passed on by the Court to Congress. Before the FRE were finalized, Congress made several substantive changes, which meant that the ACNs for those rules became inaccurate, and remain so. Also, some of the original ACNs contained "typos" and/or incorrect references to other rules. In 1998, the Federal Judicial Center published "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," which outlines those FREs where the published ACNs are misleading. This is a public document, and can be located online free at: http://www.fjc.gov/public/pdf.nsf/lookup/capra.pdf/$file/capra.pdf

d. DO NOT PROCEED DIRECTLY TO FEDERAL CASES. Starting with secondary sources can save you, and your client, a lot of time and money. Because the federal system is so big, there are several great treatises which go through the rules one-by-one, explaining the purpose and use of each rule, and digesting the important cases decided about that rule. They have done the pre-work which will make your federal case research much more efficient. Of course, you can't rely solely on the author's interpretation of the case: it is your professional responsibility to both read the case for yourself and to check on its current status. Here is a list of my favorite treatises:

- Federal Rules of Evidence Manual, 10th ed., by Steven Saltzburg & Michael Martin, Lexis product http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=42095#
- McCormick on Evidence, 6th ed., Westlaw product http://store.westlaw.com/mccormick-on-evidence-6th-practitioner-treatise-series/136369/15693906/productdetail
- Weissenburger's Federal Evidence, 7th ed., by Glen Weissenburger & James Duane, Lexis product http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=45089#
- Handbook of Federal Evidence, 7th ed., by Michael Graham, Westlaw product http://store.westlaw.com/handbook-of-federal-evidence-7th/182860/11406856/productdetail
- Moore's Federal Practice [, 3rd ed., loose-leaf, Lexis product http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=10106
- Wright & Miller's Federal Practice & Procedure, 3rd ed., Westlaw product http://store.westlaw.com/federal-practice-procedure-wright-miller/3731/22060402/productdetail

e. Research federal case law, using the treatise as a guide. Remember, these cases are only persuasive, not binding, on the Montana courts (unless the decision is based on a constitutional provision).
   i. U.S. Supreme Court
   ii. 9th Circuit decisions
   iii. Other circuits
   iv. U.S.D.C. for the District of Montana

5. U.S. Constitution (I have this on my phone and ipad via free apps, so should you. Or, like Justice Scalia, you could still carry around a hard copy…)

a. U.S. Supreme Court cases
b. If none, 9th Circuit cases
c. Other circuits

6. REMEMBER TO UPDATE your research if any time at all has passed between when you did it, and the time you are making your (oral or written; see below) argument to the Court.

USING YOUR RESEARCH

You can use your research orally, to support an objection or to respond to an objection, in the middle of trial. "Your Honor, I object. Rule ___ applies, and there is a case directly on point: Smith v. Jones, 123 Mont. 42, 78 P.3d 297 (2012). Also, the Commission Comment to Rule ___ specifically says: "XXXXXXXX." Impressive, and if you think your opponent hasn't even thought about the issue, maybe the best route because the oral objection at trial won't give her a chance to prepare a counter to your argument.

BUT you and your opponent are not the only interested parties. Consider the judge who has to make the ruling on the fly, has not been alerted to the objection beforehand, and probably hasn't read, at least recently, either the Commission Comment or the case on which you rely. Judges are only human[11] and if you put yourself in their places, wouldn't you rather have something in writing, preferably beforehand, to help you make the necessary decision? My favorite quote of all time comes from a very good Montana trial judge, which the Supreme Court saw fit to reprint verbatim:

> Plaintiffs' counsel attempted to introduce a notarized statement through the defendant Josephson:
>
> Q. I'm handing you a notarized statement of Mr. Hand. May I approach, Your Honor?
>
> THE COURT: You may, but what good is a notarized statement?
>
> Q. Mr. Hand is deceased, Your Honor. This falls outside of the definition of hearsay, it's notarized, it's a statement about Mr. Josephson and the Monroes. I'm going to ask him if he knows about it and if he's heard of it before.
>
> THE COURT: Okay. I don't know how far you're

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11 E.g., M.C.A. 3-5-202 "A person is not eligible for the office of judge of a district court unless the person...," Oldfather, "Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design," 36 Hofstra L.R. 125 (2007), http://lawarchive.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v36n01_cc4_oldfather_36_1.pdf; Boston Legal 2004 Season, "Death Be Not Proud" at 19:07.

Court releases results of Bench and Bar Survey

The recently concluded Supreme Court Bench and Bar survey shows appellate attorneys, judges and law school faculty continue to hold the Court in high regard. The survey, which asks a series of 10 questions about the Court's work pace, decision quality and overall management, showed 86.4% of the respondents reporting a positive perception of the Court. The survey is sent every two years to all District Court judges, attorneys with cases before the court, and University of Montana School of Law faculty.

Survey respondents were very pleased with the timeliness of the Court's decisions, with 94.9% strongly agreeing or agreeing that the Court issues opinions in a timely manner. An even higher number, 96.4%, indicated that the Court completes its overall workload in a timely manner. This represents a 60% increase from numbers recorded in the first survey conducted in 2008.

"As a Court we understand that Montanans should not wait for years for a decision. We have put considerable effort toward finishing cases and getting decisions out the door so litigants can get a decision and move on with life. I am very proud of the Court and happy that attorneys and judges see the difference," said Chief Justice Mike McGrath.

The survey, sent to 707 individuals, had a response rate of 46.1%, which was up from the 39.6% response rate in 2010. It was conducted in September 2012 using an anonymous on-line survey tool. The survey is part of a series of Supreme Court performance measures adopted in 2008.

The Court recently modified its case processing standards by reducing the goal for case completion from 365 days to 180 days. Under the revised standard, the Court aims to get decisions issued within 180 days of the case being submitted to the Court for classification (with all briefing completed). The average length for case turnaround is currently less than 100 days.

Survey users also expressed overall satisfaction with the Court's decisions. A large majority of respondents (80%) strongly agreed or agreed that the Court's decisions clearly state the rule of law, standards of review and instructions on remand. Respondents also agreed that decisions are based on facts and applicable laws, and deviations from the principle of stare decisis are well explained.

For all questions involving decisions, judges and law school faculty reported higher satisfaction than attorneys; however, a majority of attorneys still responded positively. The level of positive affirmation from the appellate lawyers is impressive. Each case has a winner and loser, and attorneys on both sides report confidence in the Court's work.

In 2012, a total of 778 actions (direct appeals, original proceedings and disciplinary cases) were filed before the Court. Specific details about cases filed before the Court are available at: http://courts.mt.gov/clerk/stats/default.mcpx.

The report and information about case flow measures is available at: http://courts.mt.gov/supreme/measures/default.mcpx.

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> going to get but you may approach. **This is kind of like an evidence exam for me. If somebody would tell about these things a little before then I wouldn't have to, you know, make these rulings off the cuff,** but go ahead. I mean we've got 89,000[12] exceptions to the hearsay rule and, you know, **if somebody would give me a heads up and say we've got a dead guy who has a statement here that I'm going to try to get into evidence that I could do a little research**, but I don't know if you are trying to let all these people think I'm an idiot or something, but proceed and I'll try to catch up as we go along.

Lopez v. Josephson, 2001 MT 133, ¶ 39, 30 P.3d 326, 333. Judge Prezeau articulated what most, if not all, judges must feel when called upon to rule on an evidence issue at trial, without any warning.

The best way to help the judge, and thus advance your client's case, is to reduce your research to writing and present it to the court at the time you make your argument. You can do this in several forms: a brief in support of a pretrial motion in limine to exclude or admit an item of evidence (oral or tangible); as part of a trial brief; or, at the very least, as a short "point brief" which you hand to the judge and opposing counsel in the courtroom, in support of your oral objection or response. If you are going the point brief route, I recommend that you append to your point brief copies of the pertinent MRE, the Commission Comment, and the text of the case(s) you have cited, all highlighted so the judge can quickly find the applicable provisions in that source. Even if the judge rules against you, she should be impressed with your diligence, and predisposed to listen to you carefully next time. If it is true that when a judge rules on a point of evidence, he is choosing which lawyer he wants to "represent" him if an appeal occurs, it seems obvious that he would pick the one who is better prepared. Of course, although the jury is not ruling on the evidence issue, they may at least share the judge's impression that you know what you are doing. Lastly, the opposing lawyer may retreat from marginal objections or responses to avoid a repetition of the "I have a point brief here, your Honor" scenario if her briefcase does not contain any counter. One of my favorite trial moments of all time occurred when I was appearing as a special prosecutor, and midway through the trial, the criminal defense lawyer uttered in frustration: "Enough with the Rules already, Your Honor!"

There is some danger, however: you have to be careful not to appear smug or in any other way cause the jury (or judge) to feel sorry for your opponent, and subconsciously begin to root for her. That does not mean you should not do or use your research, just that the tone with which you do it has to be consciously calibrated to convey respect for the process, the court, and your opponent.

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

12 Well, ok, maybe this is a slight exaggeration…

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